Michael Cardwell (ABR0049)

1. The UK government has declared its intention to continue with the current levels of farm support as those provided currently under the CAP until 2020. To what extent would such support be vulnerable to challenge under the WTO rules post-Brexit?

The substantial majority of UK farm support is currently delivered under the CAP direct payments regime (Pillar I of the CAP), governed by Regulation (EU) 1307/2013. Thus, in the 2015 EU financial year direct payments amounted to 3,112 million Euros out of total CAP expenditure in the UK of 4,109 million Euros. Within this category of support, the Basic Payment Scheme (including the Greening Payment and the Young Farmer Payment) was provisionally allocated £2,176 million in 2015. Farmers may also be granted support under the rural development regime (Pillar II of the CAP), governed by Regulation (EU) 1305/2013, in the 2015 EU financial year this rural development support amounting to 959 million Euros, inclusive of co-financing by the UK.[1] At least in the case of England, agri-environmental schemes are allocated the bulk of Pillar II expenditure, provisionally some £394 million in 2015.[2]

With respect to WTO compatibility, it is understood by the EU institutions that 90 per cent of direct payments are not subject to domestic support reduction commitments under the Uruguay Round Agreement on Agriculture (URAA), by reason that they meet criteria for exemption as laid down in Annex 2 (Green Box support).[3] In particular, the Basic Payment and Greening Payment are understood to qualify as 'decoupled income support' within paragraph 6 of Annex 2, while payments under agri-environmental schemes are understood to qualify as 'payments under environmental programmes' within paragraph 12. Further, the latest EU notification of domestic support to the WTO (albeit before the Single Payment Scheme was replaced by the Basic Payment Scheme) reported that the level of Green Box support was 71,140 million Euros for the 2012/2013 marketing year, as opposed to only 5,899.1 million Euros of non-exempt support,[4] with the result that there was a large margin of

[1] Over and above direct payments under Regulation (EU) 1307/2013 and rural development support under Regulation (EU) 1305/2013, there was in the same financial year a very limited amount of market price support.
[2] For all these figures, see Department for Environment, Food and Rural Affairs (DEFRA) *et al*., *Agriculture in the UK: 2015* (2016) 1 and Tables 10.2, 10.4 and 10.7.
[3] European Commission, *Commission Staff Working Document – Impact Assessment: Common Agricultural Policy Towards 2020*, SWD (2011) 1153, 32.
[4] WTO, G/AG/N/EU/26 (2 November 2015) Notification of domestic support by the European Union for the

'headroom' below the total permitted level for the EU (on which see further below).

On this interpretation, if the UK were to continue to implement the current CAP regime until 2020, there should be no difficulty in meeting domestic support commitments under the URAA, but there are a number of matters which merit attention. First, although the Government has provided reassurance that the agricultural sector will receive the same level of funding post-Brexit until the end of the EU Multiannual Financial framework in 2020, changes in the design of support regimes have not been precluded, leaving open the possibility of the introduction of measures not qualifying for exemption.[5] That having been said, it was also stated that the principles of Pillar I would continue to apply; and the Minister for Agriculture, Fisheries and Food has recently indicated before the House of Lords EU Energy and Environment Sub-Committee that the overall scheme will remain essentially the same.[6] Secondly, as observed, there is currently substantial 'headroom' below the total permitted level for EU domestic support. Accordingly, assuming always that the UK can secure at least a proportion of that total, there may be the ability to grant a level of non-exempt support without breach of WTO commitments. Thirdly, a larger consideration is the ongoing doubt as to the WTO compatibility of both the Basic Payment and Greening Payment.[7] In particular, the detailed WTO rules governing exemption for decoupled income support require, *inter alia*, that:

> '(b) The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period…
>
> (e) No production shall be required in order to receive such payments.'

2012/2013 marketing year.

[5] Letter from David Gauke MP, Chief Secretary to the Treasury, to Rt Hon David Davis MP, Secretary of State for Exiting the European Union (12 August 2016) (available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/545767/CST_letter_to_SoS_for_DExEU_August_2016.PDF).

[6] George Eustice MP, Minister for Agriculture, Fisheries and Food, Oral Evidence to the House of Lords EU Energy and Environment Sub-Committee (8 March 2017) (available on Parliament TV at: http://parliamentlive.tv/Event/Index/2c370f31-36d5-4167-b1c0-c9abcbfd9a40).

[7] See, eg, A. Swinbank and R. Tranter, 'Decoupling EU farm support: Does the new Single Payment Scheme fit within the Green Box?' (2005) 6 The Estey Centre Journal of International Law and Trade Policy 47 (in relation to the Single Payment Scheme); and F. Smith, 'Mind the Gap: "Greening" Direct Payments and the World Trade Organization', in J.A. McMahon and M.N. Cardwell (eds), *Research Handbook on EU Agriculture Law* (Edward Elgar, Cheltenham, 2015) 412. See also *US –Upland Cotton* (WT/DS267/AB/R).

The former rule may present specific difficulties for the Greening Payment in that, for example, the Ecological Focus Area provisions have the capacity to influence production decisions, while the latter rule would not appear readily compatible with the requirement in EU law that both the Basic Payment and Greening Payment are only to be granted to 'active farmers'.[8] If there were to be a successful challenge on such grounds, the scale of the potential consequences would be great, but these consequences might prove to be relatively short-lived if the UK were to move a way from decoupled income support post-2020.

2. To what extent will the UK be able to split or inherit some of the EU's AMS?

A preliminary question in this context is to determine the EU's current permitted level of domestic support. As explored already before the Sub-Committee,[9] the most recent Schedule to be certified is that for the EU-25, with certification taking place in December 2016, over a decade after enlargement.[10] By contrast, the most recent (non-binding) Notification is in respect of all the EU-28, with the Current Total Aggregate Measurement of Support shown as 72,378 million Euros.[11]

The treatment of the EU's AMS on Brexit is not a matter which is specifically addressed in the URAA and has been subject to considerable debate.[12] What is clear, however, is that the current Schedule is in the name of the EU without distinction as to separate entitlement of individual Member States. And, when the AMS was first calculated at the time of the URAA, the UK was already a Member State, with the consequence that it is not possible to identify a separate 'share' in the same way as, for example, when Bulgaria or Croatia joined the EU and contributed their respective individual entitlements.[13] Further, although levels of UK

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[8] Regulation (EU) 1307/2013, Article 9. Certain Member States would be granted discretion to dispense with the 'active farmer' requirement if the proposed 'Omnibus Regulation' is implemented: COM(2016) 605, Preamble (227).

[9] See, eg, Written Evidence of Peter Ungphakorn to the House of Lords EU Energy and Environment Sub-Committee (2 February 2017) (available at