



The WTO public morals clause

An analysis of whether a trade ban on farmed salmon would be justified under GATT Article XX (a)

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Abbreviations

AAHC	OIE Aquaculture Animal Health Code
AB	The Appellate Body
ASC	Aquaculture Stewardship Council
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	The European Commission
EU	The European Union
FAO	Food and Agriculture Organization of the United Nations
FSBI	The Fisheries Society of the British Isles
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
HSI	Humane Society International
IC	Indigenous Communities
IDH	Dutch Sustainable Trade Initiative
MFN	Most-Favored Nation
MRM	Marine Research Management
MSC	Marine Stewardship Council
NGO	Non-Governmental Organization
SPS	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
OIE	World Organization for Animal Health
VCLT	Vienna Convention on the Law of Treaties
WSPA	World Society for the Protection of Animals
WTO	World Trade Organization
WWF	World Wildlife Fund

1 Introduction

1.1 Aim of the thesis

With the continuing decline of wild fish stocks, and the growth of the world population, aquaculture is likely to play an important role in providing healthy food for human consumption. Aquaculture is also an important component of the economy of many countries, especially in rural coastal areas.

However, the aquaculture industry has long been faced with public concern. In the case of salmon, which is the topic of study here, critique has been relating to the fish farming industry's effects on the surrounding environment; from residues of medicine in nearby waters to genetic effects of escapees interbreeding with wild salmon. Lately a new type of critique has been directed towards the salmon farming industry, that is allegations of substandard animal welfare. Is the farmed fish being exposed to stress and discomfort due to shortage of space, rest, food or water?

In the recent *EC-Seal* dispute in the World Trade Organization (WTO) the Appellate Body found that the trade ban on seal products adopted by the European union (EU) was justified under the so-called public morals exception in the WTO. The *EC-Seal* ruling established that animal welfare may well be covered by the concept of public morals.¹ These findings may be bad news for a number of industries where farming and slaughtering of animals are of key importance.

Or are these findings bad news? In *EC-Seal* the contested measure was a trade ban on seal products. In this thesis it will be discussed whether an equivalent trade ban on farmed salmon products could be justified under the public morals provision in WTO. Although the definition of public morals seems to include animal welfare concerns, the existence of plausible, less trade-restrictive alternatives may limit the use of this provision for trade-restrictive purposes.

1.2 WTO: Main tasks and basic principles

This thesis will discuss the legal implications of a trade ban on farmed salmon products, with the general exceptions in General Agreement on Tariffs and Trade (GATT) Art. XX being the legal basis for the analysis. To fully understand the general exceptions in the WTO law, and in

¹ Appellate Body Report, EC–Seal

particular the provisions in the GATT, it is important to understand the main tasks and core principles of the WTO.

1.2.1 Main tasks of the WTO

The WTO is a multilateral organization set to govern trade among nations "based upon obligations its member states undertake through a series of multilateral and plurilateral treaty instruments"². All 161 members of the WTO have signed on to a number of agreements regulating their rights and obligations in international trade. The Agreement establishing the WTO, also known as the Marrakesh Agreement, lays down the structure and functions of the WTO, whereas a number of agreements contain rules on how international trade should be conducted. These agreements, covering a variety of issues of general and specific nature, are incorporated in the WTO law as annexes to the WTO agreement. All together the WTO legal texts aim at creating free, non-discriminatory, open, balanced and transparent trade.

In order to secure that members abide by WTO rules, membership to the WTO includes accepting that a dispute settlement system will adjudicate when members disagree on the correct interpretation and application of WTO rules. Hence the *Understanding on Rules and Procedures for the Settlement of Disputes*, one of the annexes to the WTO agreement and commonly referred to as the Dispute Settlement Understanding (DSU), is of core value to the WTO as a binding legal system.

A dispute arises when one member country adopts a trade policy measure or takes some action that one or more fellow members consider to be in breach of WTO agreements or to be a failure to live up to obligations. If the disputing members fail to resolve the issue through consultations, a WTO panel hearing may be requested. The hearing would normally result in a panel report containing recommendations on how the parties can bring their policy in line with the WTO Agreement. When adopted by the Dispute Settlement Body (DSB), the panel report becomes binding for the parties involved. On appeal, the disputed matter will be subject to a subsequently issued report by the Appellate Body. The Appellate Body report, when adopted by the DSB, is final.

If a "loosing" member fails to bring its policy in conformity with the recommendations, the other party may, with approval from the DSB, take retaliatory actions. This is however rare,

² Howse, R. and Langille, J.: "Permitting pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Non-instrumental Moral Values": p 370

and has hardly happened.³ Operating since its establishment in 1995, the current WTO Dispute Settlement System has become "the most prolific of all international State-to-State dispute settlement systems".⁴

Finally, it should be noted that WTO is also an arena for negotiating further liberalization of global trade. Liberalizing trade has been an objective since 1948, and is still the primary motivation behind ongoing negotiating rounds aiming at further developing the WTO legal framework.

1.2.2 Basic principles of the WTO

The WTO agreement and its many annexes together constitute the legal basis for a set of rules, on which trade among members should be based. Throughout the texts there are a number of core principles and goals that stand out.

One of these principles is the principle of non-discrimination, or the principle of *Most-favoured Nation* (MFN). This principle states that every member shall accord to all members its "most-favoured nation" treatment, that is to treat no member better than the other members when it comes to trade. If member A, i.e. in the area of trade in goods, apply a given low import duty on imports from member B, the applied low duty should apply on all imports of like products from all other members, including members C and D. Furthermore, no member shall provide better treatment to non-members of the WTO. The principle of Most-Favoured Nation is found in i.e. GATT Art. I.

Another core principle of the WTO legal system is the principle of *national treatment*. This principle implies that all subjects to trade shall enjoy the same treatment irrespective of their country of origin. A member of the WTO cannot apply trade rules that treat national providers of i.e. goods or services less favourable than that of its foreign competitors. The national treatment principle can be found in GATT Art. III.

In order to facilitate trade, the WTO agreement contains rules aiming at increasing predictability. A key feature in this regard is the system of binding of tariffs. When negotiating terms of accession to the WTO, members have had to accept that a (negotiated) number of tariffs are bound to not exceed a certain level. The bound level defines a "ceiling", above which the mem-

³ WTO (Information and External Relation Division), *Understanding the WTO*", p. 58

⁴ Bosche, Peter van den, " *The Law and Policy of the World Trade Organization*", p. 157

ber in question cannot go. Such a tariff ceiling creates predictability for traders. Following increased binding, and the lowering of bound levels, there has been a tendency among members to look for other means of controlling imports. This development may partly explain why the general exceptions in GATT Art. XX, such as the public morals clause, have been subject to increased attention.

Finally, it should be noted that GATT Art. XI contains a prohibition of quantitative import restrictions – a general rule that is of relevance to any trade ban applied by a WTO member, including the trade ban discussed in this thesis. Despite the many exceptions to this general rule, both inside GATT Art XI and elsewhere in the WTO legal structure, one may argue that this provision capture the very essence of what WTO is striving to achieve on behalf of the global trade community, not least through the negotiations on further liberalization that continue to take place.

1.2.3 The general exceptions in GATT

Promoting and protecting public health, consumer safety, the environment, economic development and national security are among the core tasks of governments. One could argue that global trade help governments promote these societal values; through the development of better and cheaper products and services does trade enable states to allocate its resources more efficiently, to the benefit of its people. Yet the principles of trade liberalization, as promoted by the WTO, sometimes go contrary to government policies. WTO law therefore contains a number of general exceptions.

A number of general exceptions are to be found in different WTO agreements, often grouped together. The general exceptions vary in scope and nature, but they all share a common feature: they allow members, under specific conditions, to adopt and maintain legislation and measures that would otherwise be inconsistent with basic WTO rules.⁵

GATT Art XX contains a number of general exceptions applying to trade in goods. One of these general exceptions relate to the protection of public morals. Another general exception relates to the protection of life and health of humans, animals and plants. These two exceptions, which form the legal basis of this analysis, are subject to further elaboration below.

⁵ Bosche: Peter van den, *"The Law and Policy of the World Trade Organization"*, p. 544-545

1.3 The salmon farming industry

Given the subject matter of this thesis a short overview of the fish farming industry is pertinent, including an account of the allegations against this industry frequently being presented by the public. In this thesis, the topic of study is salmon. Although farming of different fish species share a number of features, the point of below study is the farmed salmon industry.

