

LIVE EXPORT AND THE WTO: CONSIDERING THE EXPORTER SUPPLY CHAIN ASSURANCE SYSTEM

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There is some evidence to suggest that, in developing the new supply chain regulatory scheme for the export of live cattle and sheep, the Federal Government took the view that Australia's commitment to free trade principles as a member of the World Trade Organisation could have a potential limiting effect on the form of the new export regulations. This article provides a brief overview of the new Exporter Supply Chain Assurance System (ESCAS) and then analyses aspects of the ESCAS in light of the General Agreement on Tariffs and Trade (GATT) and the Technical Barriers to Trade Agreement. Although some aspects of the ESCAS could be seen to violate the principles of the GATT, specifically the prohibition on export restrictions, there are strong arguments that the measures would be defensible under one or more of the General Exceptions found in Article XX. However, this is not to suggest that stronger measures that provide a higher degree of animal welfare protection could not also be defended if challenged.

I INTRODUCTION

In the wake of the ABC *Four Corners* report¹ revealing the brutal treatment of Australian cattle at Indonesian abattoirs and the resulting groundswell of public outrage, the Australian Government temporarily suspended the export of live cattle to Indonesia. In formulating a longer lasting response, the Government was presented with various options, including a ban of the trade or stricter regulation. There is evidence to suggest that, in developing the new policy, consideration was given to Australia's commitment to free trade principles as a member of the World Trade Organization (WTO).² The purpose of this article is to examine the regulatory regime ultimately adopted by the Government, the Exporter Supply Chain Assurance System (ESCAS), in light of WTO law and the potential issues that could be raised in relation to an ESCAS-type system under the General Agreement on Tariffs and Trade

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1 ABC, 'A Bloody Business', *Four Corners*, 30 May 2011 (Sarah Ferguson, Reporter)
<<http://www.abc.net.au/4corners/content/2011/s3228880.htm>>.

2 Australia has been a member of the World Trade Organization since its establishment in 1995 with the *Marrakesh Agreement Establishing the World Trade Organization* (Marrakesh, 15 April 1994), entry into force 1 January 1995, [1995] ATS 8. This agreement incorporates the *General Agreement on Tariffs and Trade* (1994, as amended by the Uruguay round), as well as the *Agreement on Agriculture*, the *Agreement of Sanitary and Phytosanitary Measures* and the *Agreement on Technical Barriers to Trade*, amongst others. Australia is a signatory to the *General Agreement on Tariffs and Trade 1947* (Geneva, 30 October 1947), entry into force 1 January 1948 [1948] ATS 23, which is incorporated into the GATT 1994 [1995] ATS 40.

(GATT) and the Technical Barriers to Trade Agreement (TBT Agreement).³ The focus of this article is on the implications of free trade principles, as embodied in the WTO agreements, on a regulatory response like the ESCAS and is not an evaluation of the ESCAS more generally.

This article commences with a brief overview of the new ESCAS system and how it fits within the broader legislative system that currently applies to the live export trade. After describing the context within which free trade issues have been raised, the article analyses the relevant rules under the GATT that could be considered relevant in relation to restrictions on exports generally and their potential application to the ESCAS. On the assumption that an argument could be made that the ESCAS does violate an article of the GATT, the application of the General Exceptions will be considered and reference will be made to the pending EU seal product ban dispute. The relevance of the TBT Agreement will also be briefly considered as it gives preference to the use of international standards. Throughout the analysis of the WTO law reference will be made to previous decisions of the Panel and Appellate Body but it should be noted that decisions under the WTO dispute settlement process are only binding on the parties and do not have precedential value. However, a dispute settlement body may follow the reasoning in previous reports if it is considered persuasive.⁴

II THE REGULATION OF LIVE EXPORT AND THE ESCAS

Under its trade and commerce power,⁵ the Australian Government has undertaken to regulate the international trade in live animals, which may in some instances co-exist with State level animal welfare laws. The focus of this article is the new ESCAS, a regulatory scheme that applies to animals exported live from Australia as feeder or slaughter stock (breeder stock are not covered by the scheme) from the time of their arrival at the port of destination up to and including their slaughter. The regulation of the live export trade more generally will only be described briefly here as it has been comprehensively analysed by others.⁶

³ There would not appear to be any application of the Agreement on Agriculture to an ESCAS-type of licencing system. Although live animals are included in the covered products (HS 1) for the purposes of the Agreement, it applies to export subsidies and to export restrictions only when such restrictions are put in place to prevent critical shortages of food (which fall under GATT Art X:1(a)). See, eg, *Agreement on Agriculture*, Annex 1 (covered products), Art 12 (export restrictions).

⁴ A critical component of the WTO system is the dispute settlement process. If a WTO member believes that another member has violated one of the trade rules, it can initiate this process. There is first a period of consultation but if this does not resolve the issue, a Panel is established to hear the matter. The Panel Report on the matter will indicate whether in the opinion of the Panel, a WTO rule has been violated and, if it has, how the challenged measures should be amended. The Panel Report will be adopted automatically as a ruling of the Dispute Settlement Body unless it is appealed by one of the parties or rejected by consensus of all WTO members. If there is an appeal, nominated members of the Appellate Body will consider the matters raised in the appeal and produce a report documenting its decision. This Appellate Body Report will be adopted by the Dispute Settlement Body unless rejected by consensus. Specifically in relation to issue of precedence, “[i]f the reasoning developed in the previous report in support of the interpretation given to a WTO rule is persuasive from the perspective of the panel or the Appellate Body in a subsequent case, it is very likely that the panel or Appellate Body will repeat and follow it. This is also in line with a key objective of the dispute settlement system which is to enhance the security and predictability of the multilateral trading system.” WTO, *Dispute Settlement System Training Module: Ch 7, Legal effect of panel and appellate body reports and DSB recommendations and rulings*, 7.2 ‘Legal status of adopted/unadopted reports in other disputes’ (2013) at <http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s2p1_e.htm>.

⁵ *Australian Constitution* s 51(i).

⁶ See, eg, Malcolm Caulfield, *Handbook of Australian Animal Cruelty Law* (Animals Australia, 2009) ch 4 and Graeme McEwan, *Animal Law: Principles and Frontiers* (Barristers Animal Welfare Panel, 2011, available online at <[ww.bawp.org.au](http://www.bawp.org.au)>) ch 3.

Before moving on to consider the structure of the laws currently in place, it is important to note that any attempts of the Government to control activities that occur beyond its jurisdiction are necessarily limited under international law, under which ‘the traditional grounds for jurisdiction have been territory and nationality.’⁷ A state may exercise jurisdiction over activities occurring within its territory (including territorial waters)⁸ and may also prosecute nationals on the basis of their nationality, though this jurisdiction is generally only exercised in certain cases such as treason or offences against national security.⁹ In the context of live export, jurisdictional constraints are also presented by the fact that the live export ships are most often registered outside of Australia and therefore are not included in the scope of Australia’s jurisdiction.¹⁰ The ownership of the livestock often transfers to the importer on loading or, at the latest, on arrival at the port of destination.¹¹

This point was clearly illustrated in the Western Australia Magistrates Court decision in the *Emanuel Exports* case.¹² In relation to a particular shipment of sheep bound for the Middle East in 2003, which resulted in higher than to be expected mortality rates amongst the sheep, it was alleged that the transportation of specifically identified classes of sheep violated several provisions of the *Animal Welfare Act 2002* (WA).¹³ Magistrate Crawford determined that there was a violation of the state animal welfare law but that the state law was inoperative in this regard as it would give rise to an operational inconsistency with the Commonwealth law in relation to live exports. The accused were acquitted.¹⁴ It was noted that the State’s case was limited to the first 24 hours of the journey, whilst the vessel was still within Australian territorial waters, and that the ‘Court has no jurisdiction with respect to the treatment of animals in international waters and beyond.’¹⁵ The limits of jurisdiction have an obvious and significant impact on the extent to which Australian law can reach the live export trade and, as a result, the ESCAS can only at best achieve indirect control of actions within importing countries through the export licensing system.

The export of livestock is regulated primarily through the operation of the *Australian Meat and Live-stock Industry Act 1997* (Cth) and the *Export Control Act 1982* (Cth) and associated regulations and orders. The *Australian Meat and Live-stock Industry Act* provides, inter alia, for the issuing of licences to export live animals. The Secretary may make orders under the

⁷ Gillian Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis, 2nd ed, 2011) [8.4].

⁸ Ibid [8.8].

⁹ Ibid [8.14]. Other extensions of jurisdiction, such as universal jurisdiction, are possible but rarely sought by states. Ibid [8.22].

