

WILDLIFE PROTECTION AS A LEGITIMATE PROTECTION FOR THE WTO PANEL

OVERVIEW OF THE GATT CASES RELATED TO ANIMAL PROTECTION



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Facultat de Dret – Universitat de Barcelona / Institute for
Biodiversity Law and Policy of Stetson University College of Law

Marie Laffineur-Pauchet
University of Montpellier, IDEDH (France)

Summary

I] Presentation of the GATT

II] GATT cases related to animal protection & welfare

- The Tuna-Dolphin cases
- The Shrimp – Turtle case
- The EU Seal products case

Conclusions

I] Presentation of the GATT

- **GATT 1994** (General Agreement on Tariffs and Trade)
→ **trade in goods**
- Multilateral agreement annexed to WTO agreement
- **Binding for all WTO members** (164 members, including EU + governments & NGO observers)
- Members represent **98% of world trade**
- Objective: **eliminating discrimination and reducing tariffs and other trade barriers**

A) GATT: Core rules

- **Article I – The General Most-Favoured Nation:** any commercial favored treatment accorded to an imported or exported products shall be extend to other « like » ones.
- **Article III – National Treatment on Internal Taxation & Regulation:** internal legislation cannot be applied to protect domestic production.
- **Article XI – General Elimination of Quantitative Restrictions:** prohibition to adopt bans and restrictions « other tan duties taxes, and other charges ».

B) The GATT & Sustainability

- *Recognizing that their relations in the field of trade and economic endeavour should be conducted [...] while allowing for the optimal use of the world's resources in **accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so** in a manner consistent with their respective needs and concerns at different levels of economic development. (WTO Preamble)*
- Reaffirmed in *China-Rare Earth (Panel) / US-Shrimp (AB) / India-Solar Cells (AB)*

C) The GATT & Wildlife protection

- No specific provisions protecting wildlife
 - *“the GATT [General Agreement on Tarrif and Trade] rules are making it increasingly difficult for the EU (or any other WTO member) to introduce good new animal welfare measures”*
- Peter Stevenson



The problem of likeness and PPMs

- Important for animal welfare laws
- General prohibition to impose different treatments upon like products
Or « directly competitive or substitutable products »
 - **Case-by-case assessment**: nature and physical properties, use on market, consumers preference and habits
 - **Difficulties when comparing likeness of animal-friendly products from non-friendly ones**

III] GATT: Exceptions (Article XX)

TWO-TIER TEST

1. **Chapeau** - Exceptions allowed if they do not constitute:

« ***arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade*** »

2. Issued under specific exceptions

3 exceptions that could be invoked for wildlife protection:

- a) Necessary **to protect public morals**;
- b) Necessary **to protect human, animal or plant life or health**;
- g) Relating to the **conservation of exhaustible resources** if such measures are made effective in conjunction with restrictions on domestic production or consumption.

Article XX

General Exceptions

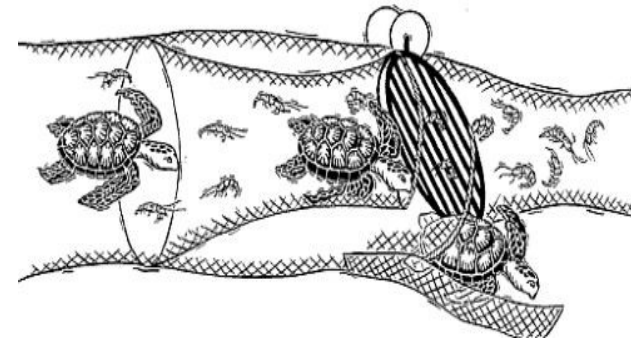
Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;*
- (b) necessary to protect human, animal or plant life or health;*
- ...*
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;*
- (e) relating to the products of prison labour;*
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;*
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;*

...



II] GATT CASES RELATED TO ANIMAL PROTECTION AND WELFARE

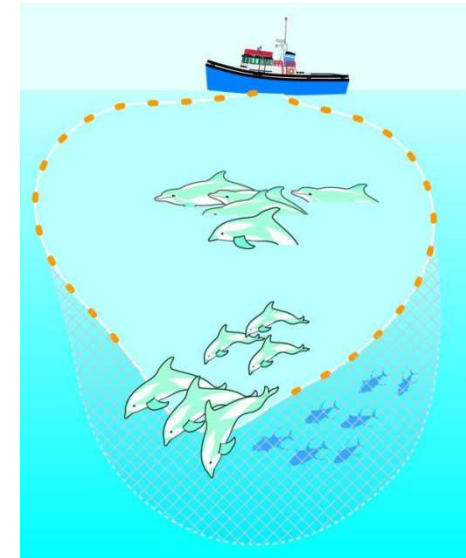


1. The Tuna-Dolphin cases (I and II)

- US: prohibited import of yellowfin tuna and derived products from countries using purse-seine fishing methods (compliance with *Marine Mammal Act of 1972*)
- Purse-seine fishing results in killing of dolphins
- Complaint introduced by Mexico who did not comply

