

BREXIT SPECIAL

Brexit: Opportunities
and Threats for Farm
Animal Welfare

What does Brexit
mean for Wildlife?

The Applicability of
GATT Article XX(a) to
Animal Welfare

OPINION

Animal Welfare After
Trump: The Real and
Anticipated
Concerns

CASE STUDY

Freedom of
Information and
Animal Experiments



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EDITOR'S NOTE

Welcome to the first edition of The UK Journal of Animal Law. The new title reflects the changes being made to ALAW's brand to better reflect our work within the animal protection community. Our name is changing to A-law and a new website will be launched soon.

In this edition, the main focus is on the possible implications for animal protection in the wake of Britain's departure from the EU. Peter Stevenson outlines the main farm animal welfare concerns while Mark Jones explores the potential impact of Brexit on wildlife protection.

As an animal protection community, our task in the years ahead will be to safeguard welfare gains and to advance new welfare standards in a political landscape where economic expediency is likely to be the only game in town.

Iyan Offer and Jan Walter consider the Applicability of GATT Article XX(a) on Animal Welfare through the prism of the EC- Seal Products case, a timely review as Britain seeks to broker future trade agreements.

The tumultuous events Stateside are not forgotten. Alison Collinson provides a lively opinion piece on the impact of the Trump administration on animal welfare.

Finally, David Thomas provides an in-depth case study of Freedom of Information in relation to animal experimentation. As one of Britain's most experienced animal protection lawyers he highlights the difficulties encountered when investigating the treatment of animals at a world renowned academic institution.

Jill Williams
Editor

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Brexit: Opportunities and Threats for Farm Animal Welfare

Peter Stevenson, Chief Policy Advisor at Compassion in World Farming

Clearly, we must ensure that Brexit does not lead to any dilution of UK legislative standards on the welfare of farm animals. To date there is no indication the Government plans to weaken these standards. Indeed, the message from the Department for Environment, Food and Rural Affairs (Defra) is that good welfare should be seen as part of the UK's post-Brexit international brand. Secretary of State Andrea Leadsom has said that the UK's Unique Selling Point, both at home and abroad, should include the highest standards of animal welfare.^{1 2} This said, we will need to be vigilant as, post Brexit, Defra and Parliament decide the future shape of each piece of farm animal welfare legislation.

Brexit offers opportunities to strengthen farm animal welfare as the UK will no longer be constrained by EU free trade rules. Nor, in the fields of welfare during transport and slaughter, will it be subject to EU Regulations that provide only limited opportunities to enact stronger domestic legislation.

In the interests of brevity this article refers to the UK and Defra in London but decisions about farm animal welfare (and other aspects of food and farming) post Brexit will have to be taken separately by each of the UK's four constituent parts.

Live animal exports

The UK currently exports around 37,000 sheep per year for slaughter on the continent. Figures received under a Freedom of Information request from the Animal and Plant Health Agency show that in the eighteen months from 1 July 2014 to 31 December 2015 a total of 56,537 sheep were exported from England and Wales for slaughter on the continent. In addition, around 20,000 calves were exported from Northern Ireland to Spain in 2016. These are mainly male dairy calves.³

The Court of Justice of the EU has twice ruled that the UK cannot ban live exports.^{4 5} Once the UK leaves the EU it will be free to ban live exports provided that in any new trade agreement with the EU it insists on the inclusion of a

provision permitting it to do so. I believe Defra should not wait for Brexit but should now introduce a Bill to ban live exports for slaughter or fattening with the coming into force date being the day after the UK leaves the EU.

"Defra should not wait for Brexit but should now introduce a Bill to ban live exports."

On-farm welfare: *Trade considerations*

The EU Directives on the welfare of animals on-farm (those on pigs, laying hens, broilers, calves and the General Farm Animals Directive) lay down minimum standards and allow Member States to set stricter welfare provisions in their own territory. However, Member States are generally reluctant to impose higher standards on domestic farmers as EU trade rules preclude them from requiring

¹ Andrea Leadsom speaking to NFU meeting at Conservative Party Conference 2016. http://www.npa-uk.org.uk/Post-Brexit_UK_to_be_an_exemplar_for_animal_health_and_welfare_standards-Leadsom.html Accessed 18 December 2016

² Andrea Leadsom's oral evidence to House of Commons Environment, Food and Rural Affairs Committee, 19 October 2016.

<http://data.parliament.uk/writteneviden>

ce/committeeevidence.svc/evidencedocument/environment-food-and-rural-affairs-committee/the-work-of-the-department-for-environment-food-and-rural-affairs/oral/41680.html Accessed 18 December 2016

³ Livestock and Meat Commission for Northern Ireland. <https://www.lmcni.com/site/wp-content/uploads/2017/01/Latest-bulletin.pdf> Accessed 19 January 2017

⁴ Queen and Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd, Case C-5/ 94. <http://curia.europa.eu/juris/showPdf.jsf?docid=99550&doclang=en> Accessed 18 December 2016

⁵ Queen and Ministry of Agriculture, Fisheries and Food, ex parte Compassion in World Farming Ltd, Case C-1/96 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61996CJ0001> Accessed 18 December 2016

imports to meet stronger standards than those set by EU legislation.

After Brexit, EU law will no longer prevent the UK from requiring imports to meet certain standards. However, this freedom may prove illusory unless, when negotiating new trade agreements with the EU or others, the UK insists on the insertion of a clause permitting the UK to require imports to meet UK animal welfare standards. However, the UK's desire to build a large portfolio of new trade agreements could deter it from holding firm in requiring the inclusion of such a clause.

"If the UK is unable to prevent the import of lower welfare products, UK farmers may press the Government to dilute welfare standards and are highly likely to oppose any strengthening of standards."

Trade issues will be decisive in determining whether the UK is able to raise welfare standards post Brexit. If the UK is unable to prevent the import of lower welfare products, UK farmers may press the Government to dilute welfare standards and are highly likely to oppose any strengthening of standards.

⁶ It is beyond the scope of this article to examine the WTO case law in detail; however a full analysis by the author is at <http://www.ciwf.org.uk/media/7131790/the-impact-of-the-world-trade->

In cases where the UK does not conclude a new trade agreement, trade will be governed by the World Trade Organisation (WTO) rules. Both the EU and the UK tend to assert that the WTO rules do not enable restrictions to be placed on imports on animal welfare grounds. This, however, is to ignore WTO case law of the last sixteen years. A number of WTO Panel and Appellate Body rulings suggest that a WTO member country may be able to require imports to meet standards equivalent to its own provided that there is no element of discrimination that favours domestic producers and no discrimination between different would-be exporting countries.⁶

Post CAP farm subsidy payments

The UK farm subsidy arrangements that replace the Common Agricultural Policy (CAP) will also play a decisive part in determining the future of UK animal welfare. The core principle that should determine strategic thinking about post CAP UK farm support payments is that farmers should be rewarded by the market for outputs, with the taxpayers' role being to provide funding for public goods that the market cannot, or can only partially, deliver. Such public goods include high animal welfare and environmental standards. Farmers may be encouraged to take what some see as a commercial risk in adopting higher welfare standards by the combination of support from the taxpayer and premium prices from retailers where these are offered.

[organisation-rules-on-animal-welfare-2015.pdf](#)

⁷ Scientific Opinion of the Panel on Animal Health and Welfare on a request from European Commission on welfare of dairy cows. *The EFSA Journal* (2009) 1143, 1-38.

Farmers willing to improve welfare should be incentivised under the new domestic farm support system. Public funding could for example be granted for membership of RSPCA Assured, or for keeping pigs outdoors or on straw indoors. Payments to individual farmers could be tiered, depending on which level of high welfare they chose.

We will now examine a number of welfare improvements that should be pursued both now and post Brexit. All these would benefit from support under the new funding arrangements.

Need to halt the move to zero-grazing in dairy farming

Reports by the European Food Safety Authority and a new review of the literature show that pasture based cows have lower levels of lameness, hoof pathologies, hock lesions, mastitis, uterine disease and mortality than zero-grazed cows.⁷ ⁸ Pasture access also results in improved lying/resting times and lower levels of aggression. When given the choice between pasture and indoor housing, cows show an overall preference for pasture.⁹

Traditionally dairy cows in the UK are kept outdoors during the grass growing season (spring, summer and early autumn) and are then brought indoors for the winter months.

The term 'zero-grazing' refers to cows that are kept indoors for all or the vast majority of the year. Some zero-grazed cows are

⁸ Arnott *et al*, 2016. Review: welfare of dairy cows in continuously housed and pasture-based production systems. *Animal* doi:10.1017/S1751731116001336

⁹ *Ibid*



housed indoors for all twelve months of the year. Others are allowed out to pasture during their 'dry period' i.e. the two months between the end of their ten month lactation and the birth of their next calf. Cows have one such two month dry period per annum. However, they will only be able to go outdoors during their dry period if it coincides with the grass-growing season.

A study carried out a few years ago for Defra found that 6-7% of farms continuously zero-graze all their cows.¹⁰ The average herd size of these farms was more than double the national average; this suggests that around 15% of cows are permanently zero-grazed. In addition, a proportion of cows that in theory might be allowed out during their dry period or in

the latter part of the lactation (when milk yields are declining) do not get out because in their case this period coincides with winter. In all I estimate that about 20% of UK cows are zero-grazed.

Public animal welfare payments should only be available for pasture-based dairying; zero-grazing operations should not benefit from taxpayers' funding. Indeed, the UK should emulate Sweden where legislation requires cows to be kept on pasture during the grass-growing season.¹¹

Moving away from farrowing crates

Sow stalls (used during pregnancy) have been banned in

the UK since 1999 and are now banned EU-wide other than in the first four weeks of pregnancy. However, the use of farrowing crates remains lawful. Sows are placed in these crates a few days before giving birth and remain there until the piglets are weaned at 3-4 weeks of age. They are so narrow that the sow cannot turn around.

Farmers use these crates to prevent sows crushing their piglets. Farrowing crates should be rapidly replaced by free farrowing systems. A number of such systems are available and research shows that piglet mortalities in loose farrowing systems can as low as, or lower

¹⁰ AW1026: the Management and welfare of continuously housed dairy cows. <http://www.bovinetb.info/docs/a-study-to-investigate-the-management-and-welfare-of-continuously-housed->

dairy-cows.pdf Accessed 18 December 2016

¹¹ Animal Protection Ordinance [1988:539]. Djurskyddsförordning (1988:539). Näringsdepartementet. Available from:

http://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/djurskyddsforordning-1988539_sfs-1988-539.

than, in crates.^{12 13} British farmers and scientists have played an important part in the development of free farrowing systems.^{14 15}

The UK should encourage a move to free farrowing systems, and ultimately ban the use of farrowing crates, giving farmers a reasonable phase out period.

Ending the use of enriched cages for laying hens

Barren cages for laying hens have been prohibited EU-wide since 2012 but the use of enriched cages is permitted. However, these cages provide only minor welfare improvements compared with the banned barren cage.^{16 17}

¹⁸ Germany has banned enriched cages from 2015 (with certain exceptions permitting their use until 2028).¹⁹ The UK should do the same.

Ban routine preventive use of antibiotics in farming

The overuse of antibiotics in intensive animal production contributes significantly to antimicrobial resistance in humans.^{20 21} The main use of antibiotics in farming is routine preventive use in intensive systems²² where animals are confined in overcrowded,

stressful conditions and are bred for maximum yield. These conditions compromise their health and immune responses, and encourage disease to develop and spread.^{23 24}

"The overuse of antibiotics in intensive animal production contributes significantly to antimicrobial resistance in humans."

Post Brexit the UK will be able to act unilaterally and should prohibit the routine preventive use of antibiotics in farming. Routine antibiotics use should be replaced by the keeping of animals in 'health-orientated systems'. In such systems good health would be integral to the system rather than being propped up by routine use of antibiotics. This approach would build good health and strong immunity by measures such as avoiding overcrowding and excessive group size; reducing stress for example by enabling animals to perform natural behaviours; and ending the early weaning of

piglets. This would deliver both good health and high welfare standards.

Need for meat and dairy products to be labelled as to farming method

Governments urge consumers to play their part in driving welfare improvements. At the same time both the European Commission and Defra refuse to introduce mandatory labelling of meat and dairy products as to farming method thereby leaving consumers to make their choices in the dark.

The problem is particularly acute as regards milk. Consumers are largely unable to play a part in determining the future direction of UK dairying as most milk is pooled together (other than organic milk) making it impossible to distinguish intensive and pasture-based milk. Defra should work with industry to explore ways in which pasture-based milk and dairy products can be labelled as such rather than being mixed with milk and dairy products from intensive herds. EU law requires eggs and egg packs to be labelled as to farming method; packs of eggs produced in enriched cages must be labelled 'eggs from caged

¹² Weber et al, 2007. Piglet mortality on farms using farrowing systems with or without crates. *Animal Welfare* 16: 277-279.

¹³ Baxter EM, Lawrence AB, and Edwards SA. Alternative farrowing accommodation: welfare and economic aspects of existing farrowing and lactation systems for pigs. *Animal*. 2012; 6(1):96-117.

¹⁴ *Ibid*

¹⁵ <http://www.360farrower.com/> Accessed 18 December 2016

¹⁶ EFSA AHAW Panel (EFSA Panel on Animal Health and Animal Welfare), 2015. Scientific Opinion on welfare aspects of the use of perches for laying

hens. *EFSA Journal* 2015;13(6):4131, 70 pp. doi:10.2903/j.efsa.2015.4131

¹⁷ Rodenburg TB, Tuytens FAM, and Sonck B. 2005. Welfare, health, and hygiene of laying hens housed in furnished cages and in alternative housing systems. *Journal of Applied Animal Welfare Science* 8(3):211-26.

¹⁸ Lay D et al, 2011. Hen welfare in different housing systems 2011 *Poultry Science* 90 :278–294

¹⁹

<https://www.buzer.de/gesetz/7344/al54179-0.htm> Accessed 18 December 2016

²⁰ World Health Organisation, 2011. http://www.who.int/mediacentre/news/releases/2011/whd_20110406/en/ Accessed 19 December 2016

²¹ European Medicines Agency, 2006. Reflection paper on the use of fluoroquinolones in food-producing animals in the European Union. http://www.ema.europa.eu/docs/en_GB/document_library/Other/2009/10/WC500005155.pdf Accessed 19 December 2016

²² *Ibid*

²³ T Humphrey (2006) Are happy chickens safer chickens? *Poultry welfare and disease susceptibility*, *British Poultry Science*, 47(4):379–391

²⁴ M Greger (2007) The human/animal interface: emergence and resurgence of zoonotic infectious diseases. *Critical Reviews in Microbiology*, 33:243–299

hens'.²⁵ Post Brexit, Defra should unilaterally extend this requirement to meat and dairy products.