¹⁰ For example, as far as can be determined, the live export ships used by Wellard Rural Exports Pty Ltd include the Ocean Drover, the Ocean Outback and the Ocean Swagman, which are all registered in Singapore. Emanuel Exports has used the Al Shuwaikh (flag state Kuwait) as recently as September 2012. Registration information from <marinetraffic.com>.

¹¹ Australian Livestock Exporters’ Council, Submission to the *Independent Review of Australia’s Livestock Export Trade* (the Farmer Review), 21 July 2011, 18.

¹² *Department of Local Government & Regional Development and Emanuel Exports Pty Ltd, Graham Richard Daws & Michael Anthony Stanton* (Unreported, Magistrates Court of Western Australia (Criminal Jurisdiction), Magistrate CP Crawford, 8 February 2008).

¹³ Specifically, it was alleged that the exporters were cruel to the sheep as they transported them in a way that was likely to cause them unnecessary harm in violation of s 19(2) of the *Animal Welfare Act 2002* (WA), the sheep were confined in a way likely to cause them unnecessary harm (see s 19(3)(a) on the meaning of cruelty), and that the sheep were not provided with proper food (see s 19(3)(d) on the meaning of cruelty).

¹⁴ There has been some doubt expressed with regard to this conclusion. See, eg, McEwan, above n 6, 62-69.

¹⁵ *Emanuel Exports*, above n 12, [8].

Act and it is a condition that the export licence holder must comply with any such orders.¹⁶ The ESCAS was established by way of the issue of the *Australian Meat and Live-stock Industry (Conditions on live-stock export licences) Order 2012* (on 1 March 2012), which requires that export licence holders comply with the *Export Control (Animals) Order 2004* (hereinafter the *Animals Order*), where this Order was amended to incorporate the ESCAS. The *Export Control Act* applies to the export of ‘prescribed goods’ and stipulates that regulations may prohibit their export, subject their export to conditions or require a licence.¹⁷ Pursuant to the *Export Control (Orders) Regulations 1982*, the Minister may make orders¹⁸ and under this power the *Animals Order* was made, where this order prescribes live animals for the purposes of the *Export Control Act*.¹⁹ The *Animals Order* stipulates a number of conditions in relation to the export of livestock including the holding of a licence under the *Australian Meat and Live-stock Industry Act* and the holding of an export permit in relation to the particular shipment.²⁰ As amended, from 27 February 2012, the Secretary must approve an ESCAS as part of the process of issuing an export permit in relation to livestock exported for slaughter.²¹

The ESCAS has been incorporated into all stages of the approval process that applies to a particular export consignment of livestock. An approved ESCAS must be in place prior to the sourcing of stock, in the same way that the Notice of Intention to Export and the Consignment Risk Management Plan are required.²² Both the application for permission to leave for loading and the application for the export permit must include the approved ESCAS.²³ In granting an export permit, the Secretary must consider whether, amongst other things, the exporter is in a position to comply with the ESCAS.²⁴

More specifically, the ESCAS must include the details of the supply chain up to and including slaughter (to evidence control of the supply chain), the tracking of the livestock (to allow Australian animals to be traced through the supply chain) and independent auditing and reporting details (where these reports must cover control, tracing and animal welfare).²⁵ The Secretary may only approve the ESCAS if satisfied that the ESCAS will ensure that the handling of the livestock (including slaughtering) will be in accordance with the recommendations of the World Organisation for Animal Health (the OIE) (these standards are discussed below).²⁶ The approval will depend on how the ESCAS addresses these issues, the exporters’ record of adherence with other approved ESCASs and any conditions thereon, and any other relevant information.²⁷ The Secretary may approve the ESCAS subject to conditions and may later vary, impose new conditions upon, or revoke the ESCAS.²⁸

¹⁶ *Australian Meat and Live-stock Industry Act 1997* (Cth) s 17.

¹⁷ *Export Control Act 1982* (Cth) s 7.

¹⁸ *Export Control (Orders) Regulation 1982* (Cth) reg 3.

¹⁹ *Export Control (Animals) Order 2004* (Cth) O 1.04.

²⁰ *Ibid* O 2.02.

²¹ An important exception to the ESCAS requirement is in relation to breeder live-stock. See *Ibid* O 2.42A(4).

²² *Export Control (Animals) Order 2004* (Cth) O 2.45.

²³ *Ibid* O 2.54 and O 2.59.

²⁴ *Ibid* O 2.59(1)(c)(v).

²⁵ *Ibid* O 2.42A.

²⁶ *Ibid* O 2.44(2A).

²⁷ *Ibid* O 2.44(2B).

²⁸ *Ibid* O 2.46A.

Beyond the listing of the broad issues that should be addressed in the ESCAS, no further details with regard to the requirements are provided in the *Animals Order*. The more detailed requirements and guidance have been developed by the Department of Agriculture, Fisheries and Forestry (DAFF) and are available by way of the department website.

The genesis of the ESCAS approach can be traced back to measures put in place with regard to live cattle exports to Egypt, which had been temporarily suspended in 2006. Australia and Egypt signed a memorandum of understanding, *Handling and Slaughter of Australian Live Animals*, which provides that Australian animals would be protected ‘in line with agreed international standards’²⁹ which is understood to refer to OIE standards. A ‘Supply Chain Assurance’ system, with the OIE guidelines at its core, was proposed by the Australian Livestock Exporters’ Council in March 2011, in response to a request from the Minister for Agriculture, Fisheries and Forestry, Senator Joe Ludwig, in January 2011 to advise on how a closed-loop system similar to that in place in Egypt might be rolled out more broadly.³⁰ When negotiations were under way to resume live cattle exports to Indonesia, a similar approach, with specific reference to the OIE guidelines and ultimately known as the ESCAS, was adopted as a condition to the resumption of trade.³¹ Two Industry Government Working Groups (IGWGs) were formally established to consider the details of the ESCAS. Their work led to reports and recommendations with respect to live cattle and buffalo exports as well as live sheep and goat exports.³² Concurrently, the *Independent Review of Australia’s Livestock Export Trade* (the Farmer Review) was initiated in the wake of the Indonesia suspension³³ and one of the recommendations to come out of the review was that these basic principles from the Indonesia approach (the ESCAS) be rolled out to all live export markets,³⁴ a process that was completed at the end of 2012.³⁵ The four major components of the scheme, now reflected in the *Animals Order*, are: control of the supply chain (by ownership or contract);

²⁹ Minister for Agriculture, Fisheries and Forestry, the Hon Peter McGuaran, ‘Livestock exports to resume after Egypt assurances’ (Media release, DAFF06/138PM, 3 October 2006). The memorandum of understanding is not available to the public. Ultimately, only cattle exports are approved and only where they are destined for the one abattoir that has been certified in Egypt. See *Australian Meat and Live-stock Industry (Export of Live-stock to Egypt) Order 2008* (Cth).

³⁰ Letter from Mr Peter Kaen, Chairman of the Australian Livestock Exporters’ Council (ALEC), to the Minister Joe Ludwig dated 22nd March 2011, attached to the ALEC Submission to the Farmer Review, above n 11, annex 2.4.

³¹ Minister for Agriculture, Fisheries and Forestry, Senator Joe Ludwig, ‘International standard for live export trade to Indonesia’ (Media release, DAFF11/181L, 21 June 2011); *Australian Meat and Live-stock Industry (Export of Live-stock to the Republic of Indonesia) Order 2011 (No 2)* (Cth) in effect from 6 July 2011. This replaced *Australian Meat and Live-stock Industry (Export of Live-stock to the Republic of Indonesia) Order 2011* (Cth) (made 7 June 2011), which temporarily prohibited all exports of livestock for slaughter to Indonesia.

³² Industry Government Working Group on Live Cattle Exports, *Report to Australian Government Minister for Agriculture, Fisheries and Forestry* (26 August 2011) and Industry Government Working Group on Live Sheep and Goats Exports, *Final Report to Australian Government Minister for Agriculture, Fisheries and Forestry* (26 August 2011).

³³ *Independent Review of Australia’s Livestock Export Trade* (the Farmer Review), presented to Government 31 August 2011. This review was initiated by the Government on 13 June 2011. Minister for Agriculture, Fisheries and Forestry, Senator Joe Ludwig, ‘Mr Bill Farmer AO to conduct independent review into live export trade’ (Media release, DAFF11/177LJ, 13 June 2011).

³⁴ *Independent Review of Australia’s Livestock Export Trade* (the Farmer Review) (2011) Recommendation 10.

³⁵ Under the terms of the amended order, the new ESCAS regime would not apply to declared countries with respect to declared livestock until the relevant declaration date, allowing for a phase-in of the new system, where such declarations were to be determined by the Secretary of DAFF and published on the DAFF website. The final countries/animals came under the scheme on 1 January 2013. *Export Control (Animals) Order 2004* (Cth) O 7.03.

animal traceability; independent auditing to ensure compliance with OIE standards; and reporting and accountability. Guidance on the auditing process with regard to animal welfare matters is now provided by way of checklists issued by DAFF, which are based on the checklists developed by the IGWGs.