1.3.1 Fish farming techniques

Across a variety of farmed fish species, the steps and methods of aquaculture production are principally the same. In the first phase, eggs and milt are mixed to induce fertilization, and kept until becoming swimming fry. When fry begin actively to search for food, they are collected and transferred to a nursery to grow and feed until a preset time, or until a size or a mass is reached, depending on the specie. In the case of salmon this phase lasts until the age of 8-16 months. Thereafter the fish are transferred to grow-out facilities, where they remain until slaughtered. In the case of salmon, the fish are slaughtered at different sizes depending on which market it is aiming at. However, a period of 16-32 months would be normal.⁶

The facilities for fish farming most commonly used are ponds, tanks, raceways, cages, and pens. Ponds can be natural or artificial, often with low water refreshment. Tanks in fibreglass often enjoy a higher water turnover. Raceways are long structures designed to let water through. Finally cages or pens, which by necessity are located in larger bodies of water such as fjords, lakes etc, are designed to let water run through.⁷

1.3.2 Critique against salmon farming

Salmon farming in its early phases used to be a small-scale activity consisting of small entities run by conventional farmers on a part-time basis. Today fish farming has turned into a large industry, and have become a major provider of food. Moreover, the aquaculture industry has become a large contributor to the national economies in countries where it takes place. In Norway, a country historically built on export of wild-caught fish, salmon farming now generate larger contributions to the national economy than traditional fisheries, and is continuously growing.

⁶ Humane Society International: "*The Welfare of Animals*", p. 2

⁷ Humane Society International: "*The Welfare of Animals*", p. 2

Following this development, the attention on the industry's performance on a variety of parameters has also grown. Concerns are frequently being highlighted by Non-Governmental Organizations (NGOs) in relation to the salmon farming industry, resulting in debates, campaigns and sometimes boycott initiatives. However, the allegations against the salmon farming industry is somewhat diversified.

Some critics argue that there are moral issues related to the animal welfare of the salmon being farmed. This critique is in line with a broad trend in modern societies, questioning the standards under which animals are treated. Increased attention to fish as sentient beings, with the potential of feeling pain and experience stress, has led to concerns among consumers about animal welfare standards in salmon farming. The issue of animal welfare for fish is elaborated in chapter two.

Other critics argue that farming of salmon has negative effects on the surrounding environment of the facilities, and in particular the negative effects on *wild* salmon. This critique falls into two categories. One group of arguments relate to the interbreeding - the reproductive interaction – between wild salmon and escaped farmed salmon, which in the long run may reduce the ability of wild salmon to reproduce. Wild salmon move out in the sea and later come back to its "home river" for reproductional purposes. If mixed with genetically cultivated farmed salmon, the ability to climb rivers may be reduced, and the ability to reproduce will be reduced accordingly. This view, which primarily relates to the risk of escapes, is supported by scientific research, but positions differ as to whether such a development represents a genuine threat to the wild stocks of salmon.

Another group of arguments relate to the implications of wild salmon passing through waters where salmon farming facilities are located. Fish farms are often located in sheltered waters. These waters are also often the migrate route of wild salmon moving between the river and the sea. In fish farms, farmed salmon are subject to medical treatment for a variety of reasons. This treatment takes place in a controlled environment. A specific threat relates to the exposure of parasites. Fish farms carry large number of fish, and parasites, like sea lice, may therefore be of a higher density in waters surrounding salmon farms. While the farmed salmon is being treated by means of de-licing procedures, this procedure is obviously not accessible for the wild salmon passing by. In particular for juvenile salmon escaping the rivers in springtime, it has proven detrimental to become host to even only a small number of sea lice. High density of sea lice in one place along the migrate route, may consequently have serious negative effects for all salmon escaping the corresponding rivers.⁸

⁸ Krkošek, M. et al.: "Transmission dynamics of parasitic sea lice from farm to wild salmon"

As regards the arguments between NGOs and producers in the public, they seem to be of a never-ending nature, although scientific knowledge is claimed to support either side. In the few countries where salmon farming take place, also regulating governmental bodies take part in deliberations on how salmon farming is to be carried out. Elsewhere allegations have been articulated mainly by NGOs. Arguments about the welfare of farmed salmon, and arguments about environmental effects on the surroundings – which may be perceived as welfare concerns related to wild salmon – are not always separated. However, the kind of concerns discussed in this thesis are those related to animal welfare of salmon inside the fish farming facilities.

Public concerns, if significant, may be articulated through policy at state level. What would happen if importing states, on behalf of the domestic stakeholders, adopt legislation that would restrict or ban imports of salmon products on the basis of animal welfare concerns?

1.4 Case study: A possible trade ban on farmed salmon products

1.4.1 Background: The *EC-Seal* case

In 2009 the European Union introduced regulation 1007/2009 prohibiting import, export and sale of seal products. This trade ban however had two significant exceptions: trade in seal products were allowed if the products was deriving from seal hunts conducted by Greenland inuits – the so-called Indigenous Communities (IC) exception. Also excluded from the trade ban were products deriving from seal hunts conducted for purposes of marine research management – the so-called Marine Research Management (MRM) exception.⁹ Shortly after, the regulation was challenged by Canada and Norway under the WTO Agreement on Technical Barriers to Trade (TBT Agreement) and GATT. Canada and Norway, both with domestic seal hunt industries, claimed that the EU seal regime was discriminatory (TBT Art. 2.1) and more trade-restrictive than necessary (TBT Art. 2.2). They also contended that the regime violated the most-favoured nation clause in GATT Art. I:1 and the the national treatment provision in GATT Art. III:4¹⁰

Although the panel held that the TBT Agreement would apply, this decision was overruled by the Appellate Body, which found that the regulation in question was not a "technical regulation" within the meaning of TBT Art 1.1. Hence the claim of non-conformity with the TBT Agreement was not supported by the Appellate Body. With regard to the claims under GATT, the

⁹ Regulation (EC) No 1007/2009, Art 3 (2) (b)

¹⁰ Schaffer: "The WTO EC-Seal Products Decision" pp. 1-2

Appellate Body found that the regulation was in breach of the Most-Favoured Nation clause in GATT Art I:1 and the National Treatment clause in GATT Art. III:4. However, the EU seal regime did qualify for the public morals exception in GATT Art XX (a). Although the Appellate Body did find that the IC and MRM exceptions did not fully comply with GATT provisions (the exceptions are currently being amended accordingly), the main feature of the EU seal regime, the trade ban on seal products, was justified.

1.4.2 Eliminate presence vs. reducing demand

Import bans on specific products under the public morals clause in GATT Art. XX (a) are in place in a number of countries. In particular, the public morals clause has been invoked to keep products away from domestic markets for reasons of religion. However, trade bans have traditionally been relating to the presence of the products in question, not its production. In that way the EU seal regime represents a different attitude towards the 'disliked industry'. In the EU regulation 1007/2009 it is stated that "Since the concerns of citizens and consumers extend to the killing and skinning of seals as such, it is also necessary to take action to reduce the demand leading to the marketing of seal products and, hence, the economic demand driving the commercial hunting of seals."¹¹ In addition to eliminate the presence of seal products in domestic markets (EU), the objective of the regulation aims at contributing to reduced profitability in the seal industry.

1.4.3 A hypothetical trade ban on farmed salmon products

Following the *EC-Seal* ruling it is clear that (at least one) trade ban on a product has been found to fulfil the requirements of the public morals clause on reasons of animal welfare. If this is an emerging trend in global trade, one may wonder which industry that involves slaughtering of animals will be next in line to suffer from similar action. And how may these industries prevent such trade-restrictive actions to be justified under the WTO general exceptions such as the public morals clause? In this thesis the aim is therefore to analyse the legal implications of applying an equivalent trade ban on farmed salmon products.

Public concern about salmon farming relates both to the animal welfare in the fish farming industry, and a variety of environmental concerns. However, in the context of this thesis it will be assumed that animal welfare concerns are the primary motivation behind a hypothetical trade ban on farmed salmon. It is assumed that the objective of the trade ban is partly to protect

¹¹ Regulation (EC) No 1007/20097, preamble, para 10

domestic consumers against farmed salmon produced under substandard welfare conditions and partly to reduce demand for farmed salmon produced under substandard welfare conditions.

1.5 Scope of the thesis

1.5.1 Preclusion of non-legal assessments

By nature, international trade law draw from insight and knowledge of a number of disciplines. Professions such as history, philosophy and political science may prove useful when analysing issues such as the interpretation of public morals. However, in this thesis the point of departure is strictly legal, as the aim of the thesis is to analyse from a legal perspective whether a given trade-restrictive action can be justified under the WTO agreement. Consequently, this thesis aims at touching upon elements relevant in this context only.

1.5.2 Preclusion of trade-restrictive actions other than trade ban

An analysis of the legal grounds, by which the salmon farming industry may be hit by trade-restrictive actions in the future, may well include a discussion of a variety of possible trade-restrictive measures. In this thesis however, the point of departure is the recent *EC-Seal* ruling by the Appellate Body and its justification of trade-restrictive action on the trade in seal products on grounds of public morals within the meaning of GATT Art. XX (a). This thesis aims at clarifying whether a similar trade-restrictive action would be equally legal when applied on another product specie, more specifically the farmed salmon. Hence, a discussion of other possibly trade-restrictive measures falls outside the scope of this thesis.

1.5.3 Preclusion of carve-outs

It also falls outside the scope of this thesis to discuss in the context of farmed salmon the legal implications of carve-outs in the EU seal regime. An IC exception to a trade ban on farmed salmon products would not be relevant, as fish farming is an industrial process having no linkage to traditions maintained by groups of indigenous people. It also falls outside the scope of this thesis to discuss legal implications of an MRM exception. While seals interact with other species in the overall ecosystem, and may be subject to harvesting for stock balancing purposes, there would be no such need in the case of farmed salmon. Hence an MRM exception has no relevance.