Improving welfare at slaughter

Food Standards Agency (FSA) data show that in the period July 2014 - June 2016 there were over 4,000 serious breaches of animal welfare legislation at slaughter and during the transport of animals to slaughterhouses.^{26 27}

"Defra should introduce legislation requiring slaughterhouses to install CCTV and to make the footage available for independent monitoring and to the FSA."

Analysis of the data by the Bureau of Investigative Journalism states that during this period there were 130 level 4 problems (animals subjected to avoidable pain, distress or suffering) during slaughter, 4005 level 4 problems during transport to slaughter and 320 other level 4 problems. Some of these breaches of the law affected several animals particularly in the case of poultry. The FSA's data makes disturbing reading. Just looking at the data

²⁵ Commission Regulation (EC) No 589/2008 laying down detailed rules for implementing Council Regulation (EC) No 1234/2007 as regards marketing standards for eggs

²⁶ [https://www.food.gov.uk/about-us/data-and-policies/foia/foirelease/information-released-under-the-freedom-of-information-act-and-environmental-information-regulations-in-2015/animal-](https://www.food.gov.uk/about-us/data-and-policies/foia/foirelease/information-released-under-the-freedom-of-information-act-and-environmental-information-regulations-in-2015/animal-welfare-regulations-at-slaughter-2014-2015)

for the most recent month (June 2016) one sees the following problems (and I use the FSA's wording):

- Birds trapped between crate and module; this problem appears many times in the FSA data
- Stunning not effective (cattle); this too appears regularly in the FSA data
- 1 trapped wing, upside down birds, several bruising and fractures
- Cattle: 3 misplaced shots
- Broken leg (pig)
- Weak animals (calves)
- 5 trapped heads, upside down birds, several bruising and fracture
- Very dirty water left over from last week
- Animals dead on arrival (lambs, pigs).
- Massive tumour ulcerated and bleeding in sheep's mouth.

Defra must take urgent steps to very substantially reduce the incidence of – and eventually to eliminate – the problems identified by the FSA data. Defra should introduce legislation requiring slaughterhouses to install CCTV and to make the footage available for independent monitoring and to the FSA.

Incorporating Article 13 TFEU into UK law

Article 13 of the Treaty on the Functioning of the EU recognises

welfare-regulations-at-slaughter-2014-2015 Accessed 19 December 2016

²⁷ <https://www.thebureauinvestigates.com/2016/08/28/severe-welfare-breaches-recorded-six-times-day-british-slaughterhouses/> Accessed 19 December 2016

²⁸ Farm Animal Welfare Committee. Farm animal welfare in Great Britain: past, present and future.

animals as 'sentient beings' and requires the Member States, when formulating and implementing EU policy on *inter alia* agriculture, to "pay full regard to the welfare requirements of animals". Post Brexit, similar provisions must be incorporated into UK law.

A more ambitious approach is needed as to what is meant by good welfare

Welfare science and policy tend to focus on preventing poor welfare rather than on promoting positively good outcomes. However, this minimalist approach is increasingly being queried. There is a growing recognition of the need to take a less narrow view of what constitutes good welfare.

The Farm Animal Welfare Committee stresses that all farm animals should have 'a life worth living' and a growing number should have 'a good life'.²⁸ It states that "each farm animal should have a life that is worth living to the animal itself, and not just to its human keeper". It adds that 'a life worth living' requires meeting wants, not just needs.

A recent paper stresses that it is necessary not only to minimise negative experiences but also "to provide the animals with opportunities to have positive experiences".²⁹ Such experiences can arise "when animals are kept with congenial others in spacious,

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/319292/Farm_Animal_Welfare_in_Great_Britain_-_Past_Present_and_Future.pdf Accessed 19 December 2016

²⁹ Mellor DJ. Updating Animal Welfare Thinking: Moving beyond the "Five Freedoms" towards "A Life Worth Living". *Animals* 2016, 6(3), 21; doi:10.3390/ani6030021

stimulus-rich and safe environments which provide opportunities for them to engage in behaviours they find rewarding. These behaviours may include environment-focused exploration and food acquisition activities as well as animal-to-animal interactive activities, all of which can generate various forms of comfort, pleasure, interest, confidence and a sense of control.”

Need for a Sustainable Food and Farming Act

Industrial livestock production not only results in poor animal welfare but also has a detrimental impact on natural resources, human health and food security. Industrial production is dependent on feeding human-edible cereals to animals who then convert them very inefficiently into meat and milk. 45% of UK cereals are used as animal feed.³⁰ For every 100 calories fed to animals in the form of human-edible crops, we receive on average just 17-30 calories as meat.^{31 32}

Industrial livestock’s huge demand for cereals has fuelled the intensification of crop production which, with its monocultures and agro-chemicals, has led to water

pollution,³³ soil degradation³⁴ and biodiversity loss.^{35 37} Reducing the need for animal feed would ease the pressure to farm arable land intensively so enabling these natural resources to be restored.

Chatham House reports conclude that technical mitigation measures and increased productivity will be insufficient on their own to prevent an increase in farming’s greenhouse gas emissions.^{38 39} These show that we cannot meet the Paris Agreement’s targets without a reduction in global meat and dairy consumption. Moreover, the high levels of meat consumption that have been made possible by industrial production contribute to heart disease and certain cancers.⁴⁰

We need food and farming that produces nutritious food and encourages healthy diets. That enables us to meet the Paris climate targets and restores water, soils, wildlife and biodiversity so that they are passed in good shape to future generations. Decent livelihoods for farmers and respect for animals as sentient beings, as individuals must be core elements of the new policy.

Compassion in World Farming advocates the introduction of a Sustainable Food and Farming Bill to ensure that the Government is required to pursue these objectives and to do so in a cohesive manner, ensuring that one objective is not achieved at the expense of another. The Bill should set measurable targets to be achieved by specified dates. The Scottish Government is committed to bringing forward a Good Food Nation Bill to draw together all aspects of its work on food. The other parts of the UK should do likewise.⁴¹

³⁰ Agriculture in the United Kingdom, 2015. Author’s calculation based on Tables 7.2-7.4

³¹ Lundqvist, J., de Fraiture, C. Molden, D., 2008. Saving Water: From Field to Fork – Curbing Losses and Wastage in the Food Chain. SIWI Policy Brief. SIWI. http://www.siwi.org/documents/Resources/Policy_Briefs/PB_From_Filed_to_Fork_2008.pdf

³² Nellemann, C., MacDevette, M., Manders, et al. (2009) *The environmental food crisis – The environment’s role in averting future food crises*. A UNEP rapid response assessment. United Nations Environment Programme, GRID-Arendal, www.unep.org/pdf/foodcrisis_lores.pdf

³³ Parliamentary Office for Science & Technology, 2014. Diffuse Pollution of Water by Agriculture: Number 478

³⁴ Edmondson *et al*, 2014. Urban cultivation in allotments maintains soil qualities adversely affected by conventional agriculture. *Journal of Applied Ecology* 2014, 51, 880–889

³⁵ Tsiafouli *et al*, 2015. Intensive agriculture reduces soil biodiversity across Europe. *Global Change Biology* (2015) 21, 973–985, doi: 10.1111/gcb.12752

³⁶ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/372755/UK_Wild_birds_1970-2013_final_-_revision_2.pdf

³⁷ Reversing insect pollinator decline. <http://www.parliament.uk/business/publications/research/briefing-papers/POST-PN-442/reversing-insect-pollinator-decline>

³⁸ Bailey R *et al*, 2014. Livestock – Climate Change’s Forgotten Sector. Chatham House.

³⁹ Wellesley *et al*, 2015. Changing climate, changing diets: pathways to lower meat consumption. Royal Institute of International Affairs

⁴⁰ Aston LM, Smith JN and Powles JW, 2012. Impact of a reduced red and processed meat dietary pattern on disease risks and greenhouse gas emissions in the UK: a modelling study. *BMJ Open* 2012, 2:e001072 <http://bmjopen.bmj.com/content/2/5/e001072.full.pdf+html>

⁴¹ SNP Manifesto 2016. <http://www.snp.org/manifesto> Accessed 20 December 2016

What does Brexit mean for Wildlife?

Mark Jones. Associate Director for Multilateral Environmental Agreements & UK Wildlife, Born Free

It seems we cannot speak about anything these days without the implications of Brexit being raised, and politicians arguing with equal gusto that the outcomes will be either hugely beneficial or utterly disastrous.

The future for wildlife is no different. Much of our law protecting our environment and the natural world comes from Europe. The extent to which the UK will retain or change this legislation following Brexit hangs in the balance.

While our current Government has sought to reassure us that nature is safe in their hands and that they intend to make good on their continuing manifesto commitment to be *'the first generation to leave the natural environment in a better state than that in which we found it'*¹, their commitment to wildlife and the environment has been questioned. DEFRA seems to be stalling on its 25 Year Plan for the Environment². Newspaper reports have suggested that action on climate change and

illegal wildlife trade might be 'scaled down' as we seek new trade deals in a post-Brexit world³.

DEFRA and its agencies have also seen swathing cuts to departmental budgets and staff in recent years, and there are serious concerns about their capability of delivering the kind of outcome from Brexit that is critical to the future of our environment and wildlife.

More than 80% of our current environmental legislation emanates from the EU in the form of Directives and Regulations⁴. The former include the key 'Nature Directives', which together constitute the basis for our wildlife legislation. The Habitats Directive⁵ lists over 1,000 animal and plant species and 200 habitat types in its annexes, requiring EU Member States to take action to conserve those habitats and species, meet the ecological needs of protected wildlife, and in many cases prevent exploitation and taking from the wild. The Birds Directive⁶

protects wild birds against deliberate killing or capture, destruction of eggs or nests, deliberate disturbance, and the trade in and keeping of most species.

"...there are concerns that our national legislation falls short in some respects, and that when we leave the EU current levels of protection for some species and habitats may diminish."

EU Directives are not legally binding in and of themselves; rather they have to be transposed into national legislation. The Nature Directives are implemented in England and Wales by various pieces of legislation, including the Wildlife and Countryside Act 1981⁷ and

¹ <https://www.conservatives.com/manifesto>

² <https://www.edie.net/news/11/Defra-25-year-plan-for-the-environment-pressure-mounts/>

³ <http://www.independent.co.uk/news/uk/politics/uk-government-to-scale-down->

<climate-change-and-illegal-wildlife-measure-a7674706.html>

⁴ <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmenvaud/599/59906.htm>

⁵ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31992L0043>

⁶ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009L0147>

⁷ <http://www.legislation.gov.uk/ukpga/1981/69>



the Conservation of Habitats and Species Regulations 2010⁸. Scotland has its own legislation. However, there are concerns that our national legislation falls short in some respects, and that when we leave the EU current levels of protection for some species and habitats may diminish.

Regulations, on the other hand, are directly binding on EU Member States, and therefore may not be currently transposed into our national law. The EU Wildlife Trade Regulations (WTRs)⁹ are a good example. Wildlife trafficking, which is worth an estimated US\$20 billion annually¹⁰ and is having devastating impacts on elephants, rhinos, tigers, lions, pangolins, parrots, many reptiles

and a host of other species, is widely thought to be the fourth largest form of illegal trade¹¹. Organised criminal networks see wildlife as a low risk-high return commodity. These criminal activities devastate populations of threatened species of animals and plants and may disrupt economic, political and social stability among some of the world's most vulnerable communities.

While the UK will remain a Party to the UN Convention on International Trade in Endangered Species (CITES)¹² following Brexit, the EU WTRs go well beyond international requirements by listing more species, giving many higher levels of protection, and imposing

stricter rules on whether and how they can be traded. The loss of these stricter protections could make the UK a target for wildlife traders and traffickers in the region.

In 2018 the UK will host the fourth in a series of high-level meetings designed to tackle international wildlife trafficking. If we are to be a credible host, we must remain at the forefront of international efforts to tackle the problem. That means ensuring our own rules on wildlife trade are strengthened, not weakened, when we leave the EU.

Other EU Directives and Regulations are designed to address a wide range of issues including invasive species

8

<http://www.legislation.gov.uk/ukxi/2010/490/contents/made>

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http://ec.europa.eu/environment/cites/legislation_en.htm

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https://cites.org/eng/international_dimension_of_illegal_wildlife_trade

¹¹ http://europa.eu/rapid/press-release_IP-15-5316_en.htm

¹² www.cites.org

management, fisheries bycatch, zoo licensing, and the import and sale of dog, cat and seal fur. These and other protections must be retained following Brexit.

“As we go forward into a new independent era, the UK should seek the highest levels of international protection for wildlife, and be prepared to set an example by implementing the strictest of domestic measures.”

Of course, it's not just specific EU legislation that might be weakened or lost as we leave the EU. The Treaty on the Functioning of the European Union recognised animal sentience and the need for animal welfare to be given due consideration throughout all legislative processes¹³. This recognition has facilitated significant progress in animal protection across EU Member States. No such language exists within the UK's constitutional arrangements, and it is imperative that this situation is rectified if the UK is to retain credibility as an international leader in animal welfare.

The EU provides mechanisms by which its laws can be challenged and interpreted, in particular through the European Court of

Justice. The European Commission has also developed Action Plans on a number of issues including: Wildlife Trafficking¹⁴; Forest Law Enforcement, Governance and Trade¹⁵; Illegal, Unreported and Unregulated Fishing¹⁶; and Organic Food and Farming¹⁷; as well as initiatives designed to facilitate collaboration and information exchange between implementing authorities. All of these initiatives have significant implications for wildlife protection. The UK must ensure it puts in place the mechanisms that will enable it to continue to engage with and implement these or equivalent processes, in order to ensure a consistency of approach after we leave the EU.

As we go forward into a new independent era, the UK should seek the highest levels of international protection for wildlife, and be prepared to set an example by implementing the strictest of domestic measures. We also need to recognise that wildlife does not respect national borders, and that our cooperation and collaboration with our near neighbours will remain vital if we are to halt and reverse the devastating declines so many of our wild species and habitats currently face.