The only multinational governmental organisation that has taken a significant interest in animal welfare is the World Organisation for Animal Health, known as the OIE, with 178 members. The OIE was originally established to address issues of disease control in animals and food safety³⁶ but identified animal welfare as a priority area in its 2001-2005 Strategic Plan and first included animal welfare principles in its *Terrestrial Animal Health Code* (the OIE Code) in 2004.³⁷ In its current form, Chapter 7.5 of the OIE Code provides a set of recommendations with respect to the slaughter of animals for human consumption. Although the recommendations reveal a clear preference for pre-slaughter stunning on animal welfare grounds, stunning is not required by the Code. This is a significant weakness with the OIE Code in comparison with Australian standards that generally require stunning except in the context of ritual or religious slaughter.³⁸ It is also important to note, as did the Farmer Review, that the OIE Code is merely a set of recommendations and is not itself enforceable.³⁹

Given jurisdictional limits, neither the Australian Government nor DAFF has the legal authority to conduct compliance inspections of export supply chains, including slaughter facilities, in export destination countries so the integrity of the system relies on the independent auditing and reporting requirements of ESCAS. This system has been developed by DAFF and is based on the recommendations contained in the IGWG 2011 reports but this level of detail is, again, not included in the Order.⁴⁰ The audits must address the following three areas: animal welfare, traceability and control. Part of the approval process for a new ESCAS is a pre-commencement audit and performance audits must also be undertaken once the ESCAS is in use. According to the DAFF standards, in the case of cattle and buffalo, performance audit reports must be provided for the first five consignments to a new supply chain, along with the end of processing reports, and ongoing audits are as determined by

³⁶ World Organisation for Animal Health, *About Us: History* (2013) <<http://www.oie.int/about-us/history/>>. The OIE takes its name from the 1924 agreement under which it was established: International Agreement for the creation of an Office International des Epizooties.

³⁷ World Organisation for Animal Health, *Animal Welfare: The OIE's achievements in animal welfare* (2013) <<http://www.oie.int/animal-welfare/animal-welfare-key-themes/>>. The full text of the Terrestrial Animal Health Code is available online through the OIE website.

³⁸ Like many areas of animal law, the regulation of the slaughter of animals for food is piecemeal, with each state and territory including rules with regard to slaughter generally through food safety rather than animal welfare laws, with an overlay of federal regulation in the context of products bound for export. However, some uniformity is obtained through the *Australian Standard for the Hygienic Production and Transportation of Meat and Meat Products for Human Consumption*, which requires pre-stunning of livestock prior to slaughter except when under an approved arrangement for ritual slaughter. Australia and New Zealand Food Regulation Ministerial Council, *Australian Standard for the Hygienic Production and Transportation of Meat and Meat Products for Human Consumption*, cl 7.10 and 7.12. (CSIRO, 2007). For a discussion of the legal issues with respect to religious slaughter see Alex Bruce, 'Do sacred cows make the best hamburgers? The legal regulation of religious slaughter of animals' (2011) 34(1) *UNSW Law Journal* 351.

³⁹ *Farmer Review*, above n 33, 69.

⁴⁰ The details of the auditing requirements can be found on the DAFF website. DAFF, *Independent Audit of an Exporter Supply Chain Assurance System – Cattle and Buffalo: Independent auditing requirements* (1 March 2012) <<http://www.daff.gov.au/aqis/export/live-animals/livestock/escas/independent-audit-escas-cattle-and-buffalo>>; DAFF, *Independent Audit of an Exporter Supply Chain Assurance System – Sheep and Goats: Independent auditing requirements* (1 March 2012) <<http://www.daff.gov.au/aqis/export/live-animals/livestock/escas/independent-audit-escas-sheep-and-goats>>.

DAFF on a 'risk/performance basis'.⁴¹ In the case of sheep and goats, performance audits are required every two months for the first six months and then at a frequency determined by DAFF.⁴² The DAFF materials also emphasise the independence and competence required of the auditors.

As DAFF has no power to inspect, it must rely on notifications of potential cases of non-compliance from the exporters (presumably revealed through the auditing process) and from third parties. To date, three cases of 'major' non-compliance have been found by DAFF, where one was reported by the exporter and two arose from Animals Australia investigations.⁴³ Where non-compliance is shown, DAFF has prepared guidelines for the management of such non-compliance.⁴⁴ The powers of DAFF are effectively limited to actions seeking to prevent such a circumstance arising again, such as further conditions on the export licence or revoking approval of the ESCAS, and are not in the nature of a punishment for the offending conduct.

III EXPORT RESTRICTIONS AND WTO LAW

There are indications that the Australian Government may have felt constrained by WTO law in designing its response to the live export crisis in Indonesia. The purpose of this part is to evaluate some of the more obvious issues that could be raised at the WTO with regard to a system like the ESCAS. Given that the general goal of the WTO is trade liberalisation, a restriction on exports, such as the requirements of the ESCAS, could be seen to interfere with free trade and therefore violate WTO commitments. It should be noted in this discussion that relatively few WTO disputes to date have involved export restrictions, with the bulk of disputes related to restrictions on imports, but many of the same principles apply in both types of cases.

At the time that negotiations were underway with the Indonesian Government to allow the resumption of the live cattle trade, the Australian media reported that an Indonesian government official threatened to lodge a complaint with the WTO if restrictive measures were to apply only to Indonesia and it appears that these comments were taken seriously.⁴⁵

⁴¹ DAFF, *Cattle and Buffalo: Independent auditing*, above n 40.

⁴² DAFF states on its website that an ESCAS for sheep should be audited three times per year, with two of those required in the high volume/high risk of non-compliance times of year, that is, festival times. This reflects the risk that sheep will be taken from the approved supply chain and sold to private individuals where no safeguards with respect to animal welfare apply. No End of Processing reports are required for sheep exports. DAFF, *Sheep and Goats: Independent auditing*, above n 40.

⁴³ DAFF, *Independent Audit Summary Reports of an Exporter Supply Chain Assurance System (ESCAS): Summary details of major and critical non-compliance with ESCAS requirements* (31 January 2012) <<http://www.daff.gov.au/aqis/export/live-animals/livestock/escas/audit-reports>>.

⁴⁴ DAFF, *Guideline – Management of Non-Compliance* (17 May 2012) <<http://www.daff.gov.au/aqis/export/live-animals/livestock/escas/non-compliance>>.

⁴⁵ This was reported widely in Australia. See, eg, ABC, 'Indonesia protests live cattle export ban', *ABC Lateline*, 8 June 2011 (Tom Iggulden, reporter); Tom Allard and Richard Willingham, 'Indonesia cries foul over live cattle export ban: LIVE EXPORTS – REACTION', *The Age* (Melbourne), 9 June 2011. Recent documents released by way of FOI requests show that the issue was being taken seriously (email dated 8 June 2011 from Ludwig senior adviser requesting to see any available legal advice about the international law ramifications in response to a report in *The Australian* (8 June 2011): 'Indonesia says ban on live cattle exports may be discriminatory') and later the same day email dated 8 June 2011 entitled 'WTO issue' containing 'Agreed words from DFAT' on addressing the issue. These documents and more are available at <<http://www.daff.gov.au/animal-plant-health/welfare/export-trade>>.

The clearest indication that trade law concerns may have had an influence on the design of the ESCAS can be found in this statement from the IGWG Cattle Report:

In applying any new regulatory framework to the export of Australian live animals it is important that this be done in a manner which is consistent with Australia's international trade obligations. Export restrictions are generally not permitted under the World Trade Organization but there are some exemptions to this general rule. Of relevance here are provisions that enable Australia to apply measures that are necessary to protect Australian public morals or the health of Australian animals. It is also important that Australia not discriminate in the application of these standards across countries, that it apply the least trade restrictive measures necessary to meet the required standards and it not apply measures that exceed those which are applicable domestically. With this in mind, it is important that the proposed framework be based around internationally agreed standards (as opposed to Australian standards) and that the measures applied do not exceed those that are in place in Australia.⁴⁶

More recently, the Government reiterated its concern that any measures adopted, such as mandating stunning, must meet WTO obligations.⁴⁷

This short statement from the IGWG Cattle Report highlights the important WTO issues that will be explored in this article. Firstly, a foundation principle of GATT is that measures must not discriminate between countries, so the application of the ESCAS to all export markets is important. Secondly, export restrictions are not generally permitted under GATT so the ESCAS must be tested to see if it is in the nature of an export restriction. If it is an export restriction, the measures can still be maintained if they meet the requirements of one of the General Exceptions of Article XX of GATT. Finally, with respect to the use of standards, the IGWG report suggests that the standards applicable under the ESCAS should be based on international standards. The WTO agreement with the most direct reference to the use of standards is the Technical Barriers to Trade Agreement so the potential application of this agreement to the ESCAS will also be analysed.

