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THE LEGALITY OF MORAL CRUSADES DISGUISED IN TRADE LAWS: AN ANALYSIS OF THE EC 'BAN' ON FURS FROM ANIMALS TAKEN BY LEGHOLD TRAPS

André Nollkaemper*

r. Introduction

This article is an inquiry into the collision of two legal aspirations. With a seemingly schizophrenic persistence, states simultaneously pursue policies to protect forests, animals, and ecosystems located in the territory of other countries on the one hand, and support a legal system that protects states' sovereign rights to determine for themselves whether or not to protect such values, on the other. Trade law is located at the intersection of these aspirations. Several states have enacted trade laws that have the objective and potential to influence policies of target states in a direction that conforms to their normative preoccupations. At the same time, they have constructed a system of trade law that, according to dominant interpretations, serves to protect states' sovereign rights to determine their own environmental policies. International law contains an assortment of legal formulae to balance these conflicting goals. However, if the surge of recent trade disputes and the mass of accompanying literature

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Daniel Esty, Greening the GATT: Trade, Environment and the Future 51 (1994); Steve Charnovitz, 'Recent Developments: Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices', 9 Am UJ Int L & Pol 751 (1994) (discussing the effectiveness of (threatened) US trade sanctions). See for a more critical assessment of the potential effectiveness of trade measures: Kevin C. Kennedy, 'Reforming US Trade Policy to Protect the Global Environment: A Multilateral Approach', 18 Harv Env L Rev 185 (1994).

Project to Reconceptualize International Law', 5 Yb Int Env L 1, 23 (1994) (stating that trade law subscribes to 'a rough counterpart' of the non-intervention doctrine); Ernst-Ulrich Petersmann, International and European Trade and Environmental Law after the Unuguay Round 18 (1995) (explaining that the GATT 'requires the respect of the domestic policy autonomy of other GATT contracting parties and the granting of non-discriminatory market access to their products independent of the domestic policies in the exporting country' (emphasis added). The second Tuna-Dolphin Panel suggested that protection of the objectives of the GATT requires the protection of sovereignty: it held that the GATT does not allow 'contracting parties to impose trade embargoes so as to force other countries to change their policies within their jurisdiction, including policies to protect living things'; Panel on 'United States Restrictions on Import of Tuna' (1994), 33 ILM 839 (1994), para 5.38.

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have had one practical result, it is to underline that these formulae are unsettled, unclear and essentially contested.

This article explores and clarifies these formulae by applying them to the narrow but illuminating field of animal welfare policy, and in particular to the dispute over the 1991 European Community ban on import of furs from animals taken by leghold traps.3 The Regulation aims to protect fur-bearing animals from suffering inflicted by leghold traps. This aim is beyond moral dispute. Leghold traps restrain animals by means of jaws which close tightly upon one or more of the animal's limbs and cause an amount of suffering that the EC rightly has considered unacceptable. The ban may influence trapping policies in states that export furs, in particular Canada, Russia and the United States. Even if it does not, it relieves the Member States of the Community from co-responsibility for morally tainted trapping practices. Despite its moral appeal, the Regulation has become entangled in a legal dispute that jeopardizes its objectives and up till now has prevented one single fur from being banned. The United States and Canada claim that the Regulation infringes their rights under international law and have contemplated to challenge the Regulation in the World Trade Organization. The EC Commission now doubts whether the Regulation is compatible with international law. The EC has postponed the ban from 1 January 1995 to 1 January 1996 and is considering to postpone the ban for at least one other year.4

Whatever the outcome of this dispute, it illustrates that states that wish to protect animal welfare or other morally inspired values in other states face an uphill struggle. States, GATT Panels and legal scholars have constructed a body of law that imposes high barriers for such aspirations. As yet, few trade measures aiming to protect animals have been challenged. But this appears to be more a matter of economics than legal principles. Moreover, also short of adjudication that may annul trade laws, legal uncertainty over legality of trade measures may discourage states from using such measures, as is evidenced by the drifting positions of the Commission of the EC as well as that of certain Member States in the leghold traps dispute.⁵

This article is an attempt to explore and clarify the sources of legal uncertainty surrounding the use of trade measures to protect values in other states. It discusses the legal barriers encountered by the leghold traps-Regulation and offers a number of suggestions that serve to deconstruct the trade law doctrine and that may help to reconcile the legal aspirations underlying animal welfare policy and trade policy. While the focus is on the leghold traps dispute, the conclusions apply equally to trade laws that seek to further comparable environmental objectives, broadly defined, in other states. Section 2 of this Article describes the background and contents of the Regulation on leghold traps and its implementation vis-à-vis the United States and

Regulation No 3254/91 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards, OJ EC 1991, L 308/1.

See further infra section 2.4.

⁵ Ibid.

This article assumes that except for specific treaty provisions (such as Article XX of the GATT, see infrasection 3) there are no fundamental legal differences between concepts of protection of 'environment', 'nature', 'animal welfare' etc; and observations on any of these categories apply equally to the others.

Comparable questions arise, for instance, in the dispute over trade measures for protection of forests in other states; see discussion in André Nollkaemper, 'Protecting Forests Through the Regulation of Trade in Forest Products: The Search for Substantive Benchmarks', 8 Georgetown J Int Env L & Pol (1996) (forthcoming).