The recent statement by the new Secretary of State for Environment Michael Gove, that any changes to UK laws following Brexit will increase, rather than reduce, environmental protections, is encouraging¹⁸. However, there will be some in Government who will be seeking to secure trade deals at virtually

any cost, and the Secretary of State for Environment will doubtless come under immense pressure not to place barriers in their way.

Our global trading relations will be hugely important to our economic security when we leave the EU. But no Government can be allowed to sacrifice the future of wildlife and the natural world on the altar of trade.

¹³ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>

¹⁴

https://ec.europa.eu/environment/cites/trafficking_en.htm

¹⁵ <http://www.euflegt.efi.int/home>

¹⁶ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:l66008>

¹⁷

https://ec.europa.eu/agriculture/organic/eu-policy/european-action-plan_en

¹⁸ <http://www.bbc.co.uk/news/science-environment-40331919>

The Applicability of GATT Article XX(a) to Animal Welfare

Iyan I.H. Ofor and Jan Walter¹

Abstract

This literature review synthesises recent academic commentary analysing whether there is evidence that trade restrictions aimed at protecting animal welfare can be justified under Article XX(a) of the General Agreement on Tariffs and Trade (GATT) 1994 and thus whether such measures can be complimentary to and comply with the World Trade Organisation's (WTO) free trade agenda. The literature review places particular emphasis on the EC – Seal Products case and the way the case has evolved interpretations of GATT Article XX(a).

Background and Conceptual Framework

This literature review assesses whether there is evidence that trade restrictions that protect animal welfare can be justified under Article XX(a) of the General Agreement on Tariffs and Trade 1994 (GATT) and thus whether such measures can be complimentary to and compliant with the World Trade

Organisation's (WTO) free trade agenda.¹ Decision-makers in the EU often use the WTO as a scapegoat when they are not politically motivated to pursue animal welfare protection measures; they claim that WTO law acts as a barrier to such legal action.² This review demonstrates that the WTO is not a barrier to enacting carefully constructed trade restrictions aimed at protecting animal welfare. Enacting such measures will not expose the EU to any challenges at the WTO's Dispute Settlement Body (DSB) to which it would not be able to mount a strong defence.

"WTO is not a barrier to enacting carefully constructed trade restrictions aimed at protecting animal welfare."

The assessment in this literature review was based on a synthesis of results from eleven articles reporting on the legality of barriers to trade intended to

protect animal welfare for moral reasons. The limited number of articles available is due to the 2014 decision in the *EC – Seal Products* case which renders earlier commentary of limited use in determining the legality of animal welfare protecting trade measures under GATT Article XX(a).³ This review is preceded by a contextual section which provides the relevant treaty terms and case law from the DSB. The literature review was conducted to analyse the state of understanding of the law. It consists of an overview of the relevant academic articles which provide insight and commentary into the use of GATT Article XX(a) as a justification for animal welfare protecting trade measures.

GATT Article XX(a) and Related Case Law

Introduction

The protection of animal welfare has traditionally been viewed as an antithesis to free trade and incompatible with the rules of the World Trade Organisation.⁴

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Farming, Deutscher Tierschutzbund, Fondation Brigitte Bardot, the RSPCA and Vier Pfoten.

¹ General Agreement on Tariffs and Trade (1 Jan. 1948) 55 UNTS 194.

² Evidenced in, e.g., Dods EU, *Briefing: EP AGRI – Exchange of views with Andriukaitis*, on file with author (2016).

³ *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R (A.B. 2014).

⁴ AB Thiermann and S Babcock, 'Animal Welfare and International Trade' (2005) 24(2) *Rev sci tech Off int Epiz* 747, 748; and André Nollkaemper, 'The Legality of

However, as interpretation and application of the WTO treaties evolves, it is increasingly being understood that this is not the case. The WTO's free trade rules⁵ have never permitted *absolute* free trade, seeking instead to strike an appropriate balance between trade and other societal values. This is important in order to address the danger posed to domestic standards on production which can be undermined by imports produced at a cheaper cost due to lower animal welfare standards (etc) which are less costly to comply with.⁶ Article XX of the GATT contains an exhaustive list of justifications a WTO Member State may provide to defend otherwise GATT-inconsistent measures. It states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade,⁷ nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) Necessary to protect

Moral Crusades Disguised in Trade Laws: An Analysis of the EC 'Ban' on Furs from Animals Taken by Leghold Traps' (1996) 8(2) J Environmental Law 237, 238.

⁵ Those relevant to this review are in the GATT, *supra* n. 2, Articles XI:1, I:1 and III:2 and 4.

⁶ Harald Grethe, 'High animal welfare standards in the EU and international trade – How to prevent potential "low animal welfare havens"?' (2007) 32 Food Policy 315, 318.

⁷ This is Article XX's so-called 'chapeau'.

⁸ Along with Article XX(b) for measures necessary to protect human, animal and plant life or health, and Article XX(g) for

public morals ...

Though it is often lamented that the list of exceptions in Article XX does not include one directly aimed at animal welfare, Article XX(a)⁸ could be of use in light of recently proven public moral concern for animal welfare.⁹ There is indeed space in WTO law and in the practice of the DSB for animal welfare protection that is compliant with the WTO's free trade rules because the WTO has sought to find a line of equilibrium between the substantive obligations in the GATT and the Article XX exceptions.¹⁰ This is despite the claim by some authors of an accepted principle of interpretation that would require exceptions to be interpreted narrowly (*singularia non sunt extendenda*).¹¹

There is concern regarding the fact that only one case in the history of the WTO's dispute settlement body (DSB) has permitted an otherwise GATT-inconsistent measure on the basis of Article XX.¹² However focusing on this statistic would ignore the fact that in most cases Member States have adopted otherwise GATT-inconsistent measures which fall unquestionably within the terms of Article XX and have not been challenged.¹³ In other cases GATT-inconsistent measures have been modified to

measures related to the conservation of natural resources.

⁹ For the case of the EU, see the results of: European Commission, *Special Eurobarometer 442: Attitudes of Europeans towards Animal Welfare*, <http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/getSurveyDetail/instruments/SPECIAL/surveyKy/2096> (accessed 24 Aug. 2016).

¹⁰ See: *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, para. 173 (A.B. 2011), and *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, para. 18 (A.B. 1996).

meet the conditions of Article XX and maintained by the Member State without being subject to further challenge.¹⁴ Article XX presents an important opportunity to use trade measures to protect animal welfare and perhaps the best option in this regard is the exception to the substantive GATT rules for reasons of public morality in Article XX(a).

"The WTO's free trade rules have never permitted *absolute* free trade, seeking instead to strike an appropriate balance between trade and other societal values."

Article XX(a): Regulating the Content of Trade Measures

i. Article XX(a)'s Relevance to Animal Welfare

Article XX(a) offers a promising opportunity for the EU to be able to pass GATT-consistent trade restricting measures that safeguard animal welfare if those measures are 'necessary to protect public morals'. There exists proven European public

¹¹ Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* 18 (3d ed., Cambridge University Press 2013) citing C de Montesquieu, *De l'Esprit des Lois* (Barillot 1748).

¹² This was *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/R (A.B. 2001).

¹³ See Van den Bossche and Zdouc, *supra* n. 12.

¹⁴ See Van den Bossche and Zdouc, *supra* n. 12.

moral concern for animal welfare¹⁵ though the usefulness of public surveys in this regard is questionable.¹⁶ However, before the recent *EC – Seal Products* case, only one case had invoked Article XX(a)¹⁷ before the DSB and so the DSB’s attitude toward Article XX(a) had been somewhat of a mystery. It has however been noted that various trade measures passed by the WTO Member States have used Article XX(a) as justification – whether implicitly or explicitly – for breaches of other terms of the GATT.¹⁸ The *EC – Seal Products* case now provides a modern analysis and confirmation of the applicability of Article XX(a) directly to the issue of animal welfare. The results of the literature review below confirm that it is generally accepted that in the *EC – Seal Products* case the DSB made clear that animal welfare protecting trade measures can be justified by Article XX(a). The following will address (1) the Article XX(a) requirement that a measure must be aimed at protecting public morals, (2) the Article XX(a) requirement that a measure must be necessary to ensure this protection, and (3) the problems posed by a possible jurisdictional limit to Article XX.

ii. *Public Morals*

The concept of public morality is undefined in the GATT and could thus be subject to varying interpretations. The treaty gives no indication as to whether animal welfare could rightly be defined as an issue of public

morality. In his seminal piece on public morality under the GATT, Charnovitz sets out the difficulties in interpreting what Article XX(a) is intended to include.¹⁹ He states in particular that the ordinary wording of the Article does little to reveal what it ought to include.²⁰ Further, he states that there are no relevant instruments between the parties connected to the conclusion of this Article, no subsequent agreement regarding this Article and no subsequent explicit practice.²¹ The travaux préparatoires of Article XX(a) further reveals little about its intended scope.²² Charnovitz thus resorts to studying moral exceptions in other trade treaties where he finds references to ‘narcotics, pornography, and lottery tickets’.²³ Nonetheless, the WTO’s DSB has provided some answers regarding the scope of Article XX(a) since Charnovitz’ work was completed.

The case of *US - Gambling* provides a helpful analysis of the concept of public morality as set out in the General Agreement on Trade in Services²⁴ which highlights that Member States have considerable freedom to define what public morality means for themselves. The panel in this case found that public morality ‘denotes standards of right and wrong conduct maintained by or on behalf of a community or nation’.²⁵ It found that the content of the public morality concept can vary between Member States ‘depending upon a range of factors, including prevailing

social, cultural, ethical and religious values’ and that Member States ‘should be given some scope to define and apply for themselves the concept of “public morals” ... in their respective territories, according to their own systems and scales of values’.²⁶ This analysis was quoted with approval in the later *China – Audiovisuals* case which applied the interpretation explicitly to Article XX(a) of the GATT.²⁷ This is a favourable ruling for members such as the EU where animal welfare has been proven to be important to the public.²⁸

“...it is generally accepted that in the *EC – Seal Products* case the DSB made clear that animal welfare protecting trade measures can be justified by Article XX(a).”

iii. *Necessity*

The necessity test requires that the measure at issue is necessary in order to protect the public morality objective of the WTO Member State. It has been held by the WTO’s DSB that states have the freedom to decide what they feel is an appropriate level of protection to be given to public morals. This fact has been stated

¹⁵ Special Eurobarometer, *supra* n. 10, at 442.

¹⁶ See discussion below in section E.2.

¹⁷ This was *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS/363/AB/R (A.B. 2009).

¹⁸ Van den Bossche and Zdouc, *supra* n. 12, at 571.

¹⁹ Steve Charnovitz, ‘The Moral Exception in Trade Policy’ (1998) 38 *Va J Int’l L* 689.

²⁰ *Ibid*, 716.

²¹ *Ibid*.

²² *Ibid*.

²³ *Ibid*.

²⁴ General Agreement on Trade in Services (01 Jan 1995) 1869 UNTS 183.

²⁵ *United States - Measures Affecting the Cross-Border Supply of Gambling and*

Betting Services, WT/DS285/AB/R, para. 6.465 (Panel 2005).

²⁶ *Ibid*, para. 6.461.

²⁷ *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS/363/R, para. 7.759 (Panel 2009).

²⁸ Special Eurobarometer, *supra* n. 10, at 442.

to be a ‘fundamental principle’²⁹ of WTO law and an ‘undisputed right’³⁰ of the WTO Member States. The test has been found to involve a ‘sequential process of weighing and balancing a series of factors’ including the objective being pursued and its relative importance, the contribution of the measure to the objective, the restrictive effects on trade of the measure, and whether less trade restrictive alternatives are reasonably available.³¹ The results of the literature review below synthesise current understanding of this requirement following the *EC – Seal Products* case.

iv. Jurisdictional Limit

There is debate as to whether or not a jurisdictional limit applies to Article XX,³² such a limit would mean that WTO Member States can protect societal values within their own jurisdiction but not outside of it. Most animal welfare protecting trade measures will have the effect of improving the welfare of animals abroad and so such a jurisdictional limit could be harmful to European efforts to restrict trade in animal products. There is no express jurisdictional limit in Article XX³³ and so it has been left up to the DSB to settle the issue.

The popular opinion is that the DSB has not provided a definitive answer to this question but the

case law does shed some light on the issue. Early DSB rulings were unfavourable toward measures having such extra-territorial effects stating that an importing state can’t use trade measures to compel another country to change its policies.³⁴ Recent case law departs from this position. For example, in *US – Shrimp* the appellate body stated that measures requiring exporting countries to comply with, or adopt, certain policies prescribed by the importing state will not render the measure *a priori* incapable of justification under Article XX.³⁵ It went on to state that: ‘[s]uch an interpretation renders most, if not all, of the specific exceptions under Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply’.³⁶ The DSB has ruled that importing states can require exporters to adopt policies that are ‘comparable in effectiveness’ to their own in order to protect one of the values listed in Article XX.³⁷ It is also stated in *US – Tuna II* that in principle there is no prohibition in general international law that would bar states from passing such measures regulating the conduct of persons within their jurisdiction that affects animals outside of that jurisdiction.³⁸

The case law is thus increasingly favourable towards efforts to protect animal welfare through

trade measures, despite the extra-territorial effect of such measures. It has also been theorised that Article XX(a) might be less problematic in this regard.³⁹ The position following the *EC – Seal Products* case is commented upon in the literature review below.

“...case law is increasingly favourable towards efforts to protect animal welfare through trade measures...”

Article XX Chapeau: Regulating the Application of Trade Measures

The opening words to Article XX⁴⁰ determine the way animal welfare protecting trade measures must be applied in order to be justifiable. It requires that 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.

²⁹ *Brazil – Measures Affecting Imports of Retreated Tyres* WT/DS332/AB/R, para. 210 (A.B. 2007).

³⁰ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* WT/DS135/AB/R, paras 80 and 168 (A.B. 2001).

³¹ *Brazil – Measures Affecting Imports of Retreated Tyres*, WT/DS332/R, para 7.104 (Panel 2007) cited with approval by the Appellate Body in *China – Publications and Audiovisual Products*, *supra* n. 18, at para. 242.

³² See, for example, Peter Stevenson, *The impact of the World Trade Organisation rules on animal welfare*, 10,

<http://www.ciwf.org.uk/research/animal-welfare/the-impact-of-the-world-trade-organisation-rules-on-animal-welfare/> (accessed 23 Apr. 2016).