A *The GATT and Export Restrictions*

As a starting point it is necessary to identify Australia's obligations as a member of the WTO and a signatory to the GATT, which is the principal multilateral agreement dealing with trade in goods. If a violation of a requirement expressed in one of the GATT articles is found, a Contracting State may rely on one of the General Exceptions found in Article XX to justify the trade restriction. The discussion in this article only relates to restrictions on exports under the GATT — there is extensive literature on GATT restrictions on imports generally and their interaction with animal welfare issues more specifically.⁴⁸ In developing an ESCAS or similar system, particular consideration should be given to the requirements of Articles XIII and XI.⁴⁹

⁴⁶ Industry Government Working Group, Cattle Report, above n 32, 8-9.

⁴⁷ Australian Government, *Response to Senate Rural Affairs and Transport References Committee Inquiry: Animal welfare standard in Australia's live export markets, Live Animal Export (Slaughter) Prohibition Bill 2011 (No 2), and Live Animal Export Restriction and Prohibition Bill 2011 (No 2) dated November 2011* (July 2012) 9.

⁴⁸ See, eg, Peter Stevenson, 'The World Trade Organisation rules: A legal analysis of their adverse impact on animal welfare' (2002) 8 *Animal Law* 107; Laura Nielsen, *The WTO, Animals and PPMs* (Martinus Nijhoff Publishers, Leiden, The Netherlands, 2007); Steve Charnovitz, 'The Moral Exception in Trade Policy' (1998) 38 *Vanderbilt Journal of International Law* 689; Edward M Thomas, 'Playing Chicken at the WTO: Defending an animal welfare-based trade restriction under GATT's moral exception' (2007) 34 *Boston College Environmental Affairs Law Review* 605.

⁴⁹ GATT Article X may also be relevant as it relates to the administration of trade regulations. Pursuant to paragraph (3), trade regulations must be administered in a uniform, impartial and reasonable way and

Article XIII sets out the principle of non-discrimination, stating that no prohibition or restriction shall apply on the export of any product to the territory of any other contracting party unless the exportation of the like product to all third countries is similarly prohibited or restricted.⁵⁰ This underlies the importance that the ESCAS, which was originally only applicable to exports of cattle to Indonesia, be extended to all other markets. Article XIII requires non-discrimination with regard to all ‘like products’, an issue that has been considered extensively in relation to the Article III prohibition of restrictions on imports.⁵¹ The accepted criteria for like products are based on product characteristics, end uses and consumer preferences and there is little doubt that live cattle and live sheep would not be considered ‘like’. As a result, differences in the regulation of exports of these animals would not likely raise concerns under this Article.

The most significant potential challenge to export restrictions like the ESCAS is contained in Article XI, dealing with quantitative restrictions. Article XI:1 states, inter alia, that no prohibitions or restrictions made effective through export licences shall be instituted or maintained on the export of any product destined for the territory of any other contracting party.⁵² The Article goes on to list exclusions from this prohibition, such as in the case of critical shortages of foodstuffs, but none of the listed circumstances are relevant to live exports from Australia.⁵³

such regulations must be published. The administration of the regulations by DAFF to date and the provision of the details regarding the system by way of the department website would appear to be sufficient in this regard.

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GATT, Art XIII(1).

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The issue of ‘like products’ has been considered a barrier to the imposition of trade restrictions on the basis of animal welfare standards, the argument being that the likeness of products is determined on the basis of the properties of the end products and not on the basis of the process and production methods (PPMs) that lead to that product. See Stevenson, above n 48, 110-115. This viewpoint is derived from comments made by the Panel in the Tuna-Dolphin I and II reports. GATT Panel Report, *US – Restrictions on Imports of Tuna*, GATT Doc DS21/R (3 September 1991, not adopted by the GATT Council) and GATT Panel Report, *US – Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, not adopted by the GATT Council). However, neither of the Panel reports was adopted by the GATT Council and therefore, arguably, these comments should not be considered conclusive of the issue. The test for ‘likeness’ was elaborated on in the more recent opinion of the Appellate Body in the EC—Asbestos case where the AB adopted a three part test for likeness: the properties, nature and quality of the products; the end uses of the products in the given market; and consumers’ tastes and habits in relation to the products. Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (12 March 2011) [101]-[103]. Whether these criteria can admit non-product related PPMs and the role of PPM distinctions under GATT has been subject to extensive academic attention but are still unresolved questions. See, eg, Douglas A Kysar, ‘Preferences for processes: The process/product distinction and the regulation of consumer choice’ (2004) 118 *Harvard Law Review* 525, in particular 540-548 and references therein, and Steven Charnovitz, ‘The law of environmental “PPMs” in the WTO: Debunking the myth of illegality’ (2002) 27 *Yale Journal of International Law* 59. In the more recent Tuna Labelling case, the Panel made the following observation: “To the extent that consumer preferences, including preferences relating to the manner in which the product has been obtained, may have an impact on the competitive relationship between these products, we consider it *a priori* relevant to take them into consideration in an assessment of the likeness.” Panel Report, *US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/R (15 September 2011) [7.249]. The issue of whether the tuna products were “like products” was not addressed on appeal. Appellate Body Report, *US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R (16 May 2012). Arguably, the same analysis could be applied to the manner in which the product is produced.

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GATT, Art XI(1).

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Ibid Art XI(2)

Export licensing requirements, such as the ESCAS, could arguably be seen to violate Article XI, even though they do not ban exports, because they restrict exports or make exporting more difficult. It is therefore important to consider the WTO disputes on this issue to determine the way in which these rules have been applied and therefore whether the ESCAS could arguably be seen to violate Article XI.

B *WTO Disputes Regarding Export Restrictions*

As noted above, there have only been a few disputes brought before the WTO to date that address restrictions on exports. For those that have been heard, there is an underlying concern that the export restrictions in effect provide an advantage to domestic producers, perhaps by keeping domestic prices for inputs lower or to encourage processing of products domestically. The ESCAS has no such object. In fact, the Government has initiated several financial assistance schemes to offset the impact of the suspension of trade to Indonesia and the implementation of the ESCAS.⁵⁴ However, a country importing livestock from Australia could take the view that the ESCAS disadvantages its interests by reducing the number of animals made available through exports or by the upward pressure on prices that the raised standards and monitoring mechanisms would create. Examination of previous decisions regarding export restrictions may assist in determining if a challenge of the ESCAS could be maintained.

As identified by Karapinar,⁵⁵ until recently there have only been three export restriction disputes under the GATT and each of these only reached the Panel opinion level: Canada – Herring and Salmon (1988)⁵⁶; Japan – Semiconductors (1988)⁵⁷; and Argentina – Hides and Leather (2001).⁵⁸ More recently, the Appellate Body has issued a decision in China – Raw Materials (2012)⁵⁹ and a new dispute, China – Rare Earths, is currently underway. These various decisions will not be considered in detail here but a few facts will be highlighted as they illustrate the types of export measures that have been challenged under Article XI and therefore can inform an opinion as to whether the ESCAS would be susceptible to such a challenge.

⁵⁴ An assistance package valued at \$30m was made available to primary producers and other related businesses affected by the suspension of trade to Indonesia. Prime Minister Julia Gillard and Minister for Department of Agriculture, Fisheries and Forestry, Sen Joe Ludwig, ‘\$30 million assistance package for live export industry’ (Press release, DAFF11/186LJ, 30 June 2011). This was in addition to income assistance provided to industry workers. Minister for Agriculture, Fisheries and Forestry, Sen Joe Ludwig, ‘Live animal trade income assistance package’ (Media release, DAFF11/185L, 27 June 2011). In addition, \$10m from the Official Development Assistance contingency reserve was made available to eligible countries that import Australian livestock and wish to work to improve animal welfare standards and \$5m has been allocation to support exporters to meet the new ESCAS requirements. Minister for Department of Agriculture, Fisheries and Forestry, Sen Joe Ludwig, ‘Gillard Government reforms live export trade’ (Media release, DAFF11/240L, 21 October 2011).

⁵⁵ See Baris Karapinar, ‘Defining the legal boundaries of export restrictions: A case law analysis’ (2012) 15(2) *Journal of International Economic Law* 443.

⁵⁶ GATT Panel Report, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT Doc L/6268 - 35S/98 (20 November 1987, adopted 22 March 1988) GATT BISD 355/98.