Canada. Sections 3, 4 and 5 examine the trade law arguments that jeopardize the its legality.

2. Background, Contents and Implementation of the Leghold Traps-Regulation

2.1. The tradition of trade measures for protection of animal welfare

The EC policy for the protection of animals from suffering inflicted by leghold traps is not an isolated use of trade law for animal welfare purposes. Live animals, meat, trophies, medicinal specimens and other animal products move in large quantities across borders. In particular cases, laws restricting this trade may contribute to the protection of animals in their country of origin.

The number of such laws is gradually increasing. Some of these are based on treaty law, in particular the Convention on the International Trade in Endangered Species. These are generally accepted by target states and do not pose any legal problems. However, certain states (mainly the United States and the European Community and its member states) also have adopted trade measures not mandated by a treaty, either in excess of the requirements of a treaty, or independent of any treaty. Examples are laws restricting import of (specimens of) endangered animals, skins of pups of harp and hooded seals and derived products, wild birds, cosmetics tested on animals, animals transported under inhumane conditions, meat from animals slaughtered or transported in 'inhumane' ways, or shrimp caught in a way that harmed endangered

⁸ Washington, 3 March 1973, 993 UNTS 243 [hereinaster CITES]. In addition to trade measures that implement the treaty by prohibiting import of species exported in violation of the treaty (arts III and IV), the Standing Committee established under the CITES has on many cases called for trade measures to be implemented against particular states. See e.g., CITES Notification No 833 of 20 January 1995 (calling on states to suspend, i.a., imports of specimens of lynx from Azerbaijan, Latvia, Lithuania, Moldovia and Ukraine; the leopard cat from China and the sand boa from Tanzania). Also other treaties mandate trade measures for protection of animals; see infra n 76.

⁹ CITES allows states to adopt unilateral trade measures beyond its requirements with a view to protect species in the state or origin. Article XIV(1).

Convention on international trade in endangered species of wild flora and fauna, OJ EC 1982, L 384 (prohibiting trade in all whales at a time when the CITES listed certain whales in Appendix II); Commission Regulation 2496/89 of 2 August 1989 on a Prohibition of importing raw and worked ivory derived from the African elephant into the Community, OJ EC 1989, L 240/5 (prohibiting import of ivory before its listing in CITES Appendix I).

¹¹ Council Directive 83/129 of 28 March 1983 concerning the importation into Member States of skins of certain seal pups and products derived therefrom, OJ EC 1983 L 91/30 (aiming at protection of seals in Canada).

The US Wild Bird Conservation Act of 1992 prohibits the importation of all species of exotic birds from a country if that country has not developed and implemented a program that ensures both the conservation and the humane treatment of exotic birds during capture, transport and maintenance, 16 USC s 4907 (1994). New York State prohibits sale of live wild birds unless such birds were born and raised in captivity (NY Env Conserv Law, s 11-728 (McKinney 1984 and Suppl 1995). See also, Clyde Farnsworth, 'Next Trade War Target May Be Dogs', NY Times, 2 December 1992 at D 1.

13 EC Directive 93/35, amending for the sixth time Directive 76/768 (EEC) on the approximation of the laws of member states relating to cosmetic products, OJ 1993 L 151/32, prohibits the marketing of cosmetics products containing ingredients tested on animals after 1 January 1998.

14 18 USC § 42(c) (1994).

Federal Meat Inspection Act, 21 USC section 620(a) (1994) (prohibiting the import of meat products unless the livestock from which they were produced was slaughtered and handled in connection with slaughter in accordance with US standards for humane slaughter). See Leesteffy Jenkins, International Free Trade: Can the System Really be De-Stabilized by Animal Welfare Laws?, paper presented at the EU/US Round Table on Environment and Trade (January 1994) (on file with author) (noting that Congress aimed to induce Australia and New Zealand to intensify their efforts to adopt humane killing methods).

sea turtles. 16 While each of these laws raises intriguing legal questions, none of them has given rise to a legal dispute as that now has emerged over the leghold traps ban.

2.2. Background and contents of the leghold traps-Regulation

Leghold traps are devices designed to restrain an animal by means of jaws which close tightly upon one or more of the animal's limbs. ¹⁷ Animals are caught when they step on the trap. The jaws cut deep in the flesh and may brake bones in the limbs. Animals stay in the trap until they are taken out by trappers. This may take several days during which the animals is left in pain.

Most member states of the European Community prohibited the use of the leghold trap in the past decennia. Until recently, some member states, for instance Spain and Luxembourg, still permitted the use of leghold traps for hunting whereas others, including Portugal, Italy and Belgium, permitted leghold traps to capture animals deemed harmful. Outside Europe, leghold traps still are used on a large scale in many states, including Russia, Canada and the United States.