³³ *United States – Restrictions on Imports of Tuna* DS 21/R, para. 5.25 (Panel 1991).

³⁴ *US – Tuna I*, *supra* n. 24, at paras 5.27 and 5.32; *United States – Restrictions on Imports of Tuna*, DS 29/R, paras 5.24-5.27 and 5.37 (Panel 1994).

³⁵ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, para. 121 (A.B. 1998).

³⁶ *US – Shrimp*, *supra* n. 36, at para. 121.

³⁷ *United States – Import Prohibition of Certain Shrimp and Shrimp Products –*

Recourse to Article 21.5 by Malaysia, WT/DS58/RW, para 5.93 (Panel 2001) and confirmed in *US – Shrimp (Malaysia)*, *supra* n. 11, at para. 144.

³⁸ *US – Tuna I*, *supra* n. 34, at para. 5.17.

³⁹ Kate Cook and David Bowles, *Growing Pains: The Developing Relationship of Animal Welfare Standards and the World Trade Rules*, 19(2) RECIEL 227, 234 (2010).

⁴⁰ Referred to as the Article XX ‘chapeau’ because they sit at the head of the section without being set out as an independent paragraph.



The Article XX(a) exception to the substantive GATT rules is 'limited and conditional' upon the terms of the chapeau.⁴¹ The chapeau is used to mark out a 'line of equilibrium' between the rights of Member States to invoke exceptions under Article XX and the substantive rights of other Member States under the GATT.⁴² It has been ruled by the Appellate Body that this line of equilibrium will move depending upon the 'kind and the shape of the measures at stake ... and ... the facts making up specific cases'.⁴³

Essentially the chapeau is about making sure that the Article XX exceptions are not abused⁴⁴ and that measures are applied in all situations where they ought to be applied, so that there are no 'unexplained gaps in the

application of a measure' which might constitute discrimination and which are unfavourable to the protection of the value at issue.⁴⁵ The majority of GATT-inconsistent measures that have met the conditions of a specific exception in Article XX have fallen short of the chapeau's requirements but the chapeau need not pose a problem to a trade restriction constructed in a non-discriminatory manner. The literature review below synthesises present understandings of the chapeau's application in Article XX(a) cases.

The EC – Seal Products Case

The literature reviewed below largely focuses on the outcome of the *EC – Seal Products* case

because this is the only time the DSB has considered the application of GATT Article XX(a) to public morality related to animal welfare. The case consisted of a challenge by Norway and Canada to the EU's seal regime⁴⁶ which bans the placing on the market of seal products, with a few exceptions. Moral concern regarding seal hunting exists because the killing often entails inhumane suffering: the seals are usually located in inhospitable places making their killing and recovery – and oversight of the killing – particularly difficult.⁴⁷ Paragraph 4 of the preamble to the EU seals regime regulation 1007/2009 refers to:

expressions of serious concerns by members of

⁴¹ *US – Shrimp*, *supra* n. 36, at para. 157.

⁴² *US – Shrimp*, *supra* n. 36, at para. 156-159.

⁴³ *US – Shrimp*, *supra* n. 36, at para. 159.

⁴⁴ *Brazil – Retreated Tyres*, *supra* n. 30, at para. 224.

⁴⁵ L Bartels, *The WTO Legality of the Application of the EU's Emission Trading System to Aviation*, 23 *EJIL* 429, 452 (2012).

⁴⁶ Regulation (EC) 1007/2009 of the European Parliament and of the Council

on Trade in Seal products (20 Nov. 2009), OJ L 286/36.

⁴⁷ Gregory Shaffer and David Pabian, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* 109 *AJIL* 154, 155 (2015).

the public and governments sensitive to animal welfare considerations due to the pain, distress, fear and other forms of suffering which the killing and skinning of seals, as they are most frequently performed, cause to those animals.

The problem with the regime largely arises from the fact that exceptions to the import ban are permitted for, *inter alia*, seal products resulting from indigenous or marine management hunts. Canada and Norway challenged the measure alleging inconsistency with Article I and Article III:4 of the GATT – as well as arguments based on the Agreement on Technical Barriers to Trade – because the exceptions did not apply to Canadian and Norwegian Inuit in the same way as they applied to Greenlandic Inuit in practice.⁴⁸ The panel ruled that the measure breaches both articles; the appellate body agreed with the ruling on Article I:1⁴⁹ and the panel's ruling on Article III:4 was not appealed.⁵⁰

The panel concluded in this case that the measure was based on the EU's public moral concern regarding seal welfare⁵¹ and stated that 'the evidence as a whole sufficiently demonstrates that animal welfare is an issue of ethical or moral nature in the European Union' and that 'international doctrines and measures of a similar nature in

other WTO Members ... illustrate that animal welfare is a matter of ethical responsibility for human beings in general'.⁵² The appellate body agreed with this ruling.⁵³ However, it found that the measure was inconsistent with the requirements of the chapeau to Article XX stating that the exceptions for indigenous hunts are not justified in a way that can reconcile them with the objective of the measure to protect public morals.⁵⁴ It concluded that the indigenous hunt exception was 'designed and applied in an arbitrary and unjustifiable manner'.⁵⁵ The literature review below synthesises current understandings of the state of the law following this case, specifically with regard to the potential for Article XX(a) to be used to defend animal welfare protecting trade measures that are otherwise GATT-inconsistent.

Methods and Material of the Literature Review

To conduct this study the international journal databases provided by 'Westlaw', 'LexisNexis' and 'HeinOnline' were utilized in order to determine the current state of knowledge regarding the legality of using Article XX(a) of the GATT to justify trade restrictions used to protect animal welfare. The focus is on academic commentary on the current state of the law.

The Boolean search term used was kept intentionally general accounting for the author's

knowledge that limited legal research has been conducted in this area and that the majority of recent legal research done regarding morality and animals are likely to relate to Article XX(a) of the GATT. The following Boolean search term was used:

(trade) AND (moral!) AND (animal!) AND XX OR 20 OR twenty.

Only results in English were used and those published at the earliest in 2013 but written after the WTO's DSB panel had published its report on the *EC – Seal Products* case. No function was available to narrow the results by date in 'Westlaw' and 'LexisNexis' so this elimination was done manually. Articles prior to conclusion of the appeal are relevant because the appellate body reached some of the same conclusions with regard to Article XX(a) as did the panel. There is helpful commentary written in between the two DSB reports that remains of relevance. The search concluded on 19 July 2016.

The 'Westlaw' search produced 210 results, the 'LexisNexis' search produced 989 results, and the 'HeinOnline' search produced 560 results. The titles, abstracts, and keywords of these articles were searched for relevance. Fifteen articles were included in the preliminary list of relevant literature. Four were eliminated because they dealt with Article XX(a) only briefly and instead focused on other issues raised by the *EC – Seal Products* case.⁵⁶ A

⁴⁸ Agreement on Technical Barriers to Trade (1 Jan. 1995), 1868 UNTS 120.

⁴⁹ *EC – Seal Products*, *supra* n. 4, at para. 5.96.

⁵⁰ *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R and WT/DS401/R (Panel 2013).

⁵¹ *EC – Seal Products*, *supra* n. 51, para. 7.404.

⁵² *EC – Seal Products*, *supra* n. 51, para. 7.409.

⁵³ *EC – Seal Product*, *supra* n. 4, at paras 5.167 and 5.201.

⁵⁴ *EC – Seal Products*, *supra* n. 4, at para. 5.337-5.339.

⁵⁵ *EC – Seal Products*, *supra* n. 4, at para. 5.339.

⁵⁶ These were: Alexia Herwig, *Too much zeal on seals? Animal welfare, public*

morals, and consumer ethics at the bar of the WTO, 15(1) World TR 109 (2016); Philip I Levy and Donald H Regan, *EC – Seal Products: seals and sensibilities (TB) aspects of the panel and appellate body reports*, 14(2) World TR 337 (2015); Petros C Mavroidis, *Symposium on the EU – Seal Products Case: Sealed with a Doubt, EU, Seals, and the WTO* 6 Eur J Risk Reg 388 (2015); Natalya Mosunova, *Are*

manual search of the footnotes in the relevant articles was also conducted; this confirmed that no other directly relevant material had been published on the subject since 2013. The results of this study are based on a qualitative synthesis of the results from the eleven articles reviewed.⁵⁷

Results of the Literature Review

EC – Seal Products

The totality of articles written on GATT Article XX(a) and animals in the last three years have focused on the results and the impact of the *EC – Seal Products* dispute at the WTO's DSB. There is consensus amongst legal commentators that this is the most important insight into the legality of trade restrictions aimed at improving animal welfare in order to protect public morality. Every article reviewed is in agreement that the *EC – Seal Products* case acknowledges that intrinsic moral concerns *are* permissible, non-instrumental rationales for the establishment of trade restrictive measures⁵⁸

and they *can* take precedence over core WTO obligations of trade liberalization. As pointed out by a few of the articles, the *EC – Seal Products* case is the only instance at the WTO to have dealt with the issue of GATT Article XX(a)'s applicability to public moral concerns regarding animal welfare.⁵⁹

"It was further noted by many of the articles that the objective of the measure is a subjective choice and need not reflect animal welfare as an objective and universally shared moral concern."

Objective of Measure

Some of the articles discuss the first requirement for a measure to fall under Article XX(a): the objective of the measure must be to protect public morals.⁶⁰ It is essential to know what the

objective of the measure is to determine whether the measure is necessary to protect public morals. This case makes it law that any animal welfare trade restriction must have public morality as its principle objective to fall under Article XX. One article emphasises that Article XX(a) will permit non-instrumental regimes, namely: those that aim not just to discourage a particular behaviour but also to express moral convictions about normatively appropriate behaviour.⁶¹

It was further noted by many of the articles that the objective of the measure is a subjective choice and need not reflect animal welfare as an objective and universally shared moral concern. It is only required that the issue at hand – animal welfare in this case – is an issue of public morality for the relevant society at a particular time. The appellate body doesn't require that animal welfare be regarded as a moral issue universally in order for Article XX(a) to be used, it only requires it is recognised as such for the particular legislator at that particular instance.⁶²

Non-Trade Values Adequately Protected under GATT Art.XX?, 2 Russ LJ 101 (2014).

⁵⁷ These articles are:

- Zia Akhtar, *Seal Hunting, EU Regulation and Economies of Scale*, Manchester J Int'l Econ L 459 (2014);
- Raj Bhala, David A Gantz, Shannon B Keating and Bruno Germain Simões, *WTO Case Review 2014*, 32 Ariz J Int'l & Comp L 497 (2015);
- Ling Chen, *Sealing Animal Welfare into Free Trade: Comment on EC-Seal Products*, 15 Asper Rev Int'l Bus & Trade L 171 (2015);
- Paola Conconi and Tania Voon, *EC – Seal products: the tension between public morals and international trade agreements*, World TR 15(2) 211 (2016);
- Cecilia Elizondo, *Case Review: European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, 11 Manchester J Int'l Econ L 312 (2014);

- Juan He, *China – Canada Seal Import Deal After the WTO EU-Seal Products Case: At the Crossroad*, 10 Asian J WTO & Int'l Health L & Pol'y 223 (2015);
- Alexia Herwig, *Lost in Complexity? The Panel's Report in European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* 5 Eur J Risk Reg 97 (2014);
- Alexia Herwig, *Symposium on the EU – Seal Products Case: Regulation of Seal Animal Welfare Risk, Public Morals and Inuit Culture under WTO Law: Between Techne, Oikos and Praxis – Editor's Introduction*, 6 Eur J Risk Reg 382 (2015);
- Rob Howse, *Symposium on the EU – Seal products Case: A Comment and Epilogue*, 6 Eur J Risk Reg 418 (2015);
- Robert Howse, Joanna Langille and Katie Sykes, *Pluralism in Practice: Moral Legislation and the Law of the*

WTO after Seal Products, 48 Geo Wash Int'l L rev 81 (2015-2016);

- Katie Sykes, *Sealing animal welfare into the GATT exceptions: the international dimension of animal welfare in WTO disputes*, 13(3) World TR 471 (2014); and
- Elizabeth Whitsitt, *A comment on the public morals exception in international trade and the EC-Seal Products case: moral imperialism and other concerns*, 3(4) CJICL 1376 (2014).

⁵⁸ See, for example, Bhala et al, *supra* n. 49, at 523, Conconi and, *supra* n. 49, at 229 and Elizondo, *supra* n. 49, at 312.

⁵⁹ Akhtar, *supra* n. 58, at 462 and Howse, Langille and Sykes, *supra* n. 58, at 84 and 111.

⁶⁰ Bhala et al, *supra* n. 58, at 523 and Chen, *supra* n. 58, at 176.

⁶¹ Howse, Langille and Sykes, *supra* n. 58, at 83.

⁶² Bhala et al, *supra* n. 58, at 526, Conconi and Voon, *supra* n. 58, at 220, He, *supra*

One article in particular spends some time arguing for the existence of an international law principle of animal welfare which would provide support to arguments that it is a legitimate matter of public moral concern.⁶³ The author notes that the DSB gives deference to local choices regarding public morality but notes that there is a limit to this deference and ‘prevailing international views about moral priorities’ could have some relevance when weighing and balancing the application of the necessity test after the threshold step of determining the objective is complete. It could help to ‘distinguish justifiable morality-based regulation from impermissible protectionism’.⁶⁴ This argument is not taken up by the other articles; it cannot be said to represent popular opinion but it could point to further potential evidence for the applicability of Article XX(a) to public morality related to animal welfare in the future, if the existence of an international law principle of animal welfare becomes more widely accepted.

Further, some of the articles stress that the protection of public morals related to animal welfare can exist alongside other objectives in a measure and still fall within the terms of Article XX(a).⁶⁵ Two articles highlight the fact that – in *EC – Seal Products* – the DSB says the measure can’t be indifferent to animal welfare in its pursuit of the main purpose; it must make an effort to avoid sacrificing the main purpose whilst pursuing its other purposes. One article does not

think this requirement is realistic given the trade-offs democracies are required to make whilst pursuing multiple objectives and so it recommends that the WTO instead treat measures with multiple objectives as separate measures.⁶⁶ In the *EC – Seal Products* case, treatment of the two measures as one meant the EU was required to remove the exception for Inuit communities and to protect animal welfare further than it originally intended. By doing what this author suggests, states may be more likely to protect animal welfare if they know they can preserve other interests in tandem. This, however, is merely a suggestion for the approach the DSB should take in the future and does not reflect the current state of understanding of the law.