⁵⁷ GATT Panel Report, *Japan – Trade in Semi-Conductors*, GATT Doc L6309 – 35S/116 (24 March 1988, adopted 4 May 1988) GATT BISD 355/116.

⁵⁸ Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WTO Doc WT/DS155/R (19 December 2000).

⁵⁹ Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WTO Doc WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (30 January 2012) (this is a joint report on the disputes initiated by the US (DS394), the EC (DS395) and Mexico (DS398)).

However, as noted above, a characterisation of the ESCAS as an export restriction is not necessarily fatal to the measure as it may still be justified through reliance on one of the General Exceptions.

In the pre-WTO Canada – Herring and Salmon dispute, the measures at issue prohibited the export of herring and salmon from Canada unless the fish had been processed, that is canned, salted, smoked, dried, pickled or frozen. The Panel held that this was a violation of Article XI.⁶⁰ It is considered unlikely that the ESCAS, which still allows the export of the product but subject to conditions, would be seen as analogous to the Canadian measures, which prohibited the export of non-processed fish entirely.

In Japan – Semiconductors, the facts evidenced a number of measures that together had the effect of restricting exports of semi-conductors below specified costs to markets other than the United States in violation of Article XI:1.⁶¹ The Panel also concluded that the export licensing system resulted in undue delays of up to three months in issuing licences, which also violated Article XI:1.⁶² This case illustrates that an export licensing system may be characterised as a restriction on exports in violation of GATT, even though exports of the product are not prohibited as such. In the context of ESCAS, for example, the requirement to arrange for an audit of a supply chain before it can be approved as part of the export permit application process could, arguably, be seen as an undue burden that results in undue delays in issuing licences.

In Argentina — Hides and Leather, representatives of the hide processing industry were allowed to attend and monitor the customs control over the export of raw and semi-tanned hides. Although this was not a *de jure* restriction on exports, the European Communities (EC) contended that it was a *de facto* restriction, as the presence of representatives of the hide tanning industry would have a chilling effect on exports, in violation of Article XI. The EC was only able to provide circumstantial evidence that export numbers were very low and could not show that the export measures were the cause. As a result, the EC failed to meet the evidentiary burden. However, what the decision does confirm is that an export measure need not be restrictive on its face; that is, a measure can violate the GATT by virtue of its effect.⁶³ Evidence could potentially be brought to show that the operation of the ESCAS has had the effect of reducing exports of livestock and therefore it is a restriction on this trade.

More recently there have been two high-profile disputes involving alleged export restrictions established by China. The first, the China-Raw Materials case, was the subject of an Appellate Body decision in early 2012.⁶⁴ The complex dispute involved a series of measures that impacted on the export of various raw materials including bauxite.⁶⁵ The complainants, the United States, Mexico and the EU, identified a total of 40 measures in their claims, where these fell into four categories of export restraints: export duties; export quotas; minimum

⁶⁰ Although the parties and the Panel all agreed that the measures were in violation of Art XI, Canada argued that the measures were justified by the exception found in Art XI:2(b) or Art XX(g). The Panel concluded that neither of these exceptions were available. See Panel Report, *Canada – Herring and Salmon*, above n 58 [4.3] and [4.7].

⁶¹ Panel Report, *Japan – Semi-conductors*, above n 59 [132(A)].

⁶² *Ibid* [132(B)].

⁶³ Panel Report, *Argentina – Hides and Leather*, above n 60 [11.15]-[11.19].

⁶⁴ AB Report, *China – Raw Materials*, above n 59.

⁶⁵ The raw materials covered by the measures are: bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorous and zinc.

export price requirements; and export licensing requirements.⁶⁶ The complainants argued that these measures created scarcity in global markets for the raw materials, driving up prices, and created an advantage for local Chinese producers due to their access to these materials at lower prices. For current purposes, it is important to note that the Panel analysed in detail the issue of automatic versus ‘non-automatic’ and ‘discretionary’ licences in the context of Article XI. The Panel made following comments:

It seems to the Panel that if a licensing system is designed such that a licensing agency has discretion to grant or deny a licence based on unspecified criteria, this would not meet the test we set out above in order to be permissible under Article XI:1. The possibility to deny the licence would be ever present; hence, the system by its very nature would always have a restrictive or limiting effect. It makes no difference, in the Panel's view, that discretion may be applied in a particular case such that a licence is authorized. The system offers no certainty that licences will be granted and hence it is not permissible.⁶⁷

On this issue, the Panel concluded that the undefined discretion provided to the Chinese authorities, which included a power to request additional unspecified documents before a licence would be issued, would allow those measures to be applied in such a way as to restrict exports in a WTO inconsistent manner and was in violation of GATT Article XI:1.⁶⁸ The opinion of the Appellate Body in this case was largely based on procedural grounds and unfortunately does not provide further jurisprudence on this issue. A concern could be raised that, as a general matter, the ESCAS does not operate automatically and therefore the grant of export licences and permits are restricted. In addition, various elements of the ESCAS, as developed and administered by DAFF, include a degree of discretion with regard to the conditions for approval of the ESCAS (an example being the discretion with regard to ongoing auditing requirements), which could be seen as an additional restriction on trade.⁶⁹

Most recently, the dispute resolution process has been initiated in the China – Rare Earths case with respect to measures applying to the export of rare earths, tungsten and molybdenum.⁷⁰ Not unlike the China – Raw Materials case, the complainant, the United States, argues that various measures including export duties, export quotas, minimum export prices and licensing requirements operate to restrict exports in a manner inconsistent with the GATT, including Article XI.⁷¹ It is also asserted that the measures are not administered in an impartial and uniform manner and some measures are not published, in violation of Article X.⁷² Should this dispute advance to a Panel Report, the analysis of licensing measures will be instructive in an attempt to analyse the robustness of the ESCAS.

⁶⁶ AB Report, *China – Raw Materials*, above n 59, [2].

⁶⁷ Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WTO Doc WT/DS394/R, WT/DS395/R, WT/DS398/R (5 July 2011) [7.921].

⁶⁸ Ibid [7.948]

⁶⁹ The Panel stated that even where the underlying measure may be justified under another article of the GATT, a licensing system that included discretionary elements could be seen as an unacceptable restriction: “a licence requirement that results in a restriction additional to that inherent in a permissible measure would be inconsistent with GATT Article XI:1. Such restriction may arise in cases where licensing agencies have unfettered or undefined discretion to reject a licence *application*.” (emphasis in original) Panel Report, *China – Raw Materials*, above n 69 [7.957].

⁷⁰ *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, DS431. Complainant United States. Joined for a single panel with DS432 (Complainant EU) and DS433 (Complainant Japan).

⁷¹ Request for Consultations by the United States, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WTO Doc WT/DS431/1, G/L/982 (15 March 2012).

⁷² Ibid.

C *Reliance on the General Exceptions*

Were a complainant to be successful in arguing that the ESCAS amounted to an export restriction in violation of Article XI, the measures could be defended by resorting to the General Exceptions of Article XX. In effect, Article XX provides exceptions so that measures that are otherwise WTO-inconsistent can nonetheless be maintained. There are two parts to this test: the measure must fit within the terms of one of the listed exceptions and must meet the requirements of the chapeau of Article XX.⁷³ There has been some academic interest to date in considering the extent to which these exceptions could protect an animal welfare related import restriction and some of these issues may be considered further in the EU seal product ban case currently pending at the WTO.⁷⁴ This part will provide an overview of how these exceptions could be relied upon in defense of the ESCAS.

1 *The Public Morals Exception*

In its reports, the IGWGs suggest that restrictions on live exports could be defended under either the public morals or animal health exceptions found in Article XX. Specifically, Article XX(a) provides an exception for a measure ‘necessary to protect public morals’. This test requires that the interest underlying the measure must be within the scope of public morals and the measure must be necessary to protect that interest. The notion of public morals was elaborated on in the US – Gambling case,⁷⁵ argued in relation to the General Agreement on Trade in Services, which has an identical public morals exception.⁷⁶ In that case, the Panel reasoned (and this analysis was upheld by the Appellate Body)⁷⁷ that the term ‘public morals’ denotes standards of right and wrong conduct maintained by or on behalf of a community or nation,⁷⁸ and the ‘content of these concepts [public morals and public order] for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values.’⁷⁹ This same standard was more recently applied in the China – AV Products case, where import restrictions placed on AV products such as videos were held to protect public morals.⁸⁰

⁷³ See Appellate Body Report, *US – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc TW/DS58/AB/R (12 October 1998) [147].

⁷⁴ *Canada-European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (WT/DS400) and parallel dispute DS401 initiated by Norway.