1.5.4 Preclusion of assessment of measures in the context of the SPS agreement

The WTO agreement on Sanitary and Phytosanitary measure (the SPS agreement) regulates to what extent trade in animal and plant products is constrained by means of animal and plant health and safety. Put simply, the SPS agreement regulates under which conditions a member may restrict trade for health and safety reasons, and under which conditions it may not. As will be revealed below, the SPS agreement makes reference to a number of standards developed by the World Organisation for Animal Health (OIE), in particular with regard to animal health standards. In this thesis the topic of interest is the somewhat more vague terminology of animal welfare, which definition goes beyond animal health. Animal welfare therefore exceeds the scope of the SPS agreement. Trade-restrictive action on grounds of animal welfare would need another legal basis than the SPS agreement. In this thesis the analysis will therefore not discuss provisions in the SPS agreement.

1.5.5 Preclusion of analysis of “measure” and non-conformity

As noted above, a prerequisite for invoking GATT Art XX is that it has been established that the measure in question represents a breach of WTO rules. It falls outside the scope of this thesis to discuss how a trade ban on farmed salmon products would provisionally be in conflict with WTO rules. It is therefore assumed that a trade ban on salmon products would be in breach of the prohibition of quantitative restrictions of trade in GATT Art. XI. This assumption is regarded as a premise for the below analysis.

In *US-Section* it was stated by the Appellate Body that, with regard to the necessity test in Art. XX, that if the necessity was not passed, the defendant was bound to use the alternative measure that would entail the least inconsistency with other GATT provisions.¹² Taking into account that this thesis does not discuss the breach of WTO rules associated with the measure, it does neither aim at determining to what the extent the alternative actions discussed here are in (less) breach of WTO rules. Consequently, it will not be determined which of the two alternatives that the defendant may be bound to use.

It is also assumed that the trade-restrictive action discussed in this thesis, a trade ban on salmon products, is a measure within the meaning of GATT Art. XX. The hypothetical trade ban on salmon products employed in this thesis, by necessity borrows features from the trade ban on seal products applied by the EU in Regulation 1007/2009. Since the trade ban on seal applied

¹² GATT Panel Report, *US-Section* 337, para 5.26

by the EU was found to be a measure, it is regarded as a premise that so is the case for the trade ban applied here too.

1.5.6 Preclusion of other species than salmon

Today several fish species are subject to fish farming. However, in modern aquaculture it all started with farming of Atlantic salmon. The farming of salmon has become a huge industry, not least in Norway. When fish farming is being discussed, and when defenders and offenders turn into public arguments, it is most often about the salmon. That is also why reports about fish welfare, environmental effects i.e. in the majority of cases are carried out with the fish farming of salmon as the topic of study. Finally, the salmon industry has become an important contributor to the Norwegian national economy, generating national income surpassing incomes from wild catches at sea. Hence, from a political economy point of view, discussing potential legitimate trade-restrictive measure directed towards the salmon industry, would be the more interesting one.

1.6 Methodology

1.6.1 WTO law and its interpretation

As noted above, the Dispute Settlement Body adjudicates in trade disputes between members of the WTO on the basis of the WTO agreements ratified by the same members. When adopted by the DSB, panel reports, or in case of appeal reports by the Appellate Body, provide recommendations on what the disputing parties must do in order to bring their policy in line with the relevant agreements. Reports of WTO panels and the Appellate Body are the most important source of clarifications and interpretations of WTO law.¹³

With regard to prior GATT 1994 panel reports, the Appellate Body in Japan-Alcoholic Beverages II (1996) held that "Adopted panels are an important part of the GATT acquis. They are often considered by subsequent panels."¹⁴ Moreover, in *US-Continued Zeroing*, where the panel

¹³ Bosche, Peter van den, " *The Law and Policy of the World Trade Organization*", p. 51

¹⁴ Appellate Body Report, *Japan – Alcoholic Beverages II*, 108

had “felt compelled to depart” from the Appellate Body’s well-established case law¹⁵, the appellate body stated with regard to the binding nature of previous Appellate Body interpretation of WTO law, commenting on the panel’s non-complying reasoning that ” [i]n matters of adjudication, there must be an end to every great debate. The Appellate Body exists to clarify the meaning of the covered agreements”.¹⁶

Where the WTO agreement so provides, also acts of WTO bodies will have binding legal effect on members’ rights and obligations under the WTO law. This is the case i.e. for decisions adopted by the Ministerial Conference in accordance with the provisions in the Art IX of the WTO agreement, second paragraph, which states that the Ministerial Conference “[..] shall have the exclusive authority to adopt interpretations of this Agreement [..]”.¹⁷

Still, reports of WTO panels and the Appellate Body are the most important source of clarifications and interpretations of WTO law. Hence the interpretation of WTO law is becoming more and more precise following new issues being subject to disputes settled by the DSB. However, some WTO provisions have not been subject to clarification by the DSB, nor by Ministerial decisions. In such cases one may seek elsewhere for factors of relevance to be considered as means for interpretation.

1.6.2 Other sources of WTO law

Art. 3, para 2 of the DSU states that clarifications of WTO law are to be “in accordance with customary rules of interpretation of public international law”¹⁸. More specifically, the Appellate Body in *US-Gasoline* stated that the Article 31 of the Vienna Convention of the Law of Treaties (VCLT) ”has attained status of a rule of general international law. And in *Japan-Taxes on Alcoholic Beverages*, the Appellate Body affirmed that Article 32 of VCLT, with its rules on supplementary means of interpretation, has attained the same status.¹⁹ Hence Articles 31 and 32 in VCLT provide guidance as to which (other) sources of law are of relevance when interpreting WTO provisions. Accordingly, when interpreting WTO legal text, the point of departure would be that a term contained in the covered agreement shall be based on its ordinary meaning, and in line with the purpose of the agreement.

¹⁵ Bosche: Peter van den, ”*The Law and Policy of the World Trade Organization*”, p. 52

¹⁶ Appellate Body Report, *US – Continued Zeroing*, para 312

¹⁷ Marrakesh Agreement Establishing the World Trade Organization, Art. IX, para 2

¹⁸ WTO Dispute Settlement Understanding, Art. 3.2

¹⁹ Zhang, Liying; Hu, Xiaoyu, ”*Liberalization of Trade and Domestic Control on Cultural Products*, p. 408

It has been held that acts of WTO bodies other than those in conformity with Art. IX of the WTO Agreement, may constitute a subsequent agreement as defined in Art. 31 (3) (a) of VCLT. Such acts may therefore also be a relevant source of law when interpreting WTO law.²⁰ Also covered by Art. 31 (3) (a) of the VCLT are the actual agreements negotiated in the context of WTO, such as i.e. agreements on further liberalization of trade in specific sectors. Accession protocols for members entering WTO after the conclusion of the WTO agreement, are also considered a part of the WTO law, and hence a source of law when interpreting WTO law provisions.²¹

In addition to subsequent agreements mentioned in VCLT Art. 31 (3) (a), the VCLT Art. 31 (3) (b) also acknowledge “subsequent practice” by members of the WTO as a source of WTO law. In *Japan – Alcoholic Beverages II*, the Appellate Body stated that subsequent practice within the meaning of Art. 31 (3) (b) must be a “concordant, common and consistent sequence of acts or pronouncements which are sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation.”²² Moreover, pursuant to VCLT Art. 31 (3) (c), any rules of international law applicable between the parties, may supplement the interpretation of a term.

It should also be mentioned that pursuant to Article 32 of VCLT, the negotiating history of the WTO legal texts may serve as a supplementary means of interpretation. WTO negotiations were never formally recorded, and recollections of negotiations may therefore not necessarily capture the objective reality. Although WTO panels and the Appellate Body have given limited weight to negotiating history, the negotiating history of GATT 1947 has been of some use in the interpretation of provisions in GATT 1994.²³

1.7 Overview of the thesis

Chapter 2 of the thesis includes an account of the current state of play with regard to scientific knowledge on animal welfare for fish, followed by an outline of two sets of standards relevant to animal welfare.

Chapter 3 of the thesis provides an analysis of whether the trade ban applied in this thesis would be justified under the GATT Art. XX. The analysis includes a determination of the requirements

²⁰ Bosche: Peter van den, “*The Law and Policy of the World Trade Organization*”, p. 54

²¹ Bosche: Peter van den, “*The Law and Policy of the World Trade Organization*”, p. 55

²² Appellate Body, *Japan-Alcoholic Beverages II*, para 105-106

²³ Bosche: Peter van den, “*The Law and Policy of the World Trade Organization*”, p. 59

in the sub-paragraph, examination of the necessity test, and a determination of the requirements of the chapeau.

Chapter 4 of the thesis includes conclusions and some comments to the interplay between recent interpretation of the moral clause and the necessity requirement.

2 Animal welfare in salmon farming

2.1 Introduction

In this thesis the topic of interest is if and how the existence and possible application of standards or sets of requirements in the field of animal welfare for fish, has legal implications as to consideration under the public morals clause in WTO law.