Many of the articles highlight that it is permissible for the EU to accord different treatment to different animal species in line with varying levels of public concern and support for protection.⁶⁷ Canada’s claim that the EU should accord equal concern to all animal species in order to be able to claim a valid defence under Article XX(a) was not accepted. This is because the WTO Member States are given discretion to set their own standards of morality and so, limiting trade in one animal product does not mean the EU will have to limit trade in all animal products. One article quotes directly the appellate body’s ruling that states: ‘just because animal welfare cannot be protected across all species does

not mean it should not be protected for any of them’.⁶⁸

One article points out that despite this, states are permitted to use *partial* bans on trade; they do not always have to resort to complete bans.⁶⁹ For example, in the *EC – Seal Products* case the ban didn’t include a ban on transit or inward processing of seal products and this was deemed acceptable.

Finally, two articles discuss what is required to convince a DSB panel that genuine moral concern exists.⁷⁰ They state that little more than some appropriate language in the measure’s preamble together with mention of the moral concern in the text of the legislation is likely to be enough. Though a public survey was presented in the *EC – Seal Products* case, this was not necessary. These authors are concerned by potential abuse of the exception because they regard this test as quite easy to navigate, but another article counters such arguments by stating that Article XX’s chapeau exists exactly for this reason: to stop the floodgates opening and abuse of the exception taking place.⁷¹ Thus there is agreement regarding what is required by the DSB to prove public moral concern but there are varying opinions regarding what the consequences of this might be.

Necessity of Measure

Once the objective of the measure is determined to be the protection of public morality relating to animal welfare issues, it must be determined that the measure is necessary in order to

n. 58, at 224, Howse, Langille and Sykes, *supra* n. 58, at 105 and 117 and Sykes, *supra* n. 58, at 494.

⁶³ See Sykes, *supra* n. 58.

⁶⁴ Sykes, *supra* n. 58, at 496.

⁶⁵ Howse, *supra* n. 58, at 418 and Howse, Langille and Sykes, *supra* n. 58.

⁶⁶ Howse, *supra* n. 58, at 419.

⁶⁷ Bhala et al, *supra* n. 58, at 503, Elizondo, *supra* n. 58, at 319, He, *supra* n. 58, at 242 and Howse, Langille and Sykes, *supra* n. 58, at 115.

⁶⁸ Quoted in Bhala et al, *supra* n. 58, at 528.

⁶⁹ Conconi and Voon, *supra* n. 58, at 229.

⁷⁰ Conconi and Voon, *supra* n. 58, at 232 and Elizondo, *supra* n. 58, at 312 and 320.

⁷¹ Howse, Langille and Sykes, *supra* n. 58, at 147.

ensure that objective is met. Comments made by a number of the articles make it clear that the necessity requirement is not an insurmountable obstacle, indeed the seals regime at issue in *EC – Seal Products* passed this test. The articles that discuss this requirement in depth all agree on the (non-binding) criteria which have been used with some consistency by the DSB to determine necessity.⁷² The appellate body will typically analyse the importance of the objective, the contribution of the measure to the objective, the trade restrictiveness of the measure, and whether there are any less trade restrictive alternatives that are reasonably available.

"It was noted in particular that EU measures restricting trade in animal products for moral reasons may undermine the competitiveness of animal products from developing countries which may not have adequate resources to ensure comparable protection."

Some of the articles further discuss the requirement in the case law that the measure must make some contribution to the

objective in order to be considered necessary. In *Brazil – Retreated Tyres* it is ruled that this contribution should be 'material' but in *EC – Seal Products* the appellate body decides that a material contribution can be any contribution not considered 'marginal or insignificant'. Many of the articles highlight that: following the *EC – Seal Products* case there is no pre-determined threshold of contribution that must be achieved before a measure can be said to be necessary.⁷³ One author seeks to explain what is required further and states that in the *EC – Seal Products* case, all that was needed was for the measure to result in a decrease in European demand for the product at issue.⁷⁴ This in turn contributes to a decrease in global demand and it can be assumed that a reduction in the number of seals killed due to reduced demand will lead to reduction in the number of seals killed inhumanely. Thus the information required by the appellate body was not too demanding here and this test is actually quite easy to satisfy. This article further states that necessity isn't a black or white issue and that there are degrees of necessity ranging from indispensable to making a contribution to the objective.⁷⁵ The fact that this is recognised by commentators and the case law makes it easier for animal welfare measures to be defended as necessary to protect public morals.

Article XX Chapeau

All of the articles are in agreement that Article XX's chapeau poses

the most difficulty for a successful use of Article XX(a) to defend trade restrictions aimed at protecting public morality related to animal welfare. This is partly in light of the failure of the EU's seal regime to pass this stage of the analysis. Some of the articles make a particular effort to emphasise that although the EU's seal regime did not draw an appropriate equilibrium line between trade and morality, other trade measures could.⁷⁶

Many of the articles highlight the reasons that the EU's seal regime failed to pass the chapeau's test.⁷⁷ These are that (1) there was no rational relationship between the objective of the measure and the IC exception, (2) the design and application of the exception indicated arbitrary or unjustifiable discrimination (ambiguity in the terms of the exception meant that it could be applied with wide discretion and could potentially fail to cover all commercial seal products), and (3) the EU didn't make comparable efforts to facilitate access to their market for Canadian Inuit as they did for Greenlandic Inuit. These failings provide concrete evidence regarding what the EU must do when framing future trade measures in order to comply with the requirements of the chapeau.

Some of the articles highlight the difficulty posed by the fact that both *de jure* and *de facto* discrimination are forbidden by Article XX's chapeau.⁷⁸ For example, the Inuit exception in the EU's seal regime was available to all Inuit communities on its face but it was not as easily available

⁷² Bhala et al, *supra* n. 58, at 537, Chen, *supra* n. 58, at 177, Howse, Langille and Sykes, *supra* n. 58, at 110 and Whitsitt, *supra* n. 58, at 1380.

⁷³ Bhala et al, *supra* n. 58, at 533, Chen, *supra* n. 58, at 177, Conconi and Voon,

supra n. 58, at 221 and Howse, Langille and Sykes, *supra* n. 58, at 110.

⁷⁴ Bhala et al, *supra* n. 58, at 535.

⁷⁵ Bhala et al, *supra* n. 58, at 532.

⁷⁶ For example, Chen, *supra* n. 58, at 179.

⁷⁷ Bhala et al, *supra* n. 58, at 553, Chen, *supra* n. 58, at 178, Conconi and Voon,

supra n. 58, at 222-223, Elizondo, *supra* n. 58, at 320, He, *supra* n. 58, at 248 and Howse, Langille and Sykes, *supra* n. 58, at 120 et seq.

⁷⁸ See, for example, Bhala et al, *supra* n. 58, at 542.

to Canadian and Norwegian Inuit as it was to Greenlandic Inuit in practice. It was thus deemed de facto discriminatory by the DSB. The articles focus on this point to highlight the efforts that must be taken by the EU to avoid being accused of legislating in a discriminatory manner.

Jurisdictional Limit

The question of a jurisdictional limit to the applicability of the exceptions in Article XX is important if the EU is to use the exceptions to justify trade restrictions. Some articles noted that the question of whether there is an implied jurisdictional limit on Article XX officially remains unanswered following the *EC – Seal Products* case because the appellate body did not rule on the issue.⁷⁹ However, it is convincingly argued by one article in particular that the possibility of a jurisdictional limitation to Article XX is unlikely to hinder the implementation of trade limitations based on Article XX(a) because such measures will aim to protect the morality of citizens within the state's jurisdiction, rather than aiming to protect the welfare of animals outside of the state.⁸⁰ None of the other articles state anything contrary to this point but merely fail to pick up on the jurisdictional limitation issue.

Impact of Using Article XX(a)

The final common theme in the articles reviewed was discussion of the impact of using Article XX(a) to justify animal welfare protecting trade measures. This discussion does not relate to the legality of such measures but it is nonetheless interesting to note

views to this effect. There was general agreement that trade bans protecting public morals in this way could have a real and concrete impact on animal welfare. This was highlighted by one article in particular that discusses the dramatic decline of consumer demand for seal products in Europe due to the moral undertones of the ban.⁸¹

However, there were some fears regarding side-effects of such measures. It was noted in particular that EU measures restricting trade in animal products for moral reasons may undermine the competitiveness of animal products from developing countries which may not have adequate resources to ensure comparable protection.⁸² Another article notes that the restriction of imports based on states' self-defined morality could allow imperialism by countries that hold disproportionately high amounts of market power.⁸³ Finally, one article focused on the fact that such trade restrictions by the EU might lead to a displacement rather than a reduction of harm to animals.⁸⁴ The example discussed in this article was the increase in exports of Canadian seal products to China following the *EC – Seal Products* case.

Conclusion

The most important finding of this literature review is the consensus on the impact of the *EC – Seal Products* case. There is agreement that animal welfare protecting trade measures can be permissible if they are enacted due to public moral concern and thus justified under Article XX(a) of the GATT. The articles further

discuss what form such trade restrictions must take in order to fall within the terms of Article XX(a). Such requirements are generally considered not to be insurmountable and it is not seen as a problem that the EU seal regime failed to pass the test of the Article XX chapeau. Thus any use of the WTO as an excuse by the EU for failing to protect animal welfare is largely discredited following this review of the relevant literature.

Table of Case Law

Brazil – Measures Affecting Imports of Retreated Tyres, WT/DS332/AB/R (A.B. 2007)

Brazil - Measures Affecting Imports of Retreated Tyres, WT/DS332/R (Panel 2007)

China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS/363/AB/R (A.B. 2009)

China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS/363/R (Panel 2009)

European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R (A.B. 2001)

European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R, WT/DS401/AB/R (A.B. 2014)

⁷⁹ Elizondo, *supra* n. 58, at 320 and Howse, Langille and Sykes, *supra* n. 58, at 123 et seq.

⁸⁰ Howse, Langille and Sykes, *supra* n. 58, at 125.

⁸¹ Akhtar, *supra* n. 58, at 466.

⁸² Chen, *supra* n. 58, at 179.

⁸³ Howse, Langille and Sykes, *supra* n. 58, at 93-94.

⁸⁴ See He, *supra* n. 58 generally.

Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines, WT/DS371/AB/R (A.B. 2011)

United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (A.B. 1998)

United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/R (A.B. 2001)

United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia, WT/DS58/RW (Panel 2001)

United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R (Panel 2005)

United States – Restrictions on Imports of Tuna DS 21/R (Panel 1991)

United States – Restrictions on Imports of Tuna, DS 29/R (Panel 1994)

United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (A.B. 1996)

Table of International Legislation

Agreement on Technical Barriers to Trade (1 Jan. 1995), 1868 UNTS 120

General Agreement on Tariffs and Trade (1 Jan. 1948) 55 UNTS 194

Regulation (EC) 1007/2009 of the European Parliament and of the

Council on Trade in Seal products (20 Nov. 2009), OJ L 286/36

Opinion: Animal Welfare after Trump: The Real and Anticipated Concerns – a Personal View from America

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The US animal protection movement suffered a knock back in November 2016. Given the change in the administration there are several real and anticipated impacts that the movement has been forced to address. Yet, it must be noted that progression for animal welfare has historically been a slow process in the US, particularly when compared to the European Union. Furthermore, the most effective animal welfare legislation has been implemented on a state by state basis rather than at a federal level. This includes state anti-cruelty laws which have been implemented due to limitations to the federal Animal Welfare Act. State measures have also been put in place for animals in agriculture. The federal US Humane Methods of Slaughter Act,¹ the only federal law concerning farm animals, has not been amended since 1978, whilst agricultural practices have altered significantly during this period. Crucially, this Act does not give

any protection to poultry, excluding it entirely, whilst a large percentage of the animals slaughtered for food each year are birds. A staggering 9.2 billion animals were estimated to have been slaughtered for human consumption in the US in 2015.²

As has been clear for some time before the election, Donald Trump appears to have no interest in animal welfare or environmental issues. In fact, Trump has outwardly supported the exploitation of animals, such as the use of animals in circuses. This extends to the President's family, whilst his sons have been shown in the media to be avid trophy hunters.³ Furthermore, since his election, Trump has surrounded himself with advisors with connections to industries that use animals; trophy hunting, puppy mills, factory farming and horse slaughter to name a few. Broadly, the advisors in this Republican cabinet are understood to lean heavily towards corporate interests.

Most concerning is their support for the agricultural industry, the main animal oppressor in terms of sheer numbers. In the US, this industry is run by a small number of powerful corporations that dominate the industry.

“As has been clear for some time before the election, Donald Trump appears to have no interest in animal welfare or environmental issues.”

One concerning individual's stance is that of Vice President Mike Pence. As well as being known for his climate change scepticism, Pence reportedly voted against the protection from slaughter of 30,000 free roaming horses and burros in 2009,⁴ whilst the need to protect these wild

¹ Humane Methods of Slaughter Act of 1978

² Hamanesociety.org, 'Farm Animal Statistics: Slaughter Totals': *The Humane Society of the United States* <www.humanesociety.org/news/resources/research/stats_slaughter_totals.html

?referrer=https://www.google.com/ > accessed 13 March 2017

³ Lauerman, K. and Lauerman, K, 'The Trump sons go hunting again. Will more trophy photos follow?' (*The Washington Post*, 6 August 2016) <<https://www.washingtonpost.com/news/animalia/wp/2016/08/06/the-trump->

sons-go-hunting-again-will-more-trophy-photos-follow/?utm_term=.169e572758c4 > accessed 13 March 2017

⁴ Ontheissues.org. 'Mike Pence on Environment' <www.ontheissues.org/Governor/Mike_

animals is a continuing concern for animal protectionists to this day. More recently, in 2016, Pence was responsible for signing off a controversial bill in Indiana permitting the captive hunting of deer species.⁵

“...one issue garnering much attention is the administration's removal of publicly available animal welfare data...”