⁷⁵ Appellate Body Report, *United States – Measure Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R (7 April 2005); Panel Report, WTO Doc WT/DS285/R (18 November 2004). For a detailed discussion of the history behind the public morals exception and the significance of the US – Gambling case see Mark Wu, ‘Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine’ (2008) 33 *Yale Journal of International Law* 215.

⁷⁶ *General Agreement on Trade in Services*, Art XIV(a).

⁷⁷ Appellate Body Report, *US – Gambling*, above n 75 [296].

⁷⁸ *Ibid* [6.465].

⁷⁹ *Ibid* [6.461].

⁸⁰ Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/AB/R (21 December 2009).

Given Australia's long history of animal protection legislation, as evidenced by the animal welfare laws at the State and Territory level, as well as Commonwealth laws,⁸¹ it should be a relatively straightforward case to argue that the public morals of the Australian community include animal welfare protection. To date there is no WTO authority on the issue of whether animal welfare is a matter of public morals but the EU seal product ban dispute may provide an opportunity for this issue to be addressed.

In order to rely on the paragraph (a) exception, the second hurdle is the test of 'necessity'. As interpreted by the Appellate Body, this involves a weighing up of the objective sought to be obtained (the extent to which it is vital and important) and the impact on trade.⁸² Whether there is any reasonable alternative available that would achieve the same level of protection but would be less trade restrictive is also a relevant consideration.⁸³

Arguments have been put forward in favour of a complete ban of live exports, like that in place in New Zealand,⁸⁴ as the only way to guarantee the acceptable treatment of livestock raised in Australia and slaughtered for food.⁸⁵ Alternatively, it has been suggested that the *Animals Order* be amended to require stunning before slaughter along the lines required in Australia.⁸⁶ It could therefore be argued that the ESCAS is a less trade-restrictive measure (compared to these alternatives) that can adequately address the public moral concern regarding animal welfare.⁸⁷ It could also be argued that requiring audited compliance with OIE guidelines is necessary to protect this interest, especially given the evidence that other less formal efforts of the Australian Government and industry groups to improve welfare standards within many importing jurisdictions (such as through providing training and equipment) have not been successful.⁸⁸

⁸¹ The importance of animal welfare as a public interest can be seen at a Commonwealth level by way of, for example, the Australian Animal Welfare Strategy and the Australian Standards for the Export of Live-Stock. Australian Government, DAFF, *Australian Animal Welfare Strategy and National Implementation Plan 2010-14* (2011) and DAFF, *Australian Standards for the Export of Livestock (version 2.3) and Australian Position on the Export of Livestock* (2011).

⁸² Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Appellate Body Report, WTO Doc WT/DS161/AB/R, WT/DS169/AB/R (10 January 2001) [162] (considering the necessity test in the context of GATT Art XX(d)), cited with approval in Appellate Body Report, *EC – Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (12 March 2001) [172] (considering the necessity test in the context of GATT Art XX(b)).

⁸³ Ibid.

⁸⁴ *Customs Export Prohibition (Livestock for Slaughter) Order 2010* (NZ).

⁸⁵ For example, two Bills were considered by Parliament in 2011 that sought to prohibit the export of live stock for slaughter: Live Animal Export (Slaughter) Prohibition Bill (No 2) 2011 (put forward by the Australian Greens) and Live Animal Export Restriction and Prohibition Bill (No 2) 2011, which provided for a phase out period until 2014 (put forward by Senator Xenophon). The Senate Rural Affairs and Transport References Committee inquiry recommended that neither Bill be passed. The Senate, Rural Affairs and Transport References Committee, Parliament of Australia, *Animal welfare standards in Australia's live export markets, Live Animal Export (Slaughter) Prohibition Bill (No 2) 2011 and Live Animal Export Restriction and Prohibition Bill (No 2) 2011* (November 2011), 17.

⁸⁶ Livestock Export (Animal Welfare Conditions) Bill 2012, Private Members Bill introduced by Andrew Wilkie MP.

⁸⁷ According to a recent survey conducted by Essential Vision in November 2012, 25% of those surveyed thought that Australia should not export livestock to any country at all, 54% thought that live exports should be allowed only to countries that guarantee that they will be treated humanely, and 15 % thought that Australia should export live cattle and sheep to any country that wants them. Survey conducted by Essential Vision and reported on 19 November 2012.

⁸⁸ There is ample evidence that extensive efforts of the Australian Government and the industry peak bodies LiveCorp and Meat & Livestock Australia within jurisdictions such as Indonesia and Egypt have not

2 *Protecting Animal Life or Health*

Article XX(b) provides an alternative exception for measures ‘necessary to protect human, animal or plant life or health’. This exception also has had little consideration to date in the context of animal welfare so any conclusions to be drawn on the availability of this exception are somewhat speculative. In the early Tuna–Dolphin I case, the Panel rejected the proposition that the US measures designed to limit the importation of tuna to that obtained by dolphin-friendly fishing methods was within the scope of Article XX(b), but on the basis that the conditions imposed were unpredictable and therefore could not be regarded as necessary to protect the health or life of dolphins.⁸⁹

More recently, the Tuna Labelling case raised the issue of whether the US dolphin-friendly tuna labelling scheme violated the TBT Agreement.⁹⁰ Under the TBT Agreement, technical regulations that give rise to a trade restriction may be justified if they are necessary to pursue a legitimate objective, where a non-exhaustive list of legitimate objectives is given in the Agreement.⁹¹ The Panel concluded that the protection of dolphins was a legitimate objective of the labelling regime as it fell within the ‘protection of ... animal or plant life or health, or the environment’ and further that the broad terms in which the objective is expressed (which is very similar to that of GATT Article XX(b)) has the effect of ‘allowing Members to pursue policies that aim at also protecting individual animals or species whose sustainability as a group is not threatened.’⁹² Although the interest sought to be protected by the ESCAS is not animal life (given that the animals are explicitly being exported for slaughter), a modern conception of animal health is broader than disease prevention and includes welfare, as evidenced by, for example, the consideration given to such matters by the OIE. Therefore, an argument could be made that the ESCAS would meet the first hurdle of the exception due to its link with animal health but the issue of whether the measures in place are necessary to achieve this objective would again need to be addressed.

been successful in raising animal welfare standards, particularly with regard to handling and slaughter, to a level acceptable to the Australian public. For example, see Evidence to Senate Rural Affairs and Transport Legislation Committee, Estimates Hearings: Agriculture, Fisheries and Forestry, Parliament of Australia, Canberra, 24 May 2011, 105-120, and responses to questions on notice, in regard to investments and training specifically in Indonesia. See also ALEC, Submission to the Farmer Review, above n 11, Annex 11: MLA-LiveCorp Research and Development Projects and Annex 13: Animal Welfare Issue and Improvements Achieved by MLA/Livecorp.

⁸⁹ GATT Panel Report, *US – Restrictions on Imports of Tuna*, GATT Doc DS21/R (3 September 1991, not adopted by the GATT Council) [5.228]. A similar conclusion was reached in the Tuna-Dolphin II case, where the argument in favour of the Art XX(b) exception failed on the “necessary” test. GATT Panel Report, *US – Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, not adopted by the GATT Council) [5.39].

⁹⁰ *Technical Barriers to Trade Agreement* (incorporated into the WTO Agreement as part of Annex 1A).

⁹¹ Ibid Art 2.2.

⁹² Panel Report, *US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/R (15 September 2011) [7.437]. This conclusion was not disputed on appeal. Appellate Body Report, *US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R (16 May 2012) (the Tuna Labelling case).

3 *Extra-Territorial Impacts*

A potentially significant argument raised in the context of the Article XX exceptions is the ‘rule on extra-territoriality’.⁹³ When applied in the context of animal welfare standards, Stevenson suggests that there is a view that one country can protect animals located within its jurisdiction but cannot (in effect) impose its standards on another country by way of trade restrictions.⁹⁴ This ‘rule’ can be traced to comments made by the Panel in the pre-WTO Tuna–Dolphin cases. In Tuna–Dolphin I:

If the broad interpretation of Article XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.⁹⁵

The US measures requiring specific dolphin-friendly fishing practices were rejected for the purposes of both Article XX(b) and Article XX(g) (an exception for measures related to the conservation of exhaustible natural resources).⁹⁶ It is suggested that this same concern would be equally applicable to measures seeking to rely on the Article XX(a) exception.

Further, in the Tuna–Dolphin II case, the Panel stated that ‘[i]t could not be said that the General Agreement proscribed in an absolute manner measures that related to things or actions outside the territorial jurisdiction of the party taking the measure’ and used the Article XX(e) exception for products of prison labour as an example.⁹⁷ However, the Panel then made the following statement:

If Article XX were interpreted to permit contracting parties to deviate from the obligations of the General Agreement by taking trade measures to implement policies, including conservation policies, within their own jurisdiction, the basic objectives of the General Agreement would be maintained. If however Article XX were interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired. Under such an interpretation the General Agreement could no longer serve as a multilateral framework for trade among contracting parties.⁹⁸

⁹³ Stevenson, above n 48, 122.