This chapter will give an account of the current state of play in research on fish and fish behaviour, as this serves as a basis for developing policies on animal welfare for fish. Thereafter three different sets of animal welfare requirements will be examined.

2.2 Backdrop: Emergence of public concern

As noted above, the welfare of farmed fish has become an increasingly important issue for the general public, as part of a trend applying to food in general²⁴. Many people are of the opinion that we have a moral obligation to the animals we keep and control. These sentiments are articulated by large NGOs engaging in the public debate on animal welfare standards.

One such NGO, the Humane Society International (HSI), is operating globally in addressing the issue of animal health and protection, and is also working on increasing animal welfare for fish in aquaculture. In a report on *The Welfare of Animals on the Aquaculture Industry*, HSI discusses the shortcomings of the aquaculture industry in detail, elaborating on the negative animal welfare effects of the current practice in a fish farming. The report acknowledges that practices differ as to how animal welfare is taken into account. However, it suggests that “[a]ll aspects of aquaculture production should be evaluated to minimize the stress and welfare assault that fish face”²⁵.

²⁴ Thiermann, A. B., & Babcock, S: Animal Welfare and International Trade

²⁵ Humane Society International: “*The Welfare of Animals*”, p. 16

Another NGO, the World Society for the Protection of Animals (WSPA) has argued that with respect to farmed salmon and trout - the latter being very similar to salmon – the stock density has increased substantially, following the significant growth in the sector over the last 40 years. According to WSPA high densities in salmon farming may lead to increased susceptibility to disease, increased incidence of physical injuries such as fin erosion, poor body condition; increased stress, and reduced growth.²⁶

The power of NGOs in the debate about animal welfare in fish farming is exemplified by the will of governments to frequently provide statements about their applied level of animal welfare, in response to public sentiments. I.e. the European Commission in 2014 saw the need to publicly state that “In response to the concerns raised by several citizens about animal welfare in fish farming, the European Commission would like to clarify that the health and welfare of farmed fish is important for EU aquaculture.”²⁷

2.3 Scientific achievements

2.3.1 Can fish feel pain?

A critical question underlying the debate on animal welfare for fish is whether fish have the mental capacity to suffer and feel pain. If it was established that fish were sentient beings, it would be more meaningful to discuss matters on animal welfare for fish.

In the debate on the mental capacity of fish, some scientists argue that the fish’ ability to suffer and their conscious awareness of stimuli are yet to be determined. Others, concentrating on the brain structure, argue that the fish brain lacks the neuroanatomical structure needed for the generation of conscious, subjective states.²⁸ A third group, which seem to enjoy the majority of support, focuses on studies on psychological and behavioural response to painful stimuli. Based on a large number of studies, they suggest that fish do have the possibility to register pain, although the response and way of showing pain is not expressed the same way as in terrestrial animals.²⁹

²⁶ WSPA: “Closed Waters: The Welfare of Farmed Atlantic Salmon, Rainbow Trout, Atlantic Cod & Atlantic Halibut”, p. 29

²⁷ European Commission, DG Mare, Press release 26.05.2014

²⁸ Humane Society International: “*The Welfare of Animals*”, p. 2

²⁹ Humane Society International: “*The Welfare of Animals*”, p. 3

Regardless of who is right and who is wrong, the sentiment of treating fish like other animals, with feelings and ability to suffer and feel pain, seems to make its way to the public. Large NGOs promoting protection of animals, form alliances and make their argument wherever salmon farming is being discussed. Faced with a growing concern in the public related to animal welfare for fish, it has become increasingly important to develop ways to measure the level of animal welfare for fish.

2.3.2 How to measure animal welfare for farmed fish

Assuming that animal welfare for fish matters, how do we measure such welfare? As a point of departure one may wish to define animal welfare for fish. That has proven hard to do.³⁰ As welfare for fish plays out on a variety of variables, one can talk of three categories of animal welfare definitions, which together capture different aspects of what the term animal welfare may mean. A *feelings-based* definition relates to the subjective mental state of the animal, and good welfare would imply that the animal is free from negative experiences. A *function-based* definition relates to whether the animal is capable of adapting to its environment and keep in good health. Finally a *nature-based* definition implies that good animal welfare would require that the animal may lead a natural life and express its natural behaviour.³¹ Since it has proven difficult to conclude on a clear definition of animal welfare, the approach has rather been to identify conditions that must be fulfilled if the animals are to have a good life quality. These conditions have taken form of five freedoms³², or “domains of welfare, constituting a conceptual framework for identifying areas of concern related to animal welfare.

The first domain relates to the freedom from water and food deprivation and malnutrition. Animals should have access to water and diet that maintain health and vigour. The second domain relates to the freedom from environmental challenges, that is to have suitable shelter and comfortable resting area. The third domain relates to freedom from disease, injury and functional impairment. This include rapid treatment, if diagnosed. The fourth domain relates to the freedom from behavioural/interactional restrictions. Animals should enjoy sufficient space, proper facilities and – if applicable – the company of other animals of the same kind.

³⁰ Huntingford: *Animal Welfare in Aquaculture*”, p. 21

³¹ Huntingford: *Animal Welfare in Aquaculture*”, p. 22

³² Farm Animal Welfare Council (FAWC), “*Report on the welfare of farmed fish*”. Surbiton, Surrey 1996

The fifth and last domain relates to the freedom from mental and physical suffering, and aims at stressing the need to avoid unacceptable levels of anxiety, fear, distress, boredom, sickness and so forth.³³

On the basis of this rather multi-variable approach to animal welfare, The Fisheries Society of the British Isles (FSBI), the publisher of *The Journal of Fish Biology* has made a step further by identifying a number of directly observable indices of animal welfare in aquaculture³⁴, including:

- Changes in skin or eye colour, often indicating exposure to adverse events;
- Changes in ventilation rate observed as increased opercular beating, indicating stress or exposure to environmental contaminants;
- Changes in swimming performance, indicating injuries, the presence of parasites, or generally decreased welfare;
- Reduced food intake, indicating acute or chronic stress;
- Loss of body condition or impaired growth, indicating possible chronic stress;
- Slow growth, may indicate stress;
- Morphological abnormalities resulting from the effects of adverse conditions on development;
- Occurrence on injuries from aggression and slow healing, indicating possible poor immune response; and
- Increased incidence of disease, indicating possible poor environmental conditions
- Reduced reproductive performance, may indicate chronic stress

2.4 Two alternative standards

On this scientific basis, there has been some development as to systemize and organize measuring of animal welfare in fish farming. But the existence of measuring possibilities does not mean that producers of farmed salmon are being measured against these variables, nor that this kind of information ever arrives at the customer or their representatives. What mechanisms or systems do exist that can potentially and meaningfully communicate levels of animal welfare in a trustworthy way?

³³ Mellor, D.J. and Stafford, K.J. “Integrating practical regulatory and ethical strategies for enhancing farm animal welfare”

³⁴ FSBI, *Briefing Paper on Fish Welfare 2*, 2002, pp. 14-15

Since customers often have little knowledge of the complex and multi-faceted value chains of providers of products and services, a private standard that would come with i.e. a label, may supply customers or import country officials with confidence that the product is produced and/or transported under certain conditions. The food industry has seen a number of so-called private standards appear in the market.³⁵

In the context of this analysis two standards will be outlined below. The first is a ready-to-use private standard which is easily made use of, but which also come with some shortcomings as regards animal welfare. The second standard carries the potential of becoming a useful tool for targeting the issue at hand, but may as well bring along some transaction costs.

2.4.1 The Aquaculture Stewardship Council certification scheme

Over the past fifteen years a number of transnational certification and labelling schemes have emerged with the aim to foster sustainable fisheries and aquaculture practices worldwide. Among the first of these were the Marine Stewardship council (MSC), established in 2000 by World Wildlife Fund (WWF) and Dutch Sustainable Trade Initiative (IDH). Building on their experience, a similar scheme for sustainable aquaculture was initiated by WWF and IDH in 2010, and launched in 2012, the Aquaculture Stewardship Council (ASC). According to ASC, its mission is “to transform aquaculture towards environmental sustainability and social responsibility using efficient market mechanisms that create value across the chain”.³⁶

The ASC certification scheme is available for a large number of farmed species. In order to obtain ASC certification for farmed salmon, producers must document that their production lives up to the ASC required standards in a number of variables. These standards include a variety of mechanisms to be present in the production, including defined maximum levels of chemical and anti-biotics used, excess nutrients and waste in the surrounding waters.³⁷ Animal welfare is not explicitly included in the scheme, but ASC notes that animal welfare will be addressed indirectly as a consequence of criteria related to proper siting of production facilities, minimum survival performance requirements, high water quality parameters, requirements for dosing medication and feed and treatment of sick animals.³⁸

³⁵ Henson, S: “The Role of Public and Private Standards in Regulating International Food Markets” (2007)

³⁶ ASC/”Vision and mission”, the ASC web page

³⁷ Lerøy Seafood: ”Lerøy ASC Salmon”, the Lerøy Seafood webpage

³⁸ ASC: ”FAQ” para 42, the ASC web page

ASC is a market-based certification scheme. It is assumed that products from ASC certified producers will be preferred by customers, since they will know that production of the given product has taken place within a framework defined by ASC. And when demand for ASC certified products increase, so will the demand for certification. As a consequence, production will turn environmentally sustainable. As of February 2015, 50 producers of farmed salmon globally are ASC certified.³⁹

2.4.2 The OIE Aquatic Animal Health Code

The World Organization for Animal Health was first established as *Office International des Epizooties* (OIE) following the signing of an international Agreement in 1924. While having kept its acronyms, the OIE now deals with a variety of matters related to Animal health, serving as an advisory and standard-setting body for its currently 180 member states. The founding mandate of OIE has evolved over time, and has been adapted to Members' needs. However, The OIE currently notes that among the organization's specific missions are to "establish standards and guidelines for animal welfare through a science-based approach and promote their application[...]"⁴⁰.