Another concerning cabinet player is the recently appointed administrator of the Environmental Protection Agency (the EPA), Scott Pruitt. No stranger to controversial opinion, prior to his appointment Mr Pruitt openly opposed much of the EPA's mission whilst forming alliances with corporations to protect them from climate protection legislation.⁶ Pruitt is also reported to boast of scrapping the environmental focus of the EPA, and directly challenging the agency's existing proposals.⁷ Most potentially

damaging is Pruitt's connections with agricultural interests. In 2016 he actively supported Oklahoma's "State Question 777" bill, known as the "right to farm" law which if passed would have effectively removed the state's ability to regulate farming practices, "a blatant attempt to protect large scale operations."⁸

Cabinet biographies aside, one issue garnering much attention is the administration's removal of publicly available animal welfare data from the U. S. Department of Agriculture's (USDA) and the Animal and Plant Health Inspection Service's (APHIS) websites. This data included key information on enforcement and violations of the US federal Animal Welfare Act (the AWA) along with the Horse Protection Act. It included thousands of annual reports on animals kept in research laboratories, zoos, puppy mills and circuses.⁹ On removing the information on 3 February 2017, the USDA issued a statement as follows: "Going forward, APHIS will remove from its website inspection reports, regulatory correspondence, research facility annual reports, and enforcement records that have not received final

adjudication. APHIS will also review and redact, as necessary, the lists of licensees and registrants under the AWA, as well as lists of designated qualified persons (DQPs) licensed by USDA-certified horse industry organizations."¹⁰ Essentially, the USDA removed all of the animal welfare information from its site.

The removal of this data sparked horror amongst animal welfare organisations, the concern being that those who have mistreated animals now have their actions hidden away, immediately impacting advocates' work. As congressman Earl Blumenauer put it in an open letter to Donald Trump of 14 February 2017: "public access to this data is critical to enforcing our nation's animal welfare laws and ensuring transparency."¹¹ He goes on to state that "public access to information can guide consumer decision-making and plays an important role in deterring regulated entities from violating the law."¹² Furthermore, without these public records, animal advocates are forced to spend more time digging up basic information to bring enforcement of the AWA, to include pushing

Pence_Environment.htm> accessed 13 March 2017

⁵ Niki Kelly, 'Pence signs captive hunting bill' (*Journal Gazette*, 22 March 2016) <www.journalgazette.net/news/local/in-diana/Pence-signs-captive-hunting-bill-12178783> accessed 13 March 2017

⁶ Eric Lipton, 'Energy firms in secretive alliance with attorneys general' (*The New York Times*, 6 December 2014) <www.nytimes.com/2014/12/07/us/politics/energy-firms-in-secretive-alliance-with-attorneys-general.html?_r=0> accessed 13 March 2017

⁷ Dimitrios J. Karakitsos, 'Choice of Scott Pruitt as EPA Administrator Puts Focus on Energy Independence' (*Holland & Knight*, 9 December 2016) <www.hklaw.com/publications/Choice-of-Scott-Pruitt-as-EPA-Administrator-Puts-Focus-on-Energy-Independence-12-09-2016/> accessed 13 March 2017

⁸ Tom Philpott, 'Trump Just Wrapped Up a Nice Double Gift to the Meat Industry' (*Mother Jones*, 8 December 2016) <www.motherjones.com/environment/2016/12/trump-just-wrapped-nice-double-gift-meat-industry> accessed 13 March 2017

⁹ Natalia Lima, 'Coalition of Animal Protection Organizations Sues USDA for Animal Welfare Blackout' (*Animal Legal Defense Fund*, 22 February 2017) <aldf.org/press-room/press-releases/coalition-of-animal-protection-organizations-sues-usda-for-animal-welfare-blackout/> accessed 13 March 2017

¹⁰ United States Department of Agriculture, Animal and Plant Health Inspection Service, 'Updates to APHIS' Website Involving Animal Welfare Act and Horse Protection Act Compliance Information' (*USDA*)

<www.aphis.usda.gov/aphis/newsroom/news/lut/p/z1/04_Sj9CPyKssy0xPLMnMz0vMAfIjo8ziffxNnA2dgg183N0CXAOcQ_29nDz9DIwM_Ez1w1EV-ld5mBk4uoaEhvhZGDp5WhrpRxGj3wAHcDQgTj8eBVH4jQ_Xj8JvhRm6AixeJGRJQW5oaIRBpicAJxAIDg!!/?1dmy&urile=wc m%3apath%3a%2Faphis_content_library%2Fsa_newsroom%2Fsa_stakeholder_announcements%2Fsa_by_date%2Fsa-2017%2Fsa-02%2Fawa-hpa-compliance> accessed 13 March 2017

¹¹ 'Blumenauer Calls on Donald Trump to Restore Vital Animal Welfare Data Online' (*Congressman Earl Blumenauer 3rd District of Oregon*, 14 February 2017) <blumenauer.house.gov/media-center/press-releases/blumenauer-calls-donald-trump-restore-vital-animal-welfare-data-online> accessed 13 March 2017

¹² Ibid.



the USDA to adequately comply with the AWA, whilst agency Freedom of Information requests can take months or even years. Furthermore, journalists are prevented from informing the public of animal mistreatment at facilities where animals are held across the country.

A coalition of animal welfare organisations and others immediately took steps to bring a lawsuit against the USDA to compel them to return the records. The coalition includes a public health organisation, the Physicians Committee for Responsible Medicine, which is stated to rely on these records in their work in modernising their

research practices away from unnecessary animal use.¹³ The coalition argues that the removal of online animal welfare records is a violation of the Freedom of Information Act as the legislation requires that frequently requested records are made publicly available. Since the initiation of this lawsuit, the USDA has taken steps to restore a minimal amount of the documentation relating to animal welfare. The USDA maintain that their reasoning for their February action was for privacy reasons. The case continues whilst the vast majority of animal welfare information remains unavailable.¹⁴

The animal and environmental protection laws that Trump and his advisors have taken steps to undermine and even reverse continue to be revealed. An ongoing international concern is the administration's actions concerning the EPA, as noted above. The changes are expected to have a detrimental impact on wildlife following reduced protections for clean air and water. In one example, on 28 February 2017 the President issued an Executive Order which directed the EPA to review and rescind or revise the 2015 Clean Water Act rule concerning federal and state control of water regulations.¹⁵ Furthermore, on 30 January 2017 Trump signed an

¹³ Mark Kennedy, 'Physicians Committee Statement: Doctors Sue Government for Hiding Animal Welfare Data' (*Physicians Committee for Responsible Medicine*, 13 February 2017) <www.pcrm.org/media/news/doctors-sue-government-for-hiding-data> accessed 13 March 2017

¹⁴ Sarah Kaplan, 'Amid outcry, some animal welfare documents are restored to USDA website' (*The Washington Post*, 17 February 2017) <www.washingtonpost.com/news/animalia/wp/2017/02/17/amid-outcry-some-animal-welfare-documents-restored-to-usda-

[website/?utm_term=.c4b74f2ad093](http://www.washingtonpost.com/news/animalia/wp/2017/02/17/amid-outcry-some-animal-welfare-documents-restored-to-usda-website/?utm_term=.c4b74f2ad093)> accessed 13 March 2017

¹⁵ United States Environmental Protection Agency, 'EPA to Act on Waters of the United States Rule' (*EPA*, 28 February 2017) <www.epa.gov/newsreleases/epa-act-

executive order requiring that prior to implementing a new rule all federal agencies must repeal two regulations; part of “his major effort to dismantle environmental protections.”¹⁶ As new protections can only be introduced once two protections are repealed, those focused on improving environmental measures are in a position whereby they are effectively prevented from making any progress. Trump appears to be fulfilling his pre-election promises wholeheartedly in taking steps to reduce the EPA’s role, size and abilities, whilst he dismisses climate change.

A further concern for animal welfare is Trump’s controversial wall. The wall would impact ecosystems and animals as well the environment. In particular, the wall is expected to “halt the cross-border movement of jaguars, ocelots and wolves.”¹⁷

Whilst President Obama recently passed the Organic Livestock and Poultry Practices (OLPP), Trump has chosen to hold off on its implementation. This amended legislation concerning labelling is expected to provide much needed protection to farm animals at a federal level. It requires that the term “organic” is strictly interpreted so that the animals involved are provided

with agreed comprehensive standards of living conditions, transport and slaughter. This legislation would also provide protection for poultry, currently excluded from the Humane Methods of Slaughter Act. Although not perfect, these standards are based on years of discussions between consumers, organic producers, environmentalists and others. In particular, they clarify the definition for “outdoor access” requirements, whilst the existing definition is vague.¹⁸

“In a further effort to protect the agricultural industry, a bill was introduced by the Republican congress in January 2017 removing protection for grey wolves.”

The OLLP was set to be implemented on 20 March 2017, with a five-year phase in period. Yet the USDA has pushed back the legislation by 60 days to be implemented on 19 May 2017.¹⁹ Its effective implementation remains uncertain. Whilst there is an executive order in place requiring that for each new

regulation two existing regulations must be removed the likelihood of the bill being implemented in the near future has been jeopardised. Even without this obstacle, food producers will no doubt continue to lobby these regulations that they consider to be “an overreach by the USDA” whom they claim is without the authority to oversee this.²⁰ Whilst the intent of this legislation was to bring the rules in line with consumer expectation, this battle is expected to continue.

In a further effort to protect the agricultural industry, a bill was introduced by the Republican congress in January 2017 removing protection for grey wolves. This concerns wolves recently introduced to Wyoming and surrounding areas, and proposes to remove them as listed under the federal Endangered Species Act.²¹ Without this listing these wolves would have limited to no protection as wild animals.

Future congress bills will no doubt follow in a similar vein.

Is it all bad?

However, we cannot entirely assume the worst for the US animal welfare movement. Many may not have predicted that the Ringling Brothers would push

waters-united-states-rule-1> accessed 13 March 2017

¹⁶ Brett Hartl, ‘Trump Orders Massive Rollback of Environmental Protections’ (*Center for Biological Diversity*, 30 January 2017) <www.biologicaldiversity.org/news/press_releases/2017/trump-protection-rollback-01-30-2017.php> accessed 13 March 2017

¹⁷ Randy Serraglio, ‘Trump’s Border Wall Will Harm People, Halt Recovery of Jaguars, Other Wildlife’ (*Center for Biological Diversity*, 25 January 2017) <www.biologicaldiversity.org/news/press_releases/2017/border-wall-01-25-2017.php> accessed 13 March 2017

¹⁸ Lynne Curry, ‘Ground-Breaking Animal Welfare Organic Rules Moving Forward’ (*Civil Eats*, 13 January 2017) <civileats.com/2017/01/13/ground-breaking-animal-welfare-regulations-for-organics-moving-forward/> accessed 13 March 2017

¹⁹ United States Department of Agriculture, Agricultural Marketing Service, ‘Organic Livestock and Poultry Practices’ (*USDA*) <www.ams.usda.gov/rules-regulations/organic-livestock-and-poultry-practices> accessed 13 March 2017

²⁰ Michael Pellman Rowland, ‘Organic’s New Animal Welfare Standards Jeopardy’

(*Forbes*, 2 February 2017) <www.forbes.com/sites/michaelpellmanrowland/2017/02/02/organic-animal-welfare-standards/#2c1ce3464293> accessed 13 March 2017

²¹ A bill to direct the Secretary of the Interior to reissue the final rules relating to the listing of the gray wolf in the Western Great Lakes and the State of Wyoming under the Endangered Species Act of 1973, S.164, 115th Congress (2017-2018) (available at: <https://www.congress.gov/bill/115th-congress/senate-bill/164/text>)

forward with the removal of circus elephants from their shows, or go as far as closing shop entirely. This is a significant development for animal advocates. The last shows are to be held in May 2017, and in the face of Trump's avid support of circus animals in the past.²²

"...over 77% of residents in the state of Massachusetts voted for a new measure banning sales of products from battery caged hens, veal and gestation crates this January."

Furthermore, despite the difficulties faced in implementing animal welfare laws at a federal level, laws continue to be developed across states. In one example, over 77% of residents in the state of Massachusetts voted for a new measure banning sales of products from battery caged hens, veal and gestation crates this January.²³ As noted above, an attempt to implement legislation in Oklahoma to protect agribusiness, was voted against by over 60% of the state.²⁴ Also recently passed was "Measure 100" in Oregon in November 2016. This measure was voted for by over 69% of residents, and implemented a domestic ban in the trade of endangered animal parts including ivory.

Such successes illustrate that animal protection law development in the US will likely continue despite the new administration. Furthermore, during monumental changes such as this, movements may be forced to rethink their strategies in achieving change. This may mean that animal protectionist groups must creatively craft arguments for change that appeal to the new administration.

²² Kyle Feldscher, 'Flashback: Trump said he would not go to circus without elephants' (*Washington Examiner*, 15 January 2017) <www.washingtonexaminer.com/flashback-trump-said-he-would-not-go-to-circus-without-

elephants/article/2611918> accessed 13 March 2017

²³ Ballotpedia, 'Massachusetts Minimum Size Requirements for Farm Animal Containment, Question 3 (2016)' <ballotpedia.org/Massachusetts_Minimum_Size_Requirements_for_Farm_Anim

[al_Containment,_Question_3_\(2016\)](http://al_Containment,_Question_3_(2016))> accessed 13 March 2017

²⁴ Ballotpedia, 'Oklahoma Right to Farm Amendment, State Question 777 (2016)' <[ballotpedia.org/Oklahoma_Right_to_Farm_Amendment,_State_Question_777_\(2016\)](http://ballotpedia.org/Oklahoma_Right_to_Farm_Amendment,_State_Question_777_(2016))> accessed 13 March 2017

Case Materials and News

Case: Heythrop Zoological Gardens Ltd (t/a Amazing Animals) v Captive Animals Protection Society [2016] EWHC 1370 (Ch)

Heythrop Zoological Gardens (t/a Amazing Animals) (“Heythrop”) provides animals for use in the film industry. It also holds open days to the public.

In September 2015 Captive Animals Protection Society (“CAPS”) investigators took photographs and videos of animals in Heythrop which showed them being used in entertainment. Visiting members of the public were also taking pictures of animals.

The photos and videos were used in articles posted on CAPS’ website alleging that these animals were being made to perform tricks and that the animals were being kept in inhumane conditions. CAPS’ allegations led to articles in the National Press.

Heythrop and James Clubb (Director of Heythrop) issued proceedings against CAPS and applied for an interim injunction to restrict the publication of images by CAPS. The injunction was sought on three grounds, namely breach of contract (claiming that visitors entered into a contract to comply with a code of conduct to not upload photos onto the internet), breach of confidence (claiming that the images contained confidential information) and “non-property” performance rights under s182 and s183 of the Copyright, Designs and Patents Act 1988

(claiming that the show was a performance and recorded and published without the second Claimant’s consent).