Concern over animal welfare does not stop at national boundaries. States opposed to trapping now have outlawed leghold traps in Europe. The 1979 Convention on the Conservation of European Wildlife and Natural Habitats took a first step by prohibiting the use of traps as indiscriminate methods of capture or killing.²⁰ The EC took a more explicit approach: from 1 January 1995 the use of leghold traps in the Community is prohibited.²¹

Banning leghold traps outside Europe proved more difficult. Attempts to agree with third countries on a prohibition have failed.²² The Community therefore decided to seek protection of wild animals in non-member states by instituting a trade ban. Regulation 3254/91 prohibits the introduction into the Community of pelts of 13 animal species and of goods that incorporate pelts of these species.²³ Annex I includes the beaver, otter, coyote, wolf, lynx, bobcat, sable, raccoon, musk rat, fisher, badger, marten and ermine.

The import prohibition does not apply if the Commission determines that one of two conditions is satisfied: (1) that in the country in which the pelts originate adequate provisions are in force to prohibit the use of the leghold trap, or (2) that the trapping methods employed in that country meet internationally agreed 'humane trapping

The US makes importation of shrimp contingent on a finding that the exporting nation adopts a regulatory program for the use of turtle excluder devices to safeguard turtles; 16 USC § 1573. In 1995, the US banned shrimp from French Guyana, Surinam and Trinidad and Tobago; 60 Fed Reg 28,962 (1995).

Article 1 of Regulation 3254/91 defines leghold traps as 'a device designed to restrain or capture an animal by means of jaws which close tightly upon one or more of the animal's limbs, thereby preventing withdrawal of the limb or limbs from the trap'.

European Parliament Report on the Harmonization of the laws in the European Community for the manufacture, sale and use of leghold traps, 9 December 1988, A-2303/88 at 9-10.

19 Ibid.

Bern Convention on the Conservation of European Wildlife and Natural Habitats, 1979, ETS 104, article and Appendix IV.

Article 2.

Infra section 2.3.

Article 3(1).

standards'.²⁴ For states that agree to stop using leghold traps (either unilaterally or on the basis of an agreement), the Community thus holds out the prospect of lifting the ban. The Community hopes that this will induce changes in trapping methods in exporting countries.²⁵

The EC policy to outlaw leghold traps is an eclectic and somewhat opportunistic response to public concern that has little to with a reasoned policy to protect animal welfare. One must doubt, for instance, whether animals living in the wild and finding themselves killed in a leghold trap are worse off then animals spending their entire life in a cramped European cage, even if those animals are more 'humanely' killed.²⁶ Also, the focus on leghold traps at the exclusion of other traps, such as the hardly more 'humane' drowning traps, is something that cannot easily be explained in terms of a rational and coherent animal welfare policy. Nonetheless, in principle, the dubious policy reasoning underlying the leghold traps ban does not affect its legality: while Regulation 3254/91 encounters serious legal problems (as discussed below), the question whether it is a wise or sufficiently comprehensive instrument for animal welfare policy in principle is not subject to international legal scrutiny.²⁷

2.3. Implementation of the import ban against the US and Canada

The United States²⁸ and Canada²⁹ export a significant part of furs from animals captured in their territory to the European Community. At the time of writing, they do not comply with one of the conditions that would allow them to escape the ban.

²⁵ See Answer to question E-682/94 (Ford), 21 March 1994, OJ EC C 6/39 (confirming that the purpose of the Regulation is to discourage the use of the leghold trap in third countries).

²⁶ 'Ministers to Fight European Fur Ban', *The Gazette* (Montreal), 17 May 1995, A13. (Quoting Canada's Environment Minister as stating that the EC definition of human trapping is 'rather devious': 'It is more humane to keep an animal in a cage for its lifetime and then to kill it off then to let the animal run free and kill it off in the last 24 hours of its life.')

As noted by Charnovitz, 'There is no doubt that the world would be a better place if countries did not enact unnecessary of inefficient laws. yet it is a giant leap to the conclusion that we ought to authorize GATT Panels to dictate changes in unwise environmental measures'; see Steve Charnovitz, 'Free Trade, Fair Trade, Green Trade: Defogging the Debate', 27 Cornell Int LJ 459, 487 (1994) [hereinafter: Charnovitz, Defogging the Debate].

The total value of US exports in 1994 was \$236,355,893. The total value of fur exports to the EC was \$44,811,829 (=19%). The total value for the 13 species listed in Regulation 3254/91 was 23,286,002 (=10%). Highest exports to EC countries were to Greece (\$8,483,511), Germany (\$5,035,455) and Italy (\$4,804,545). Figures from Eurogroup for Animal Welfare [on file with author].

The total value of Canadian fur exports to the EC is \$9,800,000 (42% of the total value of furs from Canadian wild trapped animals). Figures from Eurogroup for Animal Welfare [on file with author].