Recognizing that animal welfare is a complex issue that touches upon important scientific, ethical, economic and political dimensions, the OIE International Committee decided some years ago that OIE would "give priority to the welfare of animals used in agriculture and aquaculture."⁴¹ Since then the OIE work on animal welfare for aquatic animals has taken form of an integral part of the *Aquatic Animal Health Code* (AAHC), a document subject to periodic review. The current code, the 18th revision, was adopted in May 2015 by the World Assembly of OIE Delegates; the organisation's highest decision-making body.⁴²

Out of 11 chapters, the 7th chapter of the AAHC is called "Welfare of Farmed Fish", this chapter hereinafter called the OIE Code. The OIE Code contains the following sub-sections: Introduction to recommendations for the welfare of farmed fish (7.1), Welfare of farmed fish during transport (7.2), Welfare aspects of stunning and killing of farmed fish for human consumption (7.3), and Killing of farmed fish for disease control purposes (7.4). The aim of the OIE code is to "set[s] out standards for the improvement of aquatic animal health and welfare of farmed fish

³⁹ ASC: "ASC helps salmon aquaculture towards sustainability", the ASC website

⁴⁰ OIE: "Support to the OIE Members" The OIE website:

⁴¹ Griffin, Gilly: Science and Governance Issues in Aquaculture Animal Welfare, p. 45

⁴² OIE: "The Aquatic Animal Code", The OIE website

worldwide [...].⁴³ Hence, one may assume that the OIE code, or parts of it, may be used as a reference for a certain level of animal welfare.

Following the signing in 1998 of a formal agreement of cooperation between OIE and the WTO, OIE is recognized as a reference organisation by the WTO. In the SPS agreement this link between the two organizations is codified through a formal recognition of the role of the OIE as the international standard setting organization for animal health. Accordingly, WTO members should align their import requirements with the recommendations set out in the relevant animal health standards of the OIE, cf. SPS Art. 3. However, this formal link between OIE and WTO only applies in the area of animal health. Even though OIE has adopted a standard for Animal welfare for fish, that is chapter 7 of the code, this standard is not subject to an equivalent linkage to WTO.

2.4.3 Concluding remarks

Very different players have initiated the ASC standard and the OIE code. The two standards are different in a number of ways, and they represent different attempts with regard to improving animal welfare in fish farming. However, they both carry the potential of becoming a reference for trade in farmed salmon products, and thereby a tool for those wanting to require that purchased products of farmed salmon are produced in line with acknowledged principles of animal welfare for fish. In chapter 3 it will be discussed whether this also have legal implications.

3 Analysis

3.1 Introduction

The aim of this chapter is to analyse if a trade ban on farmed salmon products would fulfil the criteria of the general exceptions in GATT Art. XX.

An analysis under Art. XX require that a number of elements are discussed. WTO case law suggests that a determination of whether the requirements of Art. XX are fulfilled, require a certain sequence of steps to be made. After a short introduction to the general scope and application of Art. XX, this fixed sequence will be further elaborated.

⁴³ OIE: "The Aquatic Animal Code", The OIE website,

Thereafter, and in line with the mentioned sequence, the analysis will first discuss the sub-paragraph of Art XX. The relevance of two sub-paragraphs will be discussed, followed by a determination of which of the two sub-paragraphs would be most applicable. Thereafter it will be discussed whether the necessity requirements are fulfilled, the so-called necessity test. Finally it will be discussed whether the requirements in the chapeau of Art. XX are fulfilled.

3.2 Scope and application of Art. XX

3.2.1 General scope of Art. XX

Article XX of the GATT consists of an opening clause, often called a “chapeau”, and a number of sub-paragraphs. The sub-paragraphs represent a list of situations where trade-restrictive measures may be justified. A central element of GATT Art XX is the first sentence of the chapeau. It states that a measure that is found inconsistent with other provisions of GATT can still be justified, provided that the requirements in Art. XX are met.

The Art. XX therefore provides for “limited and conditional exceptions” from obligations under GATT provisions. The exceptions are limited because the list of exceptions in Art. XX is exhaustive. And the exceptions are conditional because they apply only when the conditions set out in Art. XX are met. Under certain circumstances, Art. XX simply allow members to counteract with core GATT provisions. When invoking GATT Art XX, inconsistencies with any GATT provisions may be justified. It is therefore not surprising that Art. XX has been subject to disputes in a number of WTO disputes.⁴⁴

The limited situations where this general exception rule applies, are represented by the exhaustive list of sub-paragraphs to Art. XX, covering a wide range of situations. However, the exhaustive list is not that long, and important societal values such as the promotion of human and labour rights, are not included. These omissions have given rise to discussions about the interpretation of the existing sub-paragraphs.⁴⁵ In *US-Gasoline* a measure requiring cleaner car fuel was justified under sub-paragraph (g) as being relating to the conservation of exhaustible natural resources.⁴⁶ And in *US-Shrimp*, fish were considered an exhaustible resource despite it was

⁴⁴ Bosche, Peter van den, ” *The Law and Policy of the World Trade Organization*”, p. 546

⁴⁵ Lester, S. et al.: *World Trade Law. Texts, Materials and Commentary*” p. 373

⁴⁶ Panel Report, *US-Gasoline*, para 6.36 – 6.37

argued by a party that this term should be reserved for finite resources such as minerals.⁴⁷ It thus seems that case law suggest that the broader line has been chosen. This is however balanced by a somewhat strict tradition with regard to interpreting the necessity requirement, which will be elaborated below.

The sub-paragraphs under GATT Art XX differ with regard to the required relationship between the measure at issue and the societal value pursued. For some sub-paragraphs it would be sufficient that there is a “relation” between the measure at issue and the societal value pursued, cf. ”relates to”. For other sub-paragraphs, a level of necessity must be demonstrated, cf. ”necessary to”. The latter is the case in both sub-paragraph (a), about the protection of public morals and sub-paragraph (b), about the protection of human, animal or plant life or health, discussed below.

3.2.2 The sequence of analysis

Invoking an exception under GATT Art. XX would require a series of determinations. There is clear jurisprudence that one must first examine whether the measure at issue falls within the description of the relevant sub-paragraph. Then, one must examine whether the requirements in the chapeau are met. It has been argued that this procedure can be described as a two-tiered test.⁴⁸

However, the first of these two tiers includes two steps. One may therefore well talk of a process of three successive determinations, understood as different steps to be made in sequence when invoking Art XX. One must first examine whether the measure at issue falls within the description of the societal value in the sub-paragraph in question. Then, one must examine whether the connection between the measure at issue and the societal value pursued, fulfil the requirement in the sub-paragraph in question. With regard to both sub-paragraph (a) and (b), this implies a determination of necessity, a so-called necessity test. Finally, one must determine whether the requirements of the chapeau are met.

⁴⁷ Appellate Body Report, US-Shrimp, para 127-128

⁴⁸ Bosche, Peter van den, *”The Law and Policy of the World Trade Organization”*, p. 552

3.3 An issue related to public morals or animal health?

3.3.1 Relevance of sub-paragraph (b)

When analysing whether a trade ban on farmed salmon products would fulfil the criteria of GATT Art. XX, a point of departure would be to determine if, and how, the assumed relevant sub-paragraphs are of relevance to the matter at hand. What are the scope of the two sub-paragraphs, and to what extent do they capture the situation of a trade-ban applied on farmed salmon?

GATT Art. XX (b) concerns measures which are “necessary to protect human, animal and plant life or health”. In the case at hand one may question if protection of “animal health” would describe the policy objective pursued by the trade ban.

The objective of the measure is partly to protect domestic consumers against farmed salmon produced under substandard welfare conditions, and partly to reduce demand for farmed salmon produced under substandard welfare conditions. However, the underlying perceived problem which the trade ban aims at addressing, is the substandard animal welfare conditions under which farmed salmon is produced. This problem is related to animal welfare. But does "animal health" in the context of sub-paragraph (b) capture the concept of animal welfare?