The Intellectual Property Enterprise Court refused to grant an interim injunction.

The court found that CAPS’ rights under Article 10 of the ECHR were sufficiently engaged and relied upon *Cream Holdings Limited v Banerjee* [2004] UKHL 44 which established that the threshold under section 12 of the HRA had to be met to obtain an interim injunction, namely that it would be “*more likely than not*” to succeed at trial. The court found that there was not sufficient likelihood that the claimant would obtain a final injunction at trial. The Court found that the publications were journalistic in nature and that the issue of animal treatment was in the public interest.

Case: Knowles t/a Beechwood Grange Stud v Watson [2016] EQCA Civ 1122

The Court of Appeal heard an appeal by the owner of thoroughbred mares and foals against a judgment ordering her to pay stud fees to owners of a stud farm and rejecting her counterclaim for negligence and breach of contract. The central issue in the appeal was whether owners of a stud farm should inform a vet examining a foal of all relevant matters within their knowledge.

The parties had agreed that the appellant would deliver two mares to the respondent’s stud

farm to foal. A month after they were born one of the foals suffered from diarrhoea. The second respondent found the foal’s temperature to be 102 degrees Fahrenheit. The vet treated the foal for dehydration and a stomach upset but the second respondent did not tell the vet about the foal’s temperature. The respondents did not raise this matter until late in the litigation process. When sent back to the appellant’s farm, the foal was found to be suffering from an equine lung infection, which affected his prospects as a racehorse.

The Court of Appeal allowed the appeal and found that the respondents ought to have appreciated that the foal’s temperature was an important matter and that informing vet that the foal only had diarrhoea was “*only to give him half the picture*”. The court found that whilst a reasonably competent stud farmer could not be expected to diagnose the lung infection, “*such a stud farm owner would be under a duty to place before the vet all material facts of which the stud farm owner was aware*”. The court found that the respondents were at fault for allowing that matter of the increased temperature to emerge until late in proceedings. The court held that the proper course was to set aside the judge’s decision and to order a retrial.

News: Legal Personality – Nonhuman Rights Project

On March 20th, 2017 the Uttarakhand High Court in India

recognised the Ganga and Yamuna rivers as “living entities”¹ with fundamental rights attached allowing for representation in court by designated human advocates. Subsequently the court enlarged the order to include associated sites including various eco-systems and feeder glaciers.

Kevin Schneider, Executive Director of the Nonhuman Rights Project (NhRP), says “the legal status of “living entity” appears to be functionally similar to the status of “legal personhood” which the NHRP is currently seeking on behalf of two captive chimpanzees... (Tommy and Kiko).”²

In addition to the Ganga/Yamuna decision, New Zealand’s Parliament enacted a Treaty Settlement in March of this year recognising the Whanganui River as having legal personhood status following agreement to this in 2012.³

The NhRP has cited the Whanganui Treaty⁴ in their cases since it illustrates that “legal personhood is not determined by biology but by public policy and that legal personhood is simply the *capacity* to have rights.” Schneider contrasts this view with New York’s Third Department appeals court in the case of Tommy the chimpanzee which relied “on Black’s Law Dictionary’s erroneous statement that a person had to have the capacity to bear rights *and duties*.”⁵

Schneider says that the “trend towards environmental legal personality is meaningful – and growing fast” representing one of the most “important feats of the

legal imagination”⁶ with potential to support the struggle to obtain legal personhood status for animals.

Editor’s note: The Nonhuman Rights Project is the “only civil rights organization in the United States working to secure legally recognized fundamental rights for nonhuman animals”. ALAW has established links with the NhRP and has set up an NhRP working group. Please contact ALAW for more details.

¹ For full account of decision see <https://www.nonhumanrights.org/content/uploads/WPPIL-126-14.pdf>

² NhRP webpage accessed at <https://www.nonhumanrights.org/blog/rivers-with-rights/> on 1 June 2017

³ <http://www.legislation.govt.nz/act/publi>

<c/2017/0007/latest/whole.html> accessed on 1 June 2017

⁴NhRP webpage *ibid*

⁵*ibid*

⁶ *ibid*

Freedom of Information and Animal Experiments: A Case Study

David Thomas, Legal Consultant to Cruelty Free International (CFI)

Introduction

Animal experiments in the UK are enmeshed in secrecy. Animal researchers increasingly talk about accepting the need for greater transparency, with many institutions signing up to a Concordat on Openness.¹ However, my experience is that universities and other public bodies conducting animal experiments often resist requests under the Freedom of Information Act 2000 (FOIA) for particular information.

Reliance on FOIA exemptions can be spurious. It is hard to resist the conclusion that many researchers confuse transparency with propaganda: they prefer to tell the public about what they see as the value of their animal experiments, and how well their animals are allegedly looked after, than subject what they do to proper scrutiny. A few years ago, Newcastle University spent an astonishing £250,000 in legal fees resisting, ultimately unsuccessfully, a Cruelty Free International (CFI)² request for information about controversial

neuroscience research on macaques.³

Section 24 Animals (Scientific Procedures) Act 1986 (ASPA)⁴ then provides a real obstacle to openness about how the Home Office regulates animal research. The provision prohibits officials and ministers from disclosing information given to them in confidence, save in the exercise of their ASPA functions. In the first FOIA case to reach the Court of Appeal, brought by CFI in 2008,⁵ the court ruled that it was entirely up to researchers whether they gave information to the Home Office 'in confidence': the fact that the law of confidence would not recognise information as confidential – because, for example, it was trivial or evidenced wrongdoing – was irrelevant.

Information caught by statutory disclosure prohibitions such as section 24 is exempt from disclosure under section 44 FOIA. The result is that project licences, showing how the Home Office applies key statutory tests, cannot be obtained from the

department. It claims to have been reviewing section 24, as it is required to do by section 75(1) FOIA, for over 12 years.

"A few years ago, Newcastle University spent an astonishing £250,000 in legal fees resisting, ultimately unsuccessfully, a Cruelty Free International (CFI) request for information about controversial neuroscience research on macaques."

There are some chinks of light. Academics conducting novel research need to publish (although they tend to say only the minimum necessary about

¹ <http://www.understandinganimalresearch.org.uk/policy/concordat-openness-animal-research/>

² Then known as the BUAV

³ *BUAV v Information Commissioner and University of Newcastle* EA/2010/0064 (11 November 2011)

⁴ Section 24(1): '*A person is guilty of an offence if otherwise than for the purpose of discharging his functions under this Act he discloses any information which has been obtained by him in the exercise of those functions and which he knows or has reasonable grounds for believing to have been given in confidence*'

⁵ *British Union for the Abolition of Vivisection v Home Office & Anor* [2008] EWCA Civ 870 (30 July 2008) [2008] EWCA Civ 870, [2009] 1 All ER 44, [2009] 1 WLR 636, [2009] WLR 636 <http://www.bailii.org/ew/cases/EWCA/Civ/2008/870.html>

how their animals suffer to explain the experiments). Section 24 does not apply to universities and other public bodies conducting animal research, because they generate the information and so it is not 'given' to them – in the CFI case, Newcastle University's attempt to rely on the provision failed.

Undercover investigations are time-consuming and expensive and raise all manner of legal issues, and are no substitute for a proper system of transparency. However, they do give invaluable insight, not only into what is done to animals and why but also into standards of care and the attitudes of staff and Home Office inspectors.⁶

One such investigation pitched CFI against one of the world's leading science institutions in an FOIA case.⁷

CFI's Investigation at Imperial College London

The investigation took place over seven months in 2012 at Imperial College London (ICL).⁸ It was initially reported in *The Sunday Times* and then in numerous other media around the world. It caused quite a stir in the animal research community.

⁶ In the Imperial College London (ICL) case discussed in this article, CFI explained the importance of undercover investigations more generally:

'Undercover investigations are an entirely legitimate method of campaigning and exposing wrongdoing. Indeed, they are essential in a democracy, particularly in areas where secrecy is endemic and an issue is controversial. As is well known, they are routinely deployed by major broadcasters such as the BBC, by newspapers and by many NGOs. Without such investigations, the public would

ICL carries out some 110,000 experiments on animals a year, down from 130,000 at the time of the investigation. It uses rodents, monkeys, pigs, guinea-pigs and many other species. During the investigation, animals underwent painful gastrointestinal surgery; had both kidneys removed and were left only with a transplanted one; received high doses of radiation, severely depleting their bone marrow; suffered heart failure induced by cutting off blood supply and were given diabetes; developed chronic proliferative dermatitis, potentially affecting more than *half* of the body; experienced up to 40% body weight, indicative of high morbidity; and were anticipated to experience abscesses, ulceration, diarrhoea, reduced mobility, respiratory distress, dehydration, hypothermia and other serious adverse effects. In some protocols, up to 15% of animals were anticipated to die from surgery: the actual figures were sometimes much higher.

The level of suffering *lawfully* inflicted at ICL is important because the investigation discovered that animal care staff were only on duty from 8 in the morning until 5 in the afternoon, considerably less at weekends and on public holidays. CFI was

not, for example, have found out about cruelty to care home residents, racism amongst police recruits and MPs being paid to ask questions in Parliament. Those activities would have continued unchecked ...'

⁷ *CFI v Information Commission and Imperial College London* EA/2015/0273 (16 May 2016) [http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i1795/Cruelty%20Free%20International%20EA-2015-0273%20\(16.5.16\)%20.pdf](http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i1795/Cruelty%20Free%20International%20EA-2015-0273%20(16.5.16)%20.pdf)

⁸ <https://www.crueltyfreeinternational.org>

concerned that this meant that ICL licence-holders could not comply with their duty under ASPA to keep suffering to a minimum at all times. Licences foresaw, as indeed was obvious, that serious adverse effects could occur out of office hours, especially post-operatively.⁹ It is, of course, inconceivable that hospital patients would be left unattended overnight after operations of this severity – and patients, unlike animals, are usually able to summon assistance.

“...the investigation discovered that animal care staff were only on duty from 8 in the morning until 5 in the afternoon, considerably less at weekends and on public holidays.”

The annex to this article contains an exchange between care staff about one incident: it provides an insight into the attitudes of ICL researchers and the impossibility of looking after the animals properly simply within office hours. It also highlights the

[g/what-we-do/investigations/animal-experiments-imperial-college-london](http://www.crueltyfreeinternational.org/what-we-do/investigations/animal-experiments-imperial-college-london)

⁹ For example, a licence protocol stipulated that '[animals] that undergo a bilateral nephrectomy [removal of both kidneys] and transplant in a single procedure will be carefully monitored for signs of rejection as indicated by signs of deterioration in health ... and will be killed by a Schedule 2 method within 12 hours of the onset of such deterioration'. Clearly, if the deterioration began during the 15 hours or so when the animals were not monitored, staff would not know when the 12 hour period had begun and when, therefore, they should kill the animals to end their suffering

conflict inherent between the needs of research and the welfare of animals.

ICL's animal research annual report for 2014 claimed extravagantly:

'We have a great responsibility to care for our animals in the same way that we care for our staff or students.'

CFI said this claim of equivalence insulted the intelligence of the public: ICL does not carry out highly invasive experiments on its staff or students and does not then leave them unattended overnight.

"...the statutory Animals in Science Committee concluded that the regime at ICL fell short of the standards required by ASPA and that infringements occurred on an unacceptable scale for an unknown, but extended, period."

An inquiry commissioned by ICL – the Brown Inquiry – following the CFI investigation recommended an increase in staff and greater independent review of animal welfare out of hours and at weekends, and a Home Office investigation found a 'widespread poor culture of care' and breach by the establishment licence holder (ELH) – the person in

overall charge of animal experiments at a laboratory – of a licence condition requiring appropriate staffing. The Minister forced the replacement of the ELH, the university registrar, although sanctions generally were lenient. Finally, the statutory Animals in Science Committee concluded that the regime at ICL fell short of the standards required by ASPA and that infringements occurred on an unacceptable scale for an unknown, but extended, period.¹⁰ None of this would have come to light but for the investigation.

CFI wanted to know whether the care regime had now changed, so it made a FOIA request. ICL confirmed that there was still no 24/7 cover by care staff but declined to say during which hours there was at least one care staff member on duty (the disputed information).

The Competing Arguments

ICL relied on the exemption in section 38(1) FOIA (health & safety):

'Information is exempt information if its disclosure under this Act would, or would be likely to –

- (a) endanger the physical or mental health of any individual, or
- (b) endanger the safety of any individual'.

Section 38 is a conditional exemption, which means that, even if it is engaged, the public interest in disclosure must still be weighed against the public interest in withholding information.¹¹

ICL argued that disclosing the disputed information would alert potential intruders to when the premises would be unstaffed: this would, it said, increase the risk of unauthorised entry, and the prospect or reality of such an entry would in turn risk damaging the mental health of personnel (including researchers) who were, in fact, on duty at the time. As well as this general reason, ICL relied on a 'particular reason' affecting one or more staff but refused to tell CFI what this was. It did, however, disclaim any fear of physical assault, harassment or intimidation.

The Information Commissioner upheld ICL's reliance on section 38. Initially, he declined to give reasons in public, simply, it seems, because ICL asked it not to. He relented when CFI appealed to the First-tier Tribunal (Information Rights) (the FtT): CFI argued it could not formulate its grounds of appeal without knowing the basis of the Commissioner's decision and pointed out that ICL itself had given reasons when rejecting the request.

More substantively, CFI maintained that section 38 FOIA was not engaged. It pointed to the fact that ICL had recently published the photographs of a number of care staff (and researchers) in its annual report and on its website. Given the emphasis ICL put on protecting its staff, it must have concluded that there was no risk to them from doing so – armed with the photos, a malevolent person could, in principle, follow staff home, for example. It was common ground that the incidence of animal rights militancy is currently very low. It

¹⁰ Despite all this, the Home Office simply issued reprimands to licence holders (and required additional training) found to be

in breach, even where a high degree of unnecessary animal suffering resulted.

¹¹ See section 2(2)(b) and 3 FOIA

was difficult to understand, CFI argued, why ICL nevertheless saw a realistic prospect of an illegal entry: none had, in fact, taken place at any animal research establishment for years.