²⁴ Article 3. Thus, if the second exception applies, the first is not relevant. The Commission, however, has stated that the Regulation prohibit all imports from countries that use the leghold traps and from countries that use alternative trapping methods that do not comply with international standards. See answer to Question E-681/94 (Ford), OJ EC 1995 C6/39; Joint Answer to questions E-677/94 and 678/94 (Ford): this would mean that even if a third country would meet international standards it could still be subjected to a ban. This interpretation departs for unclear reasons from the text of the Regulation, and the better interpretation is to stick to 'or'. See also the preamble of Regulation 1771/94, infra n 37, that states that article 3(1) allows third countries two options: to either prohibit the use of leghold traps, or to ensure that the trapping methods for species in Annex I meet internationally agreed humane trapping standards. Theoretically this can mean that when internationally agreed standards allow certain leghold traps (e.g. padded leghold traps), the Commission would not ban imports of furs from animals taken by such traps. Draft trapping standards that have been proposed in the ISO (see infra n 33) indeed would make it possible to consider certain leghold traps as 'humane' standards. See Question E-681/94 (Ford), J EC 1995 C 6/38. At present no international standards are immanent, and this point is moot.

Neither the United States nor Canada has nation-wide provisions in force that prohibit the use of leghold traps. In the United States, laws vary widely between states. Most states have enacted laws that set limits to the maximum size of steel jaw traps, identify target animals, or impose minimum inspection requirements. But sew states have prohibited the trap.30 In April 1995, a Bill was introduced in the US House of Representatives to end the use of steel jaw leghold traps in the United States,³¹ but the prospects for its adoption appear limited. Also in Canada no nation-wide ban on leghold traps applies. Recent legislation in British Columbia to prevent cruelty to animals allows leghold traps.³²

The United States and Canada also have been unable to accept international trapping standards. For years, states with trapping interests have sought agreement in the framework of the International Standards Organization.33 Negotiations34 have been less than successful, however, and in the near future the ISO will not adopt standards that may qualify as international standards under Article 3 of the EC Regulation. After the ISO failure, the EC, Canada and the United States have continued negotiations in a Working Group on the Development of International Humane Trapping Standards. As yet, these negotiations have not yielded any results.

Neither the United States nor Canada appears inclined to yield to the pressure to change their policies according to European preserences. In fact, they consider the ban an infringement of their rights under international law. Both states have indicated that that they could challenge the Regulation in the WTO if the ban takes effect.³⁵ In addition, the US fur industry has announced to initiate a procedure under the Trade Act 1974 if the import ban would be implemented.36 These trade

³⁰ One of few exceptions is New Jersey, that prohibits persons to 'manufacture, sell, offer for sale, possess, import or transport an animal trap of the steel-jaw leghold type' and to 'take. or attempt to take any animal by means of a trap of the steel-jaw leghold type' (NJ Stat § 23: 4-22.1-2 (1994)).

1995 HR 1404; 104 HR 1404. The Bill would prohibit the shipment in interstate or foreign commerce of steel-jaw leghold traps and of articles of fur from animals that were trapped in such traps. Sec 1. Since 1957, several comparable Bills have been introduced, but none of these Bills even reached the floor of Congress for a vote; see overview in Animal Welfare Institute, Animals and Their Legal Rights. A Survey of American laws from 1641 to 1990, 158-9 (4th rev edn, 1990).

32 Prevention of Cruelty to Animals Act, see 'New Anti-Cruelty Rules Disappoint Animal-Welfare Advocates',

The Vancouver Sun, 1 June 1995, B1.

³³ The International Standards Organization [hereinaster: ISO] is a global sederation of national standard bodies which has the aim to 'promote the development of standardization and related activities in the world with a view to facilitating international exchange of goods and services, and to developing cooperation in the sphere of intellectual, scientific, technological an economic activity'. See overview of ISO activities in Ridgeway M. Hall, Jr., and Kristine A. Tockman, 'International Corporate Environmental Compliance and Auditing Programs', 25 Env L Rep 10395 (1995).

³⁴ In 1995, the competent Technical Committee of the ISO rejected all proposals for performance standards for traps. Presently, it seeks uniformity of testing methodologies that eventually could form the basis for performance standards. See Note of the Secretariat of the ISO on Humane Animal Traps', 14 July 1995 [on file with author].

35 'Lawmakers Push Kantor to Back-Off GATT Challenge on EU Fur Ban', Inside US Trade, 26 August 1994 at 20-1; 'Kantor Says US Will Join Canada Leghold Trap Challenge of EU in WTO', Inside US Trade, 25 August 1995 at 1-2; 'US Says Europe's Animal Trap Rule Violates GATT', Reuter Textline, 8 September 1994, available in LEXIS/Nexis, News Library; 'Netherlands Implements Fur Import Ban Despite EU Delay Request', Inside US Trade, 12 January 1996 (citing spokesperson of the Canadian Government); EU Ministers Vote for Trade Ban on Fur from Leghold Traps if No Pact in 1996', 13 BNA Int Env Rep 390 (1996) (citing US ambassador to the EU).

Under § 302(a)(1) of the Trade Act 1974, 19 USCA § 2412, any interested person may file a petition with the United States Trade Representative (USTR) requesting that action be taken under § 301 and setting forth the allegations in support of that request. Under § 301 the USTR can take action to enforce US rights under trade agreements and respond to certain foreign trade practices. (19 USCA § 2411).

law claims have given the morally inspired EC policy a set-back from which it has not yet recovered.