The perception of acceptable levels of animal health has evolved over time. These levels differ depending on whether the animal in question is a wild animal, subject to its own mode of survival, or a domesticated animal, for which cleaning products, clothing etc. is available. The accepted level of animal health for animals being farmed – such as farmed salmon – may fall somewhere in between. With regard to farmed salmon, the existence of scientific studies on ability for salmon to feel pain and experience stress, indicate that animal health in the case of farmed salmon include more than just absence of deceases.

It also has to be noted that when examining the design and structure of measures in the context of GATT Art. XX (b), panels and the Appellate Body have found a wide range of measures to be pursuing the protection of life or health of humans, animal or plants”. Such measures include measures to reduce smoking of cigarettes,⁴⁹ and measures to reduce air pollution.⁵⁰ It thus seems reasonable to apply a broad definition of animal health.

⁴⁹ Panel Report, Thailand – Cigarettes

⁵⁰ Appellate Body Report, US – Gasoline, para 6.36 – 6.37

A question remains as to whether the concept of animal welfare includes parameters that go beyond the limits of what can arguably be defined as animal health within the meaning of sub-paragraph (b).

3.3.2 Relevance of sub-paragraph (a)

GATT Art XX (a) relates to measures which are “necessary to protect public morals”. This provision is considerably more vague than sub-paragraph (b). Hence determining the scope of application on the basis of the ordinary meaning of the provision's terms, is challenging. Moreover, the case law on sub-paragraph (a) is limited. Despite its introduction by the US in the negotiations of GATT 1947, no disputes on the application of the public morals clause took place in the subsequent 50 years. However, during the last 10 years the public morals clause has been interpreted by WTO panels and the Appellate Body in a few WTO disputes, providing some guidance as to how the term public morals within the meaning of GATT Art. XX (a) is to be interpreted.

GATT Art. XX(a) and Art. XIV(a) in the General Agreement on Trade in Services (GATS) contain provisions with almost identical wording. GATT Art. XX(a) refers to “public morals”, while the sub-paragraph GATS Art. XIV (a) also includes “public order”. But as regards the term public morals, the Appellate Body has ruled that jurisprudence for one of the two articles is equally applicable to the other.⁵¹ Hence, an interpretation of the public moral legal standard may draw from jurisprudence of either GATT or GATS.

China-Audiovisual (2010) was the first WTO dispute in which GATT Art. XX (a) was subject to clarification by the DSB. An interpretation of public morals in the context of GATT Art. XX (a) was established by referring to *US-Gambling* (2005) where an interpretation of equivalent language was made in the context of GATS Art. XIV (a).⁵² In *US-Gambling* the panel had noted that the term ‘public morals’ denotes standards of right and wrong conduct, maintained by or on behalf of a community or nation.⁵³

The panel in *US-Gambling* also noted, with regard to public morals, that “The content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values”. Moreover, it noted that “Members

⁵¹ Appellate Body Report, *US-Gambling*, p. 237

⁵² Zhang, Liying; Hu, Xiaoyu, “Liberalization of Trade and Domestic Control on Cultural Products, p. 403

⁵³ Panel Report, *US-Gambling*, para 6.468

should be given some scope to define and apply for themselves the concepts of 'public morals' in their respective territories, according to their own systems and scales of values".⁵⁴

This freedom for WTO members to define their own public morals within the context of GATT, their own standards of right and wrong conduct, was confirmed in the recent *EC-Seal* dispute. In fact, the *EC-Seal* actually expanded the scope of the public moral clause, by establishing that standards of right and wrong conduct relating to animal welfare, may well be among the societal values that the public moral clause aims at protecting.⁵⁵

A trade ban on farmed salmon would be aiming at responding to a moral issue related to animal welfare. Taking into account that *EC-Seal* established that animal welfare is a legitimate public morals concern within the meaning of GATT Art. XX (a), and recalling that the Appellate Body has accepted a broad definition with regard to the scope of application, it seems reasonable, despite resting merely on case law, also to consider sub-paragraph (a) as relevant in the matter at hand.

3.3.3 Animal health or Public morals

It has been noted above that the term animal health describes elements that are central to the concept of animal welfare, while recent case law establish animal welfare as contained by the term public morals.⁵⁶ Moreover, WTO case law suggests a certain freedom when interpreting the scope of both animal health and public morals. From the outset it seems that both provisions may serve as a legal basis for an analysis of a trade ban on farmed salmon products in the context of GATT Art. XX. It is therefore of interest to determine which of the two is most applicable.

We have seen that animal welfare is closely related to animal health. The concept of animal health has evolved, as sophisticated research on fish stress by means of measuring levels of cortisol, is taking place. One may therefore argue that animal welfare is basically an umbrella for a wide range of animal health related elements.

Still it is pertinent to reflect on whether animal welfare and animal health may capture different aspects and parameters of which the quality of life for animals is measured. Conceptually it is

⁵⁴ US-Gambling, panel report, para 6.461

⁵⁵ Schaffer: "The WTO EC-Seal Products Decision: Animal Welfare, Indigenous Communities and Trade (shorter version)" p. 6

⁵⁶ Appellate Body Report, EC-Seal

possible to think of animal welfare as being threatened without affecting animal health, while a threat to animal health would always be threatening animal welfare. The term animal welfare seems to cover animal health, while animal health does not cover animal welfare.

This reasoning suggests that despite an evolving concept of animal health, the two terms seem to cover different aspects of animal wellbeing. One may even suggest that animal health relates to freedom from measurable deceases and illnesses, while animal welfare relates to the conditions under which (also) a fish deserves to live. Animal health and animal welfare may indicate different levels of protection; health being the basic premise for life, and welfare being the premise for a good life.

This logic is also shown when observing from where the demands for performance come. From a business point of view, sick fish represent increased mortality and reduced product quality. This in turn plays out in reduced profits. With production cycles of 4-5 years, producers of farmed salmon would not risk their profits by compromising on animal health. Demands for animal welfare standards, on the other hand, are consumer-driven. This indicates that animal welfare relates to elements going beyond those directly related to the producer's economic interest, such as fish mortality and food quality. Which underpins the finding above, that animal health and animal welfare capture different level of protection.

Taking into account the sophisticated means by which animal welfare for salmon is measured, such as level of cortisol as indicator for stress, it seems reasonable to proceed by concluding that the concept of public morals more completely capture the perceived problematic practice being the reason why the measure at issue is adopted. Consequently, the analysis will proceed, by determining necessity within the context of sub-paragraph (a).

3.4 The necessity requirement

3.4.1 Examining necessity

From the outset it should be recalled that invoking sub-paragraph (a) of GATT Art. XX requires that the measure at issue is necessary to achieve the policy objective pursued by the measure. In the context of this thesis, the consideration of necessity will relate to whether a trade ban on farmed salmon products is necessary to protect domestic consumers against farmed salmon produced under substandard welfare conditions, and to reduce demand for farmed salmon produced under substandard welfare conditions.

As noted, there is sparse jurisprudence on the application of the public morals clause. With regard to the other sub-paragraphs requiring necessity, including sub-paragraph (b), the situation is somewhat different. These general exceptions have more frequently been subject to WTO disputes. This jurisprudence provides substantial guidance as to how the examination of the necessity requirement should take place.⁵⁷ In *US-Section*, the Panel stated that measure cannot be justified under Art. XX if a less trade-restrictive alternative is reasonably available.⁵⁸ In *Korea-Beef* Appellate Body clarified the meaning of necessity by indicating that a measure need to be close to indispensable in order to be necessary in the meaning of art. XX.⁵⁹ Hence, with regard to necessity, the freedom of interpretation is rather narrow, as opposed to the interpretation of the sub-paragraphs.

In *Korea – Various Measures on Beef*, where the discussion on necessity took place in the context of GATT Art XX (d), the Appellate Body suggested that with regard to the necessity requirement, one must consider a number of relevant factors. These factors include, in particular, the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and the measure's trade-restrictiveness. Given that the preliminary conclusion of this analysis is that the measure is necessary, this result must be confirmed by comparing the measure with plausible alternatives that are reasonably available. If one or more alternatives, which are at the disposal of the defendant, are less trade-restrictive than the measure at issue, while providing for equivalent contribution to the achievement of the objective, then the contested measure may not be necessary within the meaning of Art. XX.⁶⁰

The comparison between the measure and plausible alternatives should be carried out in the light of the importance of the interests or values at stake. However, the weighing and balancing of factors in order to determine whether a measure is necessary, is a "holistic operation" that may include considering all variables together after examining them individually.⁶¹

3.4.2 The interests or values at stake

As noted above, necessity is a core requirement in the determination of whether the public morals clause can justify a measure that would otherwise be in breach of WTO rules. An ac-

⁵⁷ Lester, Mercurio & Davies, "World Trade Law: Text, Materials and Commentary", p. 363

⁵⁸ GATT Panel Report, *US-Section 337*, para 5.26

⁵⁹ Appellate Body Report, *Korea – Various Measures on Beef*, paras 164

⁶⁰ Appellate Body Report, *Korea – Various Measures on Beef*, paras 164-166

⁶¹ Appellate Body Report, *Brazil – Tretreaded Tyres*, para 178-182

count of interests or values at stake should therefore not be limited to the direct interests involved in the dispute. Rather it should strive to include all those interests for which the imposition of the measure at issue would have an impact. They would, however, normally be grouped into two categories; arguments in favour of the measure, and arguments against the measure.