Tuna-Dolphin I: 1991. 51pp. DS21/R
Tuna-Dolphin II: 1994. 63 pp. DS29/R

} Not adopted



1. The Tuna-Dolphin cases – Protection of all animal species

- **Article XX (b) – Animal Life or Health: applies to « endangered as well as non-endangered species » (Panel).**
- *“the protection of animal life or health need not, in our view, be directed exclusively to endangered or depleted species or populations, to be legitimate. Article 2.2 refers to “animal life or health” in general terms, and does not require that such protection be tied to a broader conservation objective. We therefore read these terms as allowing Members to pursue policies that aim at also **protecting individual animals or species** whose sustainability as a group is not threatened”*

1. The Tuna-Dolphin cases – Main findings

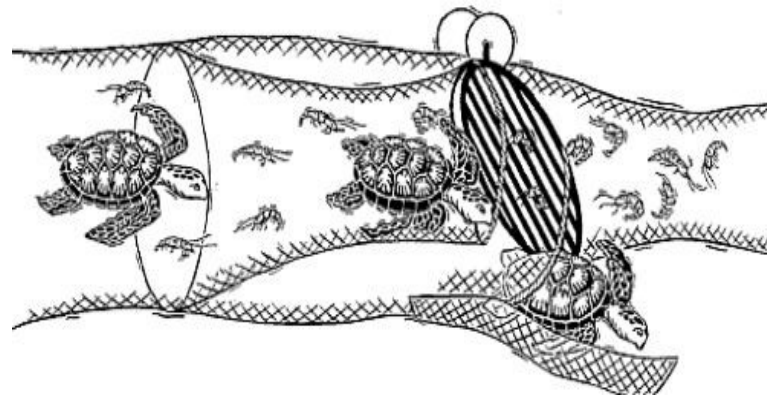
- **Article XX (a) (b) - Public morale and right to prevent « inhumane » practises and animal life:** US is legitimate to want to prevent a practise which resulted in killing of dolphins and to ensure consumers are not misled with a dolphin-safe labelling.
- **« Process » vs. « product »:** US cannot restrict import based *on the way* product is made, only applies to product *as such* (issue of label)

1. The Tuna-Dolphin cases - Conclusion

- **Extraterritoriality:**
 - no limitation regarding animals' location.
 - However, a country cannot use trade measures to force another to change its internal policies.
- Solution of the controversy in favour of Mexico (later EEC/The Netherlands)

2. The Shrimp – Turtle case

- Hot waters: shrimps and marine turtles (endangered species) coexist
- US: introduced a ban on import of shrimps on countries who did not use an excluding fishing net device
- India, Malaysia, Pakistan and Thailand who did not comply introduced a complaint



WTO case Nos. 58 (and 61). [Ruling](#) adopted on 6 November 1998

2. The Shrimp – Turtle case

- Similar to *Tuna – Dolphin case*
- More evolutive Panel/Appellate Body:
 - **Extra-territoriality:**
 - Turtles are migratory species
 - A country cannot require another to change its own regime but can require measures « **comparable in effectiveness** »
 - « **Animal life or health** »: can allow some discrimination and commercial restrictions based on PPMs (direct link)

2. The Shrimp – Turtle case: Right to environmental protection

- Appellate Body: **right of country to take trade action to protect the environment (human, animal or plant life and health and endangered species and exhaustible resources).**

“... We have not decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. ...”

2. The Shrimp – Turtle case: Solution

- US lost (chapeau) but Parties are legitimate to introduce animal protection trade rules in a non-discriminatory way.

→ Modification of its ban to not be discriminatory

3. The EU Seal products case

- 2009: EU general ban on import of seal products
- Exceptions to the regime: « Inuit and other indigenous communities » + « Travellers »
- Canada (joined by 10 other third-parties) introduced a complaint: discrimination to its own producers
- DS400: Panel Report 2013 & AP 2014



3. The EU Seal products case – Animal protection as a public morale issue

- Animal welfare: recognised as an issue of public morale within the EU
- EU **Ban on Seal products allowed on the basis of public moral exception** (Article XX (a))
- *« was claimed as a victory by conservationists and animal welfare activists who have been campaigning for years against such hunts in Canada and Norway » (The Guardian)*



3. The EU Seal products case - Solution

- The ban did not meet the requirements of the chapeau
 - Question of necessity – Balance of interests:
 - relative importance of the interests or values furthered by the challenged measure;
 - contribution of the measure to the realization of the ends pursued by it;
 - restrictive impact of the measure on international commerce.
- Modification of the EU's regime (elimination of consumption at least in part + new condition on AW)

Conclusions

Evolutionary posture of the Panel towards animal welfare & protection:

- **Right of Parties to determine their own level of wildlife protection**
- **Animal welfare as a public morale issue**
- International treaty on wildlife protection or specific provisions in the GATT might help to avoid such disputes
- **Extraterritoriality:**
 - Parties can require « measures **comparable in effectiveness** »
 - No limitation regarding animals' location
- **PPMs: some exceptions allowed** (Issue of labelling: is it a reflection on the final product?)
- **Value *per se* of non-human animal lives?**

“Who draws the line?”

- Terry Audla, president of the Inuit Tapiriit Kanatami



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