2.4. Internal Community developments

The resistance of Canada and the United States to the leghold traps ban has set in motion a chain of legal developments in the EC that have overgrown the moral aspirations. In July 1994, the EC postponed the starting date for the ban to 1 January 1996.³⁷ In December 1995, the Commission proposed an amendment to Regulation 3254/91³⁸ that at least postpones the ban for another year, but more likely will push it into the indefinite future.³⁹ Although the internal policies of the Commission are difficult to fathom, doubts as to the legality of the ban appear to have been a major reason for this continued retreat.⁴⁰ The Council provisionally accepted the main elements of the Commission's proposal in March 1996.⁴¹

As the Regulation was not amended before IJanuary 1996, the ban went into effect on that date. In a curious move, the Commission tried to prevent states from implementing the ban by asking customs authorities not to implement the ban. This went down badly with European Parliament and some Member States. The European Parliament is considering to initiate a legal action against the Commission for failure to implement the ban. In December 1995, a British fur company initiated an action before the Court of Justice to seek a declaration that the ban would not go into effect on I January 1996. In its order of 12 February 1996 (Case T-228/95 n.y.p) the President of the Court of First Instance declined to decide on what he considered a 'complex question' in interim proceedings. The Netherlands decided to implement the ban anyway and thus became the only Member State to comply with its obligations under Community law. In what may be the best illustration of total confusion over the animal welfare-trade law interface, the Netherlands had to pay for its compliance with the law by facing two actions. In March 1996, a group of Canadian natives

Commission Regulation 1771/94 of 19 July 1994 laying down new provisions on the introduction into the Community of pelts and manufactured goods of certain wild animal species, OJ 1994, L 184/3.

Proposal for a Council Regulation (EC) amending Council Regulation (EEC) No 3254/91 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards, OJ 1996, C 58/17.

Under Article 4 of the proposal, exporting states can escape a ban as long as they make 'sufficient progress', or agree to a 'framework agreement on humane animal trapping standards' as long as that contains an agreed timeframe for implementation.

⁴⁰ EP opposes delay in leghold traps ban, Agence Europe, 16 December 1995 (quoting EC Commissioner Bjerregard as stating that the conflict with the WTO rules was one of the reason for the Commission to postpone the ban). See also 'Letter of the Commission to the Netherlands' (infra n 46) (stating that the proposed continued postponement is in particle intended to avert a 'crisis' in the relationship with the United States, Canada and Russia over the implementation of the Regulation).

^{41 &#}x27;EU Ministers Vote for Trade Ban on Fur from Leghold Traps if No Pact in 1996', 13 BNA Int Env Rep 390 (1996).

Transcript of letter from the Commission to the Ambassadors of Member States of the EU, 12 December 1995 [on file with author].

Resolution on Leghold Traps, adopted on 14 December 1995, OJ 1996, C 17/167. The Resolution, adopted by 262: 46 votes, with 14 abstentions, calls on the President of the Parliament 'to evaluate the advisability of taking the Commission to the Court according to article 175'.

[&]quot;Wijziging Regeling aanwijzing bedreigde uitheemse dier- en plantesoorten en wijziging Vrijstellingsregeling bedreigde uitheemse dier- en plantesoorten', Stert 1995, nr 252; and Stert 1996, nr 2.

asked a Dutch Court unsuccessfully to annul the import ban. In February 1996, the Commission of the EC sent a formal letter in which it considers the ban illegal. Once the Council would adopt the amendments proposed by the Commission, the Netherlands will have to withdraw the import ban, that will go in the history books as a small but brave attempt to promote animal welfare in other countries despite the pressures of trade doctrine that have made the position of the Commission and most other member states stagger.

3. The Collision Between Moral Environmental Crusades Welfare and Trade Laws

The flat factual developments outlined above hide legal issues of grand proportions. It forces us to reconsider the scope of states' entitlements to pursue what they consider moral environmental high ground in other countries. Do states subjective sensitivities for 'psychological spill-overs' grant them an entitlement to remove the source of their moral concern? This question acquires its legal acuteness because of states' choice to employ trade laws to achieve that purpose: while the expression of moral concerns through moral persuasion or treaty negotiation at best are in need of moral legitimization in the face of reproaches of cultural sensitivity and imperialism, the use of trade law creates an pungent problem of legal legitimacy.

The legal legitimacy problem is a narrow one, though. There can be no doubt that general international law does not affect states' rights to adopt trade measures to seek to realize any morally inspired purpose. One of the most fundamental misperceptions surrounding trade measures that aim to influence other states' policies is that these would constitute a form of unlawful extra-jurisdictional legislation. Definitions of extra-territoriality are multifarious and inconsistent. But there is little doubt that

Metis Nation Northwest Territories v the State of the Netherlands, President of the District Court of the Hague, Judgment of 28 March 1996, n.y.p. Plaintiffs (Metis-people, living in Northwestern Territories, Canada) had claimed that the import ban was illegal under Dutch law; this mandates the Government to ban imports of species or specimens when necessary to implement European Community law. Plaintiffs claimed that as the Regulation had not entered into force, there was no legal basis for the ban. The President concluded otherwise, and held the conclusion of the Netherlands that the Regulation had entered into force on 1 January 1996 was sustainable.

Letter of 26 January 1996 (on file with author). The Commission claimed that the Dutch decision violated the competences of the Community in the field in commercial policy in general and those based on Regulation 3254/91 in particular.