⁹⁴ Ibid, 122-127.

⁹⁵ GATT Panel Report, *US – Restrictions on Imports of Tuna*, GATT Doc DS21/R (3 September 1991, not adopted by the GATT Council) [5.27].

⁹⁶ Ibid [5.32]. GATT Article XX(g) provides an exception for measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”. In relation to the Art XX(g) exception, the Panel stated: “A country can effectively control the production and consumption of an exhaustible natural resource on to the extent that the production or consumption is under its jurisdiction. This suggests that Article XX(g) was intended to permit contracting parties to take trade measures *primarily* aimed at rendering effective restrictions on production or consumption within their jurisdiction.” Ibid, [5.31] (emphasis added).

⁹⁷ GATT Panel Report, *US – Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, not adopted by the GATT Council) [5.16].

⁹⁸ Ibid [5.26].

On this basis the US measures, which effectively required the exporting country to show that it had a comparable regulatory program to the US and had a rate of incidental taking of marine mammals comparable to US vessels, were seen as measures taken to force other countries to change their policies to mirror those of the US and were not justified under Article XX(g).⁹⁹

More recently, this hurdle was avoided in the Shrimp–Turtle case, where the Appellate Body explicitly declined to make a ruling regarding any ‘implied jurisdictional limit’ to Article XX(g).¹⁰⁰ The Appellate Body concluded that the endangered sea turtles meant to be protected by the standards (which required the use of turtle-exclusion devices in the catching of shrimp) were migratory and therefore had a relevant connection with the US.¹⁰¹ In the US – Gasoline case, clean air was considered an exhaustible natural resource for the purposes of Article XX(g) and issues of territorial reach were not raised (although this may be because clean air is a global commons).¹⁰² In other cases involving the protection of human health or public morals, the protection was inwardly directed towards the country’s own population — protecting French residents from the dangers of asbestos, US residents from online gambling and Chinese residents from inappropriate materials.

In the view of Stevenson, these arguments miss the point:

The aim of such countries is not to force other countries to change their standards, but to be at liberty to prohibit within their own territory the marketing of products (whether domestically produced or imported) derived from practices which involve animal suffering.¹⁰³

Given that the ESCAS is an export restriction, the offending conduct sought to be prevented is necessarily occurring in the overseas jurisdiction, and what the measures are effectively seeking to do is restrict the supply of the livestock to those overseas markets unless they comply with the prescribed standards. To re-phrase Stevenson’s argument, it could be said that the aim is (arguably) not to force other countries to change their standards but to be at liberty to prohibit the supply of animals to other territories where local practices give rise to unacceptable levels of animal suffering.

Alternatively, it could be argued that, as the measures are based on OIE guidelines, the OIE members have already approved the standards prescribed by the ESCAS. Therefore, the ESCAS does not require Australian standards to be adopted but rather that the already multilaterally accepted OIE guidelines be put into practice. It is hoped that the ‘rule’ of extra-territoriality will be addressed and clarified in the seal products case (discussed below) given that the measures at issue in that case target the inhumane slaughter of seals undertaken outside of the EU.

⁹⁹ Ibid [5.27].

¹⁰⁰ Appellate Body Report, Shrimp-Turtle, above n 73, [133].

¹⁰¹ Ibid.

¹⁰² Appellate Body Report, *US – Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS52/AB/R (29 April 1996).

¹⁰³ Stevenson, above n 48, 126.

4 *The Chapeau*

In order to rely on any one of the Article XX exceptions, the measure must also meet the tests of the chapeau (the introductory material to the Article). The measure must not result in arbitrary or unjustifiable discrimination between countries and must not be a disguised restriction on international trade. These tests were analysed in detail in the context of the Shrimp-Turtle dispute: although the protection of sea turtles met the requirements of Article XX(g) as ‘relating to the conservation of exhaustible natural resources’ the manner in which the measures were applied was held to violate the conditions of the chapeau.¹⁰⁴ It is considered that the Shrimp–Turtle case is the most relevant case for current purposes given the outward-looking nature of the measures in that case and their objective of protecting animals (sea turtles).

The Appellate Body went to great lengths to emphasise the important role of the chapeau in preventing the abuse or misuse of the exceptions:¹⁰⁵

The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (eg, Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement.¹⁰⁶

The measures in Shrimp–Turtle I effectively required that overseas fishers meet the same standards as applicable to US domestic shrimpers in order to be certified. The Appellate Body concluded that the manner by which the US sought to achieve its goal of protecting sea turtles amounted to both unjustifiable and arbitrary discrimination as between members of the WTO.¹⁰⁷

The US measures were adjusted in light of the decision but were challenged again in Shrimp–Turtle II, where the Panel concluded that the new measures, which required standards that were ‘comparable in effectiveness’ (rather than ‘essentially the same’) now met the requirements of the chapeau.¹⁰⁸ This decision highlights the need for negotiation and flexibility in a certification regime, which arguably can be evidenced in the ESCAS given the outcomes-based standards that must be met for approval of a supply chain. Although DAFF provides checklists on its website, these are merely provided as suggestions. Another factor that weighed in favour of the US’s case was evidence that the government repeatedly offered technical assistance and training to other governments,¹⁰⁹ efforts not unlike those of Australia with regard to the ESCAS.

The ESCAS may also be more likely to pass the test of the chapeau given that the welfare code upon which it is based, the OIE guidelines, is an internationally developed set of standards that has already been accepted by the members of the OIE (although this acceptance

¹⁰⁴ Appellate Body Report, Shrimp-Turtle, above n 73.

¹⁰⁵ Ibid, [156]-[158].

¹⁰⁶ Ibid, [159].

¹⁰⁷ Ibid, [186].

¹⁰⁸ Panel Report, *US – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/RW (15 June 2001); Appellate Body Report confirming findings, WTO Doc WT/DS58/AB/RW (22 October 2001) [144].

¹⁰⁹ Ibid [5.118]-[5.119].

does not mean the standards are binding).¹¹⁰ In addition, the way in which the OIE guidelines are themselves structured, which flows through into the ESCAS checklists, is outcomes based rather than prescriptive as to animal handling techniques, thereby retaining a degree of flexibility.

5 The EU Seal Product Ban Dispute

There is a real possibility that many of the uncertainties with respect to the application of WTO principles to measures directed towards improving animal welfare will be considered, if not resolved, in the dispute resolution process currently under way involving the EU's measures to prohibit the import and sale of seal products.¹¹¹ The dispute concerns the European Union regulation that bans seal products being placed on the European Community market in all but a few limited circumstances.¹¹² Given that these measures operate as a ban they arguably fall foul of Article XI.¹¹³

The case is likely to focus on the availability of one of the Article XX exceptions. As evidenced in the introductory paragraphs to the Regulation, animal welfare considerations are the drivers behind the ban and there is no evidence of environmental protection as a motivating factor. Therefore, the Article XX argument is likely to rely on the public morals exception. This dispute may therefore, importantly, provide a definitive statement that animal welfare is within the scope of this exception. The areas likely to generate greater debate are the application of the necessity test in this context and the application of the chapeau.

In the application of the public morals exception, the relative weight or importance given to animal welfare concerns as compared to interests of market access will be incorporated into the necessity test as will a consideration of whether a less trade-disruptive measure could have attained the stated objective. For example, rather than a ban, could there have been a labelling or certification scheme. The preamble to the Regulation specifically states that, in the view of the EC, these options would not be effective.¹¹⁴ The Panel may also consider it relevant to adjudge

¹¹⁰ It should be noted that the live export markets to which the ESCAS applies are all members of the OIE.

¹¹¹ *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400, commenced by Canada. Norway has commenced a parallel dispute resolution process in WT/DS401. The dispute settlement process was commenced in 2009 but the Panel has not yet heard the arguments.

¹¹² *Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products*, Official Journal of the EU, L286/36-39 (31.10.2009). The circumstances under which importation is allowed are threefold: seal products resulting from Inuit or other indigenous community traditional and subsistence hunting; goods imported on an occasional nature wholly for the personal use of travellers; and by-products of sustainable management practices regulated at a national level and only if on a non-profit basis. However, as pointed out by Fitzgerald, in effect the regulation does not ban seal products passing through the EU on route to other markets. Peter L Fitzgerald, "Morality" May Not Be Enough to Justify the EU Seal Product Ban: Animal Welfare Meets International Trade Law' (2011) 14 *Journal of International Wildlife Law & Policy* 85, 94.