In any event, the disputed information would not aid a hypothetical intruder because it would simply tell him or her when the site in question was *empty of care staff*, not when it was *empty of all staff* (including, in particular, security personnel and researchers). CFI established that care staff made up less than 10% of the staff complement in the animal research units. The would-be intruder would have to assume, it argued, that there were stringent security measures in place, particularly after all the unwanted attention on ICL's animal research, and would be highly unlikely to attempt a break-in.

Procedural Skirmishing

Things then took a Kafkaesque turn.

It is routine in FOIA appeals that requesters, for obvious reasons, do not get to see the disputed information. Part of a hearing is open and part closed, and the same goes for pleadings. The result is that requesters fight appeals with one arm tied behind their back: it can be difficult to argue why an exemption has been inappropriately applied without seeing the information to which it has been applied.

In the present case, CFI accepted that it should not see the disputed information. However, ICL, with

the Commissioner's support, also wanted to withhold *other* information, said to support the 'particular reason' for its reliance on the exemption, under rule 14 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. This, again, was on health and safety grounds. Moreover, it refused to say even whether the particular reason applied to one or more than one member of staff.

In *Browning v Information Commissioner and another*,¹² a case exploring the suggestion made by the Information Tribunal (as the FtT was then called) in an earlier CFI case that a requester's legal team and experts should be allowed to attend closed sessions in FOIA appeals on confidentiality terms, the Court of Appeal cited Supreme Court case law emphasising the importance of the principles of open justice and of parties knowing the case they had to meet, each principle to be abrogated only to the minimum extent necessary.¹³ A Practice Note on rule 14¹⁴ makes the same point.

CFI argued, for example, that it was impossible, as a matter of logic, to see how disclosing the number of staff said to be affected by the 'particular reason' could reveal anyone's identity. Around 1,000 staff work at ICL's animal research units.

However, the President of the Chamber granted ICL's rule 14 application. He regarded it as significant that 'CFI had a covert operator working [at ICL] for some seven months', but did not explain why.¹⁵

CFI was therefore left to prosecute the appeal with not one but one and a half arms tied behind its back: it did not know the case it had to meet save in the most general terms. But for the proximity of the hearing and the discouragement by the Upper Tribunal in *Browning* of satellite litigation about rule 14 applications, it would have challenged the President's ruling.

ICL had put in a witness statement strongly attacking CFI's investigation and the organisation's *bona fides*. That was a tactical mistake because it enabled CFI to seize the high moral ground by explaining what the investigation and the inquiries which followed had found:

'[The inquiries] give the lie to the claims by Mr Hancock [ICL's sole witness] that ICL fully applies the Three Rs [the principles of replacing animals, reducing numbers and refining techniques to minimise suffering which govern the grant of licences¹⁶]; that it complies with all legal and regulatory requirements (including by providing appropriate staffing); that CFI published a "lurid series of allegations ... which purported to demonstrate the cruel and illegal treatment of animals at the College"; that CFI's campaign is "largely untruthful and misleading"; and that its allegations are "unsubstantiated".'

¹² [2014] EWCA Civ 1050

¹³ *Bank Mellat v Her Majesty's Treasury (No 1)* [2013] UKSC 38 (not *Bank Mellat (No 2)* as cited by the Court of Appeal) and *Al Rawi and others (Respondents) v*

The Security Service and others. [2011] UKSC 34 (13 July 2011)

¹⁴ *Closed Material in Information Rights Cases* (May 2012)

¹⁵ Insult was added to injury by the strange refusal by the FTT Registrar to

include the rule 14 submissions in the bundle for the hearing, leaving CFI to create a separate bundle

¹⁶ See section 2A ASPA

It is always important, where possible, to get judicial decision-makers on side about the justice of one's case as they address the legal issues.

The Hearing before the FtT

The credibility of ICL's position was further tested at the hearing.

Its annual report came under particular scrutiny. The report claimed:

'In addition to world-class facilities, we are committed to providing round the clock care for all our animals, with at least one veterinarian and five senior animal care staff on call 24/7 ...' (emphasis added).

CFI argued that this was plainly untrue. A reader would assume that there was always someone on hand to care for the animals. Although researchers might occasionally work into the evening, there was never 24 hour care, and most days there was no one to care for the animals between 5pm and 8am.

Mr Hancock repeated ICL's mantra that vets were on call 24/7, which laid himself open to the obvious cross-examination question: 'But if there is no one on site, who calls the vets when an animal is in distress?'. The question was met with silence. In its decision, the Tribunal said it could 'see the force of' CFI's concern' that ICL was misleading the public.¹⁷

In addition, Professor Maggie Dallman, Associate Provost, said in the annual report:

'We felt that [a particular protocol] was so valuable that we asked the project licence applicant if we could share that with our community, to encourage more people to use this comprehensive list of signs and symptoms to judge how well their animals are and to take appropriate action immediately if there is any sign of suffering beyond the terms of the licence' (emphasis added).¹⁸

Clearly, it is not possible to take appropriate action immediately unless there is someone present when the action is needed.

"In its decision, the Tribunal said it could 'see the force of' CFI's concern' that ICL was misleading the public."

The attack on ICL's credibility was felt to be important in persuading the FtT to scrutinise closely claims about safety concerns. There was no direct evidence (open or closed) before the tribunal from anyone whose mental health was alleged to be at risk. Both ICL and the Commissioner, in resisting CFI's calls for such evidence, had insisted that it was for ICL to decide which witnesses to call. The FtT had said that it would assess what weight to give hearsay evidence.

Under cross-examination, Mr Hancock also claimed that the reason ICL operated an office hours regime for care staff had

nothing to do with saving money; rather, it was to avoid disturbing the animals. To which the riposte was obvious: would not animals in distress prefer to be disturbed so that their distress could be relieved? In any event, as noted above researchers have a legal duty under ASPA to minimise suffering at all times, whether it is experienced during the day or the night.

Post-hearing Submissions about Public Interest

CFI does not normally rely on public interest if endangerment to safety is established. However, what differentiated this case, it explained, was the ease with which ICL could remove any endangerment to mental (or physical) health. In the vast majority of cases where section 38 is engaged, there is very little or nothing which the public body can do to remove or mitigate the identified risk. Not so here. ICL could easily ensure, for example, that staff did not work alone and that vulnerable staff did not work past a particular time.

On ICL's case, there was *already* a risk of a break-in out of hours. Section 2(1) Health & Safety at Work etc Act 1974 provides: 'It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees'. Regulation 3 of The Management of Health and Safety at Work Regulations 1999¹⁹ then requires employers to conduct risk assessments and keep them under review. Measures have to reflect the general principles set out in Article 6(2) of Directive 89/391/EEC, including avoiding risks and adopting the work to the

¹⁷ Para 21

¹⁸ p21

¹⁹ 1999 SI 1999/3242

individual. The Health & Safety Executive, finally, issues guidance on lone working, requiring an employer to ensure, where appropriate, that it does not happen.

The measures open to ICL to avoid any endangerment to health arising out of disclosure of the disputed information should, CFI argued, weigh heavily with the FtT in exercising its public interest judgement. In that way, the public interest in transparency and accountability could be satisfied without there being any endangerment to anyone's health. This was precisely the sort of circumstance, it suggested, that Parliament would have had in mind when deciding to make section 38 a conditional exemption.

In the CFI Newcastle case, the FtT made the important point that the existence of statutory regulation and internal controls around animal experiments was not sufficient to satisfy the public interest:²⁰

'The existence of the statutory controls operated by the Home Office does not annul [the strong public interest in animal welfare and transparency and accountability], which extends to seeing how, and the extent to which, the statutory system is working in practice. Such private scrutiny as takes place inside the statutory system is not a substitute for well-informed public scrutiny. In the present case these interests are further underlined by the fact that the research was

supported by public funds'.

That must be all the more so, CFI argued, when the statutory regulation had failed – Home Office inspection indisputably failed to pick up the systemic failings at ICL later identified by, *inter alia*, its own inquiry into CFI's allegations; and so had internal controls – the Brown Inquiry was strongly critical of such controls, noting (for example) the existence of 'two tribes' (researchers and care staff)²¹ and describing the key Animal Welfare Research Ethics Body as 'not fit for purpose'.²²

What did the FtT Decide?

The FtT concluded that there was no likelihood of danger to anyone's health or safety from release of the disputed information. Public interest did not, therefore, need to be considered.

ICL had argued that 'endanger' in section 38(1) denotes risk, rather than actual or probable harm. The Tribunal said that that rather begged the question of what 'risk' meant. The exemption was engaged, it explained, where there was a likelihood of a situation dangerous to someone's health or safety. It referred to a 'person of ordinary robustness'. More importantly, it said: '... we cannot make positive findings that there is a likelihood of danger to someone's mental health without appropriate evidence to justify such a finding. In reality the concerns which Mr Hancock expressed amount to nothing more than speculation based on second-hand lay opinion'. In other words, whatever the legal threshold, ICL failed to meet it.

In *People for the Ethical Treatment of Animals v Information Commissioner and the University of Oxford*²³ (another animal research case), the FtT said that the fact that Oxford University had not led psychiatric evidence did not prevent it from relying on the section 38 exemption on mental health grounds. There was no such evidence in the ICL case either. The FtT in that case said that whether such evidence is required depends on the circumstances. Unlike ICL, Oxford University had been subjected to sustained illegal and threatening forms of activism.

Has ICL now Revealed the Information in Dispute?

ICL did not seek to appeal the FtT decision. Just before the deadline set by the tribunal, it told CFI that core hours for care staff had not increased. Subsequent FOI requests revealed that care staff and vets rarely come in outside those hours.

"ICL had not implemented the recommendation of the Brown Inquiry for an increase in care staff cover... despite claiming to have implemented all the Inquiry's recommendations"

In other words, nothing had changed in this respect since the CFI investigation. ICL had not implemented the

²⁰ Para 52

²¹ Para 7.26

²² Para 3.4

²³ EA/2009/0076



recommendation of the Brown Inquiry for an increase in care staff cover, especially out of hours and at weekends, despite claiming to have implemented all the Inquiry's recommendations.

The Home Office has not required the care hours to be increased either. This is despite finding the ELH in breach of a standard condition which requires appropriate staffing and finding that researchers were in breach of another standard condition to the same effect, leading to particular animals being allowed to suffer 'a major departure from [their] usual state of health or well-being ...', greater suffering than permitted by the project licences.

Part of the problem may be that Home Office inspectors are too close to the institute. The inspector with responsibility for ICL wrote an article for the ICL

annual report. ICL inevitably wanted the report, its first, to put its animal research in as favourable a light as possible, after all the criticism it had received. Many will find it astonishing that the Home Office allowed the inspector with responsibility for ICL to contribute to a PR document of this nature. It will inevitably strengthen suspicions that it was this closeness which led to the inspector failing to identify all the problems which the CFI and the Brown Inquiry found and to the lenient sanctions imposed by the Home Office on licence-holders.

Other universities are no better than ICL, sadly. For example, a CFI undercover investigation of neuroscience research at Cambridge University some years ago discovered that macaques were left for 15 hours overnight after brain surgery, despite suffering uncontrolled seizures

and numerous other serious aide-effects. A number were found dead in the morning.

In fact, 24/7 care is extremely rare at any of the 180 or so UK establishments where animal experiments are carried out. CFI believes that the Home Office is allowing establishments to put financial considerations before animal welfare, and is therefore regulating animal experiments unlawfully.

Conclusion

Section 38 is an important exemption. Safety has to be a priority. However, it is all too easy for public bodies operating in controversial areas such as animal experiments to claim a concern about safety and refuse to disclose information for that reason. This is particularly so with mental health: it can feel to requesters that they have to

prove a negative – that no one's mental health will be endangered by disclosure of the disputed information. That can be extremely challenging, particularly where requesters are denied crucial evidence said to support the exemption.

The importance of the FtT's decision is that it shows that it is not enough for a public body to raise the spectre of endangerment to mental health, even where there has been a history of militancy in the area in question and public attention has recently been directed at failure by the public body to perform its statutory duties. The decision makes it clear that the public body has to demonstrate, with evidence appropriate to the circumstances, why there would be endangerment to health from disclosure of the information in question.

(David Thomas, a solicitor, acted for CFI in this case.)

Annex: Example of an Infringement at ICL

31 out of 56 mice in a protocol died or had to be euthanised on welfare grounds following a procedure involving sub-lethal irradiation and reconstitution with spleen cells/bone marrow cells with the aim of generating a chronic disease model in the mice. Of the 31, 14 were found already dead (presumably overnight) and 17 had to be culled as they had breached the severity limits authorised by the protocol (i.e. the suffering they were experiencing exceeded that permitted). The mice died or were euthanised over a period of more than two weeks.

These are conversations recorded by the CFI investigator:

Named Animal Welfare Care Officer (NACWO) 2 (17 October 2012): 'This is what she [the personal licence holder] does all the time. Then you've got some like that [inaudible] I understand they are meant to get sick but not like at death's door'

NACWO 1: 'I said [to the deputy named veterinary surgeon [DNVS]] they are shit for want of a better term. I said there's no other way about it. I said I think she's exceeded her endpoint [the point at which use of an animal must be brought to an end to avoid unacceptable suffering] and they should go, the whole lot'

"The thing is if the Home Office had seen it that would have been the end of that project licence probably."

NACWO 2: 'We have gone through things with her before [inaudible]'

NACWO 1: 'The thing is if the Home Office had seen it that would have been the end of that project licence probably'

NACWO 2 (19 October 2012): 'They're all still alive in there on their wet diet. They look like shit but they're eating their wet diet'.

NACWO 1 (22 October 2012) said that she had sent an email to the DNVS: 'I've emailed [the DNVS] and asked him and explained that [NACWO 2] and I are extremely concerned because I'm sure [the personal licensee's] violating her endpoints [the point at which suffering must be brought to an end] and severity limit. If it dies then it's not moderate anymore is it, it's substantial and if you've got

to cull them before they die and we're already finding them dead then they're exceeding their endpoints'. She looked at some of the mice and stated: 'They all look shit' and 'That looks manky, that looks, I mean look at the state of that one'.

NACWO 2: 'Should [get rid of them] but we're not going to do that ... [NACWO 1] has sent an email to [the DNVS] asking him for advice and funnily enough he hasn't got back to her ... Cos [NACWO 1] told [the DNVS], she said we're really concerned about this. It could be that there might be a breach of their project licence.'

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