⁴⁷ See for a conceptualization of this term: Richard B. Stewart, 'Environmental Law: the United States and the European Community: Spillovers, Cooperation, Rivalry, Institutions', U Chi Legal F 41, 45–6 (1992).

See generally Deepak Lal, 'Eco-fundamentalism', 71 Int Affairs 515 (1995) (criticizing 'ill-sounded' attempts to impose constraints on other states' policies in the name of environmental protection as 'new forms of imperialism rooted in alien values').

Even though one may argue that there is a customary law principle of non-intervention, trade measures in principle do not violate such a principle; see the 'Judgment of the International Court of Justice in Military and Paramilitary Activities In and Against Nicaragua (Nicar v US), Merits', 1986 ICJ Rep 14, 126 (holding that it could not regard sugar import quota and trade embargoes as a breach of the customary-law principle of non-intervention). The obverse (right to adopt trade measures as an expression of state sovereignty) is expressed by Belina Anderson, 'Unilateral Trade Measures and Environmental Protection Policy', Temple L Rev 751, 754 (1993) (noting that 'Under customary international law, a nation state's power to regulate trade flows from its authority to exercise jurisdiction over the property, persons, acts or events located or occurring within its territory').

they should not cover import regulations. The fur ban does not raise any issue of extra-territoriality as it is applied to national markets. Although the fur ban aims to influence the conduct of legal subjects abroad, it does not legally regulate such conduct. Also when the ban is put into effect, Canadian and US fur hunters may use leghold traps. They could and should fear that they cannot market their furs in the European Community, but if nonetheless they choose to trap furs with leghold traps, the EC will not and cannot prevent them from doing so. Rather than in unhelpful terms of international law (that does not pose any restrictions to morally inspired trade measures), the scope of states' rights to adopt trade measures to influence other states' policies is determined by a narrow question of treaty interpretation: have states surrendered their right to adopt a ban on furs or adopt comparable measures by adopting the General Agreement on Tariffs and Trade in 1947 and 1994.

A lawyer, unfamiliar with the construction of GATT doctrine, who would read the text of the GATT for the first time would find it surprising that this question could be subject of dispute. While there is no doubt that the fur ban is a quantitative restriction on imports that is prohibited by the GATT,⁵² the GATT left untouched states' rights to take trade measures to protect animal and plant health and life⁵³ to conserve exhaustible natural resources⁵⁴ or, most significantly in this context, to protect public morals.⁵⁵ As the ban on furs from animals taken by leghold traps serves to protect each of these values,⁵⁶ states would seem to be fully entitled to implement a ban on furs.⁵⁷ Of course, the GATT aims to ensure that states do not abuse these

Paul Demaret, 'Environmental Policy and Commercial Policy: The Emergence of Trade-Related Environmental Measures (TREMS) in the External Relations of the European Community's Commercial Policy Aster 1992: The Legal Dimension 305, 375 (M. Maresceau ed, 1993).

General Agreement on Tariss and Trade, 30 October 1947, 55 UNTS 194, as modified by the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 ILM 1125 (1994).

52 Article XI.

Article XX(b). At the time of the adoption of the provisions, some seem to have thought primarily of sanitary measures. Steve Charnovitz, 'Exploring the Environmental Exceptions in GATT Article XX', 25 J World Trade L 37, 38-44 (1991) [hereinaster: Charnovitz, Article XX]. But that intention should be subordinated to the ordinary meaning of the text as primary method of treaty interpretation, supported by a fuller account of the history of the provision. Ibid. It is plausible to bring prevention of animal suffering within the ambit of the

⁵⁴ Article XX(g). While the two *Tuna-Dolphin* Panels had no difficulty in bringing conservation of dolphins within the scope of this provision, bringing animal welfare issues within the scope of the article would require a strained interpretation of the term 'conservation'. However, the article is relevant in view of the protection of non-target endangered species—leghold traps are not discriminatory and catch a large number of non-target

species.

55 Article XX(a). While no Panel has interpreted this provision used to justify measures relating to plant and animal life, the term 'morals' is sufficiently open-textured to allow a Panel to do so. In the first Tuna-Dolphin case, Australia argued that article XX(a) could justify measures applied equally to domestic and foreign animal products. Panel on United States Restrictions on Import of Tuna' (1991), 30 ILM 1594 (1991), para 4.4.

See supra n 53-5.