¹¹³ Howse and Langille argue strongly that the seal products ban does not violate the GATT but, if it were concluded that it did, the public morals exception would be available. Robert Howse and Joanna Langille, 'Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values' (2012) 37 *Yale Journal of International Law* 367, 397-411. In their argument they maintain that it is inappropriate to apply Article XI to the seal products ban – given that the same restrictions apply to imported and domestically produced products, they argue that it is appropriate that these measures be considered under Article III, where a violation of this article would not be found. *Ibid* 405-407.

¹¹⁴ EC Regulation No 1007/2009, above n 112, preamble para (11) and (12).

whether there is sufficient flexibility in the measures. The three stated exceptions to the ban could also be relevant in considering whether the ban is arbitrary, and Fitzgerald asks why seals have been singled out when other fur-bearing animals are subject to similarly cruel hunting or slaughtering practices.¹¹⁵ However, Howse and Langille make a persuasive case that the ban should be justified under both the public morals and animal health exceptions.¹¹⁶ The dispute may also provide an opportunity to address the issue of extra-territorial reach (given that the seal hunting takes place outside the EU). The Panel was composed in October 2012 and its final report is expected in October 2013.

D *Technical Barriers to Trade*

In many WTO cases involving trade restrictions, the complainants will include claims under the TBT Agreement. Although it is not entirely clear that such a claim could be brought with respect to the ESCAS, the IGWG Reports place much emphasis on the need to apply international standards, rather than Australian standards, and the TBT Agreement makes more direct reference to international standards than does the GATT.

A threshold issue is whether the ESCAS is a technical regulation as defined for the purposes of the TBT Agreement — if the ESCAS is not a technical regulation then the TBT Agreement is not applicable. The Annex I definitions state that a technical regulation is a ‘document which lays down product characteristics or *their related* processes and production methods ... with which compliance is mandatory’ (emphasis added). A three-part test to determine if a measure is a technical regulation has been developed: the regulation must apply to a designated product or group of products; the regulation must lay down one or more characteristics; and compliance with this characteristic must be mandatory.¹¹⁷ Although it seems quite clear that the handling and slaughter standards stipulated in the ESCAS framework are process or production methods (PPMs), these processes would not affect the character of the ultimate product (being processed meat) and would therefore be considered ‘unincorporated’ or ‘non-product related’ PPMs. The wording of the definition of technical regulation, in particular the use of the phrase ‘their related’, suggests that technical regulations would only include regulations which require PPMs that relate to the product characteristics and therefore do not encompass non-product related PPMs. Although it is not free from doubt, there is a strong argument that the TBT Agreement simply does not apply to non-product related PPMs such as the ESCAS.¹¹⁸

In the recent decision in the US – Tuna Labelling case, the AB confirmed that the dolphin-safe labelling scheme was a technical regulation, even though it clearly relates to a non-product related PPM, the fishing method. The US submitted that the measure was not related to product characteristics but the AB did not take a view on this point.¹¹⁹ There is an

¹¹⁵ Fitzgerald, above n 112, 129.

¹¹⁶ Howse and Langille, above n 113, 411-421.

¹¹⁷ Appellate Body Report, Asbestos, above n 53, [66]-[73], adopted and applied by the Appellate Body in Appellate Body Report, *EC – Trade Description of Sardines*, WTO Doc WT/DS231/AB/R, [176], and Panel Report, Tuna Labelling, above n 94, [7.53] and AB Report, Tuna Labelling, above n 94, [179].

¹¹⁸ See, Jan McDonald, ‘Domestic regulation, international standards, and technical barriers to trade’ (2005) 4(2) *World Trade Review* 249, 255-256 and references therein; Elizabeth Sheargold and Andrew Mitchell, ‘Oils Ain’t Oils: Product Labelling, Palm Oil and the WTO’ (2011) 12 *Melbourne Journal of International Law* 396 at 402; Abhinay Kapoor, ‘Product and process methods (PPMs): “A losing battle for developing countries”’ (2011) 17(4) *International Trade Law Review* 131, 137-138.

¹¹⁹ Appellate Body Report, Labelling, above n 95, [197]

argument that an extension of the definition of technical regulation in Annex 1, which states that ‘it may also include... labelling requirements as they apply to a product, process or production method’, is broader and will pick up labelling schemes that relate to non-product related PPMs, given there is no qualifier that the PPM in this instance be ‘related’ to the product characteristics.¹²⁰ Again, this issue is not settled and it seems likely that extension to non-product related PPMs is only for the purposes of characterising labelling schemes as technical regulations.

The ESCAS also has the curious feature of stipulating a PPM that will only occur after the export has taken place. The wording of the TBT Agreement suggests that the technical regulations must be met before the import or export takes place and the measures at issue in the prominent cases to date have had the same backward-looking approach.

Although there is clearly some doubt on this issue, if one were to conclude that the ESCAS regime, or more specifically the animal welfare component of the scheme, is a technical regulation, the TBT Agreement stipulates that technical regulations shall be no more trade-restrictive than necessary to fulfill a legitimate objective¹²¹ and that a party must use the relevant international standard (if one exists) unless it would be ineffective in fulfilling the legitimate objective.¹²² Legitimate objectives are defined inclusively for the purposes of this agreement and include the protection of animal life or health. As noted above, in the recent Tuna Labelling case, the Panel accepted as legitimate the objective of dolphin protection and there is no obvious reason why livestock protection would not also be accepted. The TBT Agreement has a clear preference for harmonisation through the use of international standards, of which the OIE guidelines would be the likely model,¹²³ as this is seen to facilitate international trade.¹²⁴ However, this would not necessarily prevent an argument being made that a higher, Australian standard, one that requires pre-slaughter stunning, is necessary to achieve the objective of ensuring welfare standards acceptable to the Australian Government and the Australian people. However, the added difficulty of making such an argument could have influenced the ESCAS designers to rely on the OIE guidelines.

IV CONCLUSION

When examined from a WTO law perspective, a system like the ESCAS, that requires compliance with detailed regulatory and reporting requirements with respect to the grant of export licences and permits, raises several issues. The GATT requirement of non-discrimination in the application of export restrictions (Article XIII) has arguably been addressed by the application of the ESCAS to all major categories of livestock and all export markets. However, the Article XI prohibition on export restrictions is more problematic given that the WTO jurisprudence suggests that non-automatic licensing regimes and licensing regimes that incorporate discretions, such as the ESCAS, could be considered trade restrictions inconsistent with the GATT. Reliance on one of the General Exceptions would then be required for the measures to be maintained. The strongest case would appear to lie

¹²⁰ McDonald, above n 118, 256-257.

¹²¹ TBT Agreement, Art 2.2.

¹²² TBT Agreement, Art 2.4.

¹²³ The OIE standards are already relied upon as the reference standards for the purposes of the WTO *Agreement on the Application of Sanitary and Phytosanitary Measures* in relation to animal health and zoonosis. See *SPS Agreement*, Annex A(3)(b).

¹²⁴ McDonald, above n 118, 251-252.

with the Article XX(a) public morals exception, with reference to animal welfare as the motivation for the licensing regime. The measures must be deemed necessary to achieve the objective of animal welfare protection, where this requires a balancing of the interest being protected against the impact of the measures on trade. Evidence could be provided that Australia's previous efforts to improve welfare outcomes through funding equipment improvements and providing training have not been effective and therefore stronger measures are required. Although the issue of extra-territorial impacts could be raised, given that the current scheme relies on the OIE guidelines rather than Australian standards, there is less of a case to be made that Australia is seeking to impose its standards on importing countries.

Finally, in order to meet the conditions of the chapeau, a more generalised balancing test is applied that compares the member's right to invoke the exception and the other members' rights under the GATT more broadly. There is also an enquiry into whether the measures give rise to arbitrary or unjustifiable discrimination. In this regard, the degree of flexibility in the specific procedures that can be adopted by an importer in meeting the ESCAS animal welfare outcomes and, again, the use of internationally accepted OIE guidelines as the framework, would weigh in favour of the measures. For completeness, it seems unlikely that the ESCAS could be characterised as a technical regulation for the purposes of the TBT Agreement, so concerns that this agreement would require reliance on OIE guidelines rather than Australian guidelines may be unfounded.

Although, as described in this article, the potential WTO issues raised by the ESCAS can be addressed, this is not to say that a stricter set of standards, such as welfare protections based on the Australian slaughter standards that require stunning in most cases, would not also be defensible if tested. And, of course, it is probably obvious to suggest that just because import or export measures are potentially subject to a WTO challenge does not necessarily mean that they will be disputed. For example, consider the New Zealand order that effectively prohibits live exports, which has not been challenged. Unfortunately the deference that appears to have been given to free trade principles may have produced a live export licensing regime that is too weak to deliver the level of welfare outcomes that the Australian community rightly expects.