At the outset one may assume that the consumers who want the measure in place, represented by the importing state, have an interest in having their morality reflected in the working rules and regulations. The measure would respond to a desire of the importing country to make sure that what is put on dinner tables around the country is produced in line with principles held by the domestic population.

On the other hand, a trade ban on farmed salmon products would have negative effects for the countries in which production takes place. Salmon is largely traded on the international markets, and a trade ban would have negative impact by means of reduced demand. For countries where salmon is being farmed, the industry is commercially important, not least for the rural coastal areas where the facilities are typically located.

Turning away from the parties directly involved, there are public interests to be taken into consideration. From the perspective of the environment, there are obvious shortcomings related to salmon production, such as impact on nearby waters with potentially detrimental effects for wild salmon. Reduced demand for salmon would contribute to reduced salmon farming, to the benefit of the wild salmon.

However, the issue of energy consumption per unit of food produced is also related to the environment. Comparative studies indicate that production of farmed salmon represents lower carbon footprint per produced unit of animal protein than that of traditional farming of terrestrial animals, also when issues related to supply of feed is taken into consideration.⁶² Provided that food production capacity is a limited good, and that production of proteins is vital, one may assume that it may be fortunate to stimulate salmon farming. In this regard, increasing demand for farmed salmon would represent a contribution.

The latter argument is closely related to the discussion on global food security and nutrition. Fish, including farmed salmon, have important nutritial properties.⁶³ However, catches of wild fish continue to decrease while the world population continues to grow. Which is why the Food and Agriculture Organization of the UN (FAO) has stated that there is a need for increased

⁶² SINTEF: "Carbon footprint and energy use of Norwegian seafood products", 2008

⁶³ FAO: "Sustainable fisheries and aquaculture for food security and nutrition", 2014

supply of fish proteins in the future, and that all the excess supply will have to come from aquaculture.⁶⁴ This future perspective indicates that from a global food security and nutrition point of view, the salmon farming industry needs trade to be facilitated rather than hindered, in order for production to grow. Hence, a trade ban on farmed salmon would work counter to the public interest of increasing production of fish protein by means of fish farming. Taking into account the future prospects of food production, one may even talk of a consumer moral represented by a trade ban, running counter with a public moral, represented by future generations of a world more densely populated, and with scarce supply of protein.

It should be noted that from a global food security perspective, NGOs have argued that salmon farming represents an allocation of marine proteins from poor populations in developing countries to prosperous consumers in developed countries. I.e. a significant share of catches of the fish specie *Anchovieta* in Peru is being purchased by the salmon industry at prices beyond what domestic consumers are willing to pay. Which in turn would leave domestic consumers with less supply of marine proteins.⁶⁵

However, the fact that cheap fish is being used for producing expensive fish can also be seen as traditional value creation to the benefit of all involved parties. Low-price seafood that few would fancy is being used to make highly priced salmon for consumers that are willing to pay for a high-end product. Moreover, it may be argued that responsible domestic legislators, rather than the international food market, should be held responsible for food security and nutrition in their territories.

A preliminary conclusion with regard to interests and values at stake, may be that there are diverging interests with regard to a trade ban on farmed salmon products under the premise that such a trade ban would reduce demand and thereby contribute negatively to the total output. Whereas public morals domestically may be in favour of a trade ban, this may not necessarily be in the interest of the global community.

⁶⁴ FAO: “State Of the World Fisheries 2014”, p. 107

⁶⁵ The Ecologist: “Special report: How our growing appetite for salmon is devastating coastal communities in Peru” 2008

3.4.3 Contribution to the achievement of the policy objective

It should be recalled that the objective of the hypothetical trade ban on salmon products applied in this thesis, is to protect domestic consumers against farmed salmon produced under substandard welfare conditions and to reduce demand for farmed salmon produced under substandard welfare conditions.

By hindering the farmed salmon to enter the market, a trade ban will effectively contribute to the achievement of one part of the policy objective pursued by the measure; to protect the domestic consumers against salmon produced under substandard welfare conditions.

With regard to the other part of the objective, the contribution will rest on a premise that consumers would be purchasing the product in question in case the ban was not imposed. Provided that there is a moral reasoning behind the ban, and this morality is shared by a majority of the domestic population, one may assume that the purchasing potential would be limited in a non-ban situation. However, the perceived need for a ban would normally derive from a fear that some consumers would be attempted to still buy the product. Hence, it is probable that a ban would contribute to reduced demand.

3.4.4 The measure's restrictiveness

A trade ban imposed by a big and prosperous WTO member would have more impact on global trade, prices etc, than an identical trade ban imposed by a small and relatively poor WTO member. It is assumed however, that an assessment of the restrictiveness of a measure in the context of the necessity test, would focus on the measure itself, rather than on the effects related to the imposing member (although exceptions from this assumption seem possible).

Under the premise above, relevant parameters in the assessment of trade-restrictiveness would be levels of imports and/or exports of the product in question in a situation with the trade ban imposed, and a situation without.

In a situation without a trade ban, the point of departure would be that trade, according to WTO principles, would normally be unhindered, except for sector-specific requirements applying to the group of products in question. The other situation – with a trade ban in place – would imply that no imports or exports would take place regardless of the quality of the product. In fact, with regard to levels of trade flows, few measures seem more trade-restrictive than an absolute prohibition of imports and exports, such as a trade ban. It may therefore not be controversial to conclude that the measure at issue is very trade-restrictive.

3.4.5 Preliminary conclusion

Important public interests related to global food security and nutrition indicate that there are good reasons to stimulate trade in farmed salmon rather than to prohibit such trade. However, in a situation without a trade ban, consumers in the imposing country would not be protected against having farmed salmon available domestically. Under the premise that farmed salmon are generally produced under substandard animal welfare conditions, a preliminary conclusion may be that the trade ban is necessary to achieve the policy objective pursued by the measure.

3.4.6 Plausible alternative measures

As noted above, case law imply a certain degree of freedom when interpreting the scope of application of the sub-paragraphs of Art. XX, while the room for interpretation of necessity is significantly more narrow. As noted above, the preliminary conclusion should be compared with plausible less trade-restrictive alternatives which are reasonably available.

Within the context of Art. XX (b), the Appellate Body in *EC – Asbestos* stated that, with regard to whether less trade-restrictive alternative measures are reasonably available, it should be considered whether the alternative measure contributes to the realization of the end pursued.⁶⁶

In this context it should be noted that the trade ban's contribution to the achievements of its policy objective rests on the premise that all salmon farming is carried out under substandard animal welfare conditions. However, the alleged problematic element associated with salmon farming, which is assumed to motivate the measure at issue, is not the salmon farming itself, but rather the way the salmon farming is carried out.

When examining plausible trade-restrictive alternatives, and to what extent these alternatives contribute to the policy objective pursued by the trade ban, particular interest may relate to whether such alternatives contribute to address the underlying concern, rather than only relate to whether it protects the domestic population and reduce the demand of the product. If one or more reasonably available and plausible alternatives would equally respond to the animal welfare concerns by targeting only the problematic element of salmon farming, then production would not be a relevant factor, and neither the reduction of demand.

⁶⁶ Appellate Body Report, *EC-Asbestos*, para 172

3.4.7 Requiring ASC certifications

An alternative to a trade ban on farmed salmon may be to require ASC certification for all farmed salmon being imported to or exported from the imposing country. Most notably, this alternative will allow for trade in farmed salmon, and hence be less trade-restrictive than a trade ban. But is this alternative plausible and reasonably available?

The ASC certification scheme comes with a fixed set of requirements covering a wide range of issues related to aquaculture. Animal welfare is not directly mentioned among the specific requirements. Requiring imports of salmon products to be ASC certified would therefore not respond 100% to the issues of concern. By not being tailor-made to address the concerns behind the trade ban, the ASC certification scheme deviates somewhat from what may be perceived as a plausible alternative.

Moreover, providing 'protection' of interests outside scope of animal welfare, such as specific environmental or social issues, one may assume that complying with the ASC standard comes at a higher cost than necessary, compared with a scenario where only animal welfare standards were complied with. On the other hand, the fact that the ASC certification scheme is ready-to-use, indicates that transaction costs related to commencing the new practice are low. ASC has institutions and procedures in place, and one would assume that the ASC certifications scheme would be convenient to make use of for importing countries and exporters alike.

Moreover, the close ties between ASC and the Marine Stewardship Council (MSC), which has already gained a certain position in the traditional fisheries sector, indicates that ASC will quickly gain confidence among consumers and their representatives, even if ASC is still in its infancy and the certification record for ASC so far is limited. On the other hand, states may for reasons of principles be somewhat reluctant towards adopting import requirements set by NGOs pursuing specific stakeholder interests, such as WWF.

It seems reasonable to conclude that to require ASC certification on farmed salmon products traded in the imposing country, would represent a plausible less trade-restricting alternative that is reasonably available.