57 In addition, the GATT allows states to regulate imports if the regulations apply both to domestic and imported products and do not discriminate other countries. Article III(4). This provision is less relevant to the fur ban, as article III applies only to imported products and does not apply at the border. Note, however, that GATT panels have not drawn a sharp distinction. The second Tuna-Dolphin Panel examined the US import embargo on tuna, although applied at the border, under article XI and III; see para 5.8. The article will also not discuss implications of the 1994 Agreement on Technical Barriers to Trade—although the scope and meaning of this Agreement is subject of continuing evaluation, it is believed that it is not the proper basis for examining an import ban. For trade measures devised in other ways than a ban, article III of the GATT and the TBT Agreement may be relevant. Several of the principles discussed below apply to all trade measures, whether examined under article XX, article III or the TBT Agreement.

provisions, in particular that they do not protect domestic production.⁵⁸ But other than that, it does not affect the legality of the policy objectives within the purview of Article XX, and does not grant Panels the authority to double-check the validity of these objectives.⁵⁹

However, the interpretation of the GATT has become burdened with dogmatic constructions that obscure the law and make it uncertain whether the text of the GATT represents the state of the law. Several Panels have interpreted Article XX in such manner that may bring policy objectives under legal scrutiny. Two GATT Panels held, on different grounds that all are critical to the legality of the fur ban, that import restrictions that aimed to protect dolphins from Mexican fishing practices were unlawful. Many authorities dispute states' rights to take trade measures to protect nature or animal welfare within other states' territory. Trade law doctrine is pervaded and dominated by rigid conceptions of state sovereignty over domestic affairs that may appear neutral invariables, but in fact are normative aspirations. Equations.

The states involved in the leghold traps-dispute have done little to clarify the situation. Because the United States and the European Community are both influenced and influencing states, neither has been able to formulate a principles position. The EC has adopted laws on leghold traps and cosmetics, the but at the same time has called for adoption of the infamous first Tuna-Dolphin panel that, if accepted as law, almost certainly would invalidate the leghold traps Regulation. And while the United States has enacted import bans on tuna and shrimp, to objects to the Community's ban on furs and the eco-labeling program for forest products. While of course these cases should be examined on their individual merits, the process of claims and counter-claims concerning each of them has

The headnote of article XX prohibits arbitrary and unjustifiable discrimination and disguised restriction on international trade. The subsequent sections proceed on the basis of the assumption that the leghold traps Regulation is not intended to serve protectionist purposes (that is: protect the position of fur-farms in the EC), but reflects genuine animal welfare concerns. This assumption finds some support by the history of the ban in the European Parliament and the 1979 Bern Convention, supra n 20. However, note that United States Trade Representative Kantor stated that the ban on imports of furs from states that use leghold traps was 'clearly trying to protect an industry'. Journal of Commerce, Wednesday, 22 June 1994. Also Canadian industry has claimed the Regulation would serve commercial interests. 'Kohl Stroked on Fur Trade', Financial Post, 20 June 1995.

Charnovitz, Defogging the Debate, supra n 27 at 478 (noting that Article XX establishes a strong deference to sovereignty and national decision-making). This holds also for article III. The Alcoholic Malt/Beverage Panel considered it 'imperative that the like product determination in the context of Article III be made in such a way that it not unnecessarily infringe upon the regulatory authority and domestic policy options of contracting parties' United States—Measures Affecting Alcoholic and Malt Beverages, paras 5.71-5.72, BISD 39th Suppl 206 (1993).

⁶⁰ Panels on United States Restrictions on Import of Tuna (1991), 30 ILM 1594 (1991), paras 5.26-5.28; (1994), 33 ILM 839 (1994), paras 5.27, 5.39.

⁶¹ Infra n 82.

⁶² See note, 'Constructing the State Extraterritorially: Jurisdictional Discourse, The National Interest, and Transnational Norms', 103 Harv L Rev 1273, 1303 (1990) (arguing that jurisdictional allocations have 'far less to do with formalistic notions of territory than with choices regarding the importance attached to the values [that are involved]'.

See generally with respect to the 'shifting and doubling' roles, that make that any given states 'may not necessarily have a clear perspective on where its national interests lie with respect to the non-intervention norm': Lori Fisler Damrosch, 'Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs', 83 Am J Int L 1, 13 (1989).

Supra n 13.
Supra n 16.

⁶⁶ See 'Report on Identification of Trade Expansion Priorities Pursuant to Section 310 of the Trade Act of 1974', 60 Fed Reg 52029.

concealed the underlying legal entitlements. Moreover, both the EC and the US have undermined the legality of objectives to protect values in other countries by signing policy statements that aim to prevent exactly what the tuna and fur ban achieve to do. The 1992 Rio Declaration⁶⁷ and the 1995 OECD Ministerial Report⁶⁸ proscribe unilateral trade measures aimed at environmental protection in other states.⁶⁹

Neither these policy statements nor the unadopted GATT Panel reports do formally affect the GATT, ⁷⁰ and of course this also holds for the array of scholarship that denies states' rights to protect values in other states. However, they may influence the further development of the law—as is illustrated by the frequent references to the Principles of the Rio Declaration in the negotiations in the WTO Committee for Trade and Environment. The contradictions between the text of the law, policy statements and panel reports have created a confusion as to the state of the law that even when trade laws are not successfully challenged may dissuade states from pursuing such measures. A practical effect is the poor drafting of trade measures with environmental objectives. The leghold traps Regulation is no exception. Its non-clarity, ⁷¹ inconstancy ⁷² and over-inclusiveness ⁷³ jeopardize its legality irrespective of the fundamental entitlements at issue here. These imperfections cannot exclusively be attributed to poor drafting capabilities of the Commission or the Council—at least in part they appear to be caused by uncertainty as to what exactly international law allows states to do in an instrument with the objectives seeking to effectuate moral values in other states.

The subsequent section sets out to deconstruct the doctrinal interpretations of the law and to examine in more detail the main trade law barriers encountered in the implementation of Regulation 32254/91.

4. The GATT and Animal Welfare-Trade Measures: Three Misperceptions

An analysis of recent doctrinal work, GATT Panels, state practice and the positions of the states involved in the leghold traps dispute indicates that the fur ban encounters three hurdles: alleged norms that proscribe (1) trade measures that protect values in other states; (2) unilateral trade measures; and (3) trade measures that are based on trapping standards. This section will argue that both on legal and policy grounds these constructions should be reconsidered. A fourth and more pertinent group of

⁶⁷ Rio Declaration on Environment and Development, 14 June 1992, 31 ILM 874 (1992) [hereinaster 1992 Rio Declaration].

⁶⁸ OECD, Report on Trade and Environment (1995).

⁶⁹ See also Charnovitz, 'Desogging the Debate', supra n 29 at 513-23 (discussing the contradictory positions of the EC and the US). See also 'MEPs want Britain's Head Over Leghold Traps', Reuter News Service, 11 December 1995, available in LEXIS, Textline library (quoting Ken Collins, chair of the Environment Committee of the European Parliament, who criticizes the EC for agreeing to the WTO agreements if these would not sanction the leghold traps ban).

Both Tuna-Dolphin Panels have not been adopted by the GATT Council and have no legal effect.

For instance, this holds for the lack of clarity as to whether compliance with international standards is

sufficient to escape the ban; supra n 24.

72 For instance, the regulation prohibits the sale of furs from third countries (article 3) but does not ban the sale of furs from animals taken illegally by leghold traps within the Community (article 2).

⁷³ See infra section 5.

barriers is examined in section 5: rules that aim to secure a rational relationship between means and ends.

4.1. The 'prohibition' of protection of fur-bearing animals in other states

The ordinary meaning of the text of Article XX⁷⁴ does not suggest that, when drafting the GATT, states intended to give up their rights to protect moral concern over animals irrespective of geographical considerations. In fact, Article XX(e) makes clear that Article XX exceptions do apply to other states.⁷⁵ Subsequent state practice supports this interpretation: many national laws aiming at protection of values abroad⁷⁶ have not been challenged. While the large number of treaties providing for trade measures to protect animals in other states⁷⁷ are technically not relevant to the interpretation of the GATT, as they are to be regarded as lex specialis that apply between the parties, they do make it somewhat implausible that states have intended to create a body of international law that would invalidate trade laws (whether multilateral or unilateral) to protect animal welfare in other states.

Yet, in recent years a doctrinal construction has emerged that hides these entitlements from view. This doctrine has found its most express formulation in the report of the first *Tuna-Dolphin* Panel, that concluded that Article XX could not justify trade measures targeted at protection of dolphins outside the jurisdiction of the state taking the trade measure. This panel report, unadopted by the GATT Council, has evoked an unprecedented criticism. It appeared to be overruled by the Second *Tuna-Dolphin* Panel, that held that there is nothing in the GATT that would justify a geographical limitation of Article XX. But now that the smoke has cleared, we can see that the issue is by no means settled.

States continue to reaffirm a principle that holds that '[u]nilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided'. This absolute aversion against such extra-territorial objectives seems to give way for a more subtle principle that, while more broadly supported, would be equally deadly for the fur ban. Many states and scholars now accept that trade meas-

Article 31(1) of the Convention on the Law of Treaties, Vienna, 23 May 1969, 8 ILM 679 (1969).

Article XX(e) explicitly contains a justification for import embargoes for products made by prison labour. See Steve Charnovitz, 'Green Roots, Bad Pruning: GATT Rules and Their Application to Environmental Trade Measures', 7 Tulane Env LJ 299, 341 (1994) (noting that there is no basis to argue that article XX(e) would have a broader geographical reach than XX(b)) [hereinafter: Charnovitz, Green Roots].

⁷⁶ Supra section 2.1.

[&]quot;E.g., article 9 of the Convention Relative to the Preservation of Fauna and Flora in their Natural State, 1933, 172 LNTS 241 (prohibiting import and export of trophies unless such as have been originally killed, captured, or collected in accordance with the laws of the state of export); article IX of the Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, 1940, 3 Bevans 630, TS 981; article IX of the African Convention on the Conservation of Nature and Natural Resources, 1968, 1001 UNTS 3 (obliging parties to control and regulate import and export of protected fauna and flora); article III(3) of the CITES (making import permits for animals contingent on a determination by the state of import that the import is not detrimental to the survival of the species). See also Charnovitz, Article XX, supra n 53 at 52-3 (noting that the 'domestic-only' interpretation of article XX is hard to reconcile with the long history of environmental laws and treaties concerned with seals, fish etc. in areas outside the territory of other states).

First Tuna-Dolphin Panel, para 5.27.

Para 5.20.

Principle 12 of the Rio Declaration. The principle was re-emphasized by the Commission for Sustainable Development; see Commission on Sustainable Development, Report on the Third Session 11–28 April 1995), Economic and Social Council, Off Rec, 1995, Suppl No 12, UN Doc E/CN 17/1995/36, para 53.