3.4.8 Requiring production in accordance with the OIE Code

Another alternative to a trade ban on farmed salmon may be to require that all trade in farmed salmon take place under the premise that production is carried out in accordance with the animal welfare standards contained in the OIE code. This alternative too will allow for trade in farmed

salmon, and hence be less trade-restrictive than a trade ban. But is this alternative plausible and reasonably available?

Contrary to the ASC certification scheme, the OIE Code represents a list of requirements that would specifically target the animal welfare concerns behind the trade ban on salmon products examined here. If the OIE Code would apply as a requirement for trade in farmed salmon, this requirement would be tailor-made for pursuing one part of the objective; protecting domestic consumers against salmon products from substandard animal welfare production. And while addressing the problematic issue motivating the trade ban, there would be no need to pursue the objective of reducing demand for salmon products

It seems however that OIE lacks an institutional set-up suitable for controlling and certifying production of farmed salmon – a service that would probably neither be established. Hence, institutions may be established. It would be assumed that establishing a controlling and certifying service on the basis of the OIE Code, would imply additional costs to be covered by either the importing country or the exporters.

Taking into account the policy objective of the trade ban, this argument may however be turned around. If compliance with the OIE code is required by an importing country, it is more probable than not that this will stimulate the development of a controlling mechanism that would quickly be at the disposal of more than the initial players. One may assume that consumers in the imposing country would welcome that animal welfare requirements becomes more easy to apply – and comply with. Hence the development of controlling and certifying services may have positive effects not only on production related to trade in the imposing country, but to the trade in farmed salmon in general. As such this requirement, understood as a less trade-restrictive alternative, may potentially have larger impact on animal welfare for salmon, than the eventually replaced trade ban, which may balance out the extra costs related to establishing a controlling and certifying mechanism.

One may also assume that a set of requirements for trade in farmed salmon based on the OIE Code, would quickly gain acknowledgment as a reasonable level of animal welfare protection. Not only is OIE acknowledged as the global standard-setting body in the area of animal health; it also has a formal connection to the WTO, and thereby to the international trading community.⁶⁷

⁶⁷ Thiermann, A.: Globalization, international trade and animal health: the new roles of OIE (2005)

Taking into account the tailor-made nature of a set of requirements based on the OIE Code, and considering potential gains despite initially higher transaction costs, it seems reasonable to conclude that conditioning trade in farmed salmon on compliance with the OIE code is a plausible and reasonably available trade-restrictive alternative to a trade ban on salmon products.

3.4.9 Weighing and balancing of factors.

As noted above, the Appellate Body in *EC-Seal* has recently confirmed that it is within the discretionary powers of a WTO member to define its public morals. What may be considered in relation to WTO law, is not the public morals itself, but whether the measure contributes to the protection of the public moral in question.

There is little doubt that the trade ban contributes to the policy objective pursued by the measure. It has, however, become apparent that there are alternative actions that may equally contribute to increase the level of animal welfare in salmon farming. Moreover, these alternatives carry the potential of having positive effects on animal welfare beyond what may have been the case under a trade ban.

Taking into account the many interests in stimulating farming of salmon, not least in relation to the public interests such as food security, nutrition, and efficient production of proteins, it seems reasonable to conclude that the trade ban discussed here is not 'close to indispensable', as there are plausible and less trade-restrictive alternatives at the disposal of the imposing country. Hence, the measure does not pass the necessity test under Art. XX.

3.5 The requirements in the chapeau

As noted above, the sequence of determining justification of otherwise WTO-inconsistent measures, developed by WTO panels and the Appellate Body, implies that the requirements of the chapeau relating to possible discrimination and disguised trade-restriction is examined at the end of the analysis.

The aim of the chapeau is to avoid that provisionally justified measures are applied in a way that would constitute abuse or misuse of the Art. XX exceptions. In *US-Shrimp* the Appellate Body held that the chapeau strikes a balance between the rights of a member to restrict trade

under specific conditions, and the rights of the other members under the (other) GATT provisions. This balance is not fixed, but may develop over time and vary depending on the measure and the facts being subject to consideration.⁶⁸

3.5.1 Arbitrary or unjustifiable discrimination

The chapeau aims at safeguarding that the measure at issue is not applied in a way that would constitute abuse or misuse of the Art. XX exceptions. If different exporting countries are treated unequally as a consequence of the application of a trade-restrictive measure, this unequal treatment is prohibited by the chapeau only in case of a qualified discrimination - discrimination per se is not prohibited by this provision. The discriminatory application must be either arbitrary or unjustifiable.

With regard to “arbitrary” and “unjustifiable”, the Appellate Body has made statements both in *US – Shrimp* and in *Brazil – Retreaded Tyres* on the interpretation of the terms. The clarifications provided, imply that the application of a provisionally justified measure will constitute arbitrary or unjustifiable discrimination only when that discrimination – arising from the application of the measure – relates to a rationale that has no reasonable connection with the objective of the measure, or even go against that objective.⁶⁹

With regard to the matter at hand, a trade measure on farmed salmon products would be equally hurting for countries with salmon production. Reduced demand will have negative effect on prices on the global market, which in turn will hurt producers equally. One may however question whether a trade ban on farmed salmon would represent a discriminatory application in situations where other species of farmed fish would not be subject to a trade ban, and hence be traded normally. In particular this question would arise in cases where level of animal welfare in the fish farming sector concerned, would be below that of salmon farming, or if the level of animal welfare would be even lower.

With regard to the case discussed here, and provided that the measure had passed the necessity test, it must be concluded that no arbitrary or unjustifiable discrimination among countries producing farmed salmon would arise from the application of a trade ban on products of farmed salmon.

⁶⁸ Appellate Body Report, *US-Shrimp*, para 157-159

⁶⁹ Appellate Body Report, *Brazil-Retreaded Tyres*, para 232

3.5.2 Disguised restriction on international trade

The chapeau also safeguards against measures which constitute a disguised restriction on international trade. Having that in mind, it was reasonable for the Appellate Body in *US - Shrimp* to state that the chapeau articulates a principle of good faith as it “prohibits the abusive exercise” of the exception.⁷⁰ Although it may be difficult to ascertain the presence of a 'disguised' trade-restrictive measure, the Appellate Body in *EC-Asbestos* suggested that the protective application of a measure may be identified by studying the design and architecture of the measure at issue.⁷¹

Possible disguised trade restriction would arise when there is reason to believe that the trade measure imposed is designed to protect an identified industry or sector, such as when there are domestic producers of like or substitutable products. An analysis of the design and architecture of a measure would typically be relevant in relation to such domestic competitors. Given the hypothetical nature of the measure applied in this thesis, and the absence of potentially protected competitors, examining this requirement will not be elaborated further.

In the matter at hand, and provided that the measure would pass the necessity test, it would be assumed that a trade ban on farmed salmon products would not be a disguised trade restriction.

4 Conclusions

This thesis has examined whether a hypothetical trade ban on farmed salmon products would be justified under the general exception provision in GATT Art XX. The measure at issue was found to be an issue of public morals, and the analysis was carried out within the context of GATT Art. XX (a). When undertaking the necessity test, it was concluded that plausible and less trade-restrictive alternatives were reasonably available. Since the trade ban did not pass the necessity test, determination of requirements under the chapeau were not critical, and were only briefly touched upon. The conclusion of the analysis is that the measure at issue is not justified under GATT Art. XX (a).

Moreover, at least one of the alternative measures examined was assumed to represent a potentially more substantive contribution to the objective pursued by the trade ban examined. As

⁷⁰ Appellate Body Report, *US-Shrimp*, para 158

⁷¹ Panel Report, *EC-Asbestos*, para 8.263

such this conclusion support the ruling of WTO judiciary that reasonably available alternatives should be examined before justifying otherwise WTO-inconsistent measures.

This thesis was motivated by recent developments with regard to the interpretation of sub-paragraph (a) of GATT Art. XX, in particular the *EC-Seal* ruling and its definition of animal welfare as an issue of public morals. Critics of the *EC-Seal* ruling have argued that it would have been fortunate if *EC-Seal* had provided additional guidance as to how future panels shall assess whether a measure falls within the scope of the public morals clause, such as i.e. listing of relevant factors to be considered in future analysis⁷². Instead the *EC-Seal* did little in refining the scope of the public moral clause. To the contrary, *EC-Seal* has actually expanded the scope of the public moral clause – an invitation to justify measures directed towards a number of industries that involve harvesting of animals in ways society may find immoral.⁷³

This thesis suggest that despite a possible expansion of the scope of Art. XX (a), the necessity requirement provides limits as to whether this expansion will come into effect as long as plausible alternatives are reasonably available. In a global trade community where a variety of standards emerge as response to customers' requests, one may assume that less trade-restrictive alternatives to a trade ban may often be reasonably available to the importing country. This assumption is further underpinned by the unchanged signal by the WTO judicial to keep a high threshold for passing the necessity test.

⁷² Schaffer: "The WTO EC-Seal Products Decision: Animal Welfare, Indigenous Communities and Trade (shorter version)"

⁷³ Schaffer: "The WTO EC-Seal Products Decision: Animal Welfare, Indigenous Communities and Trade (shorter version)" p. 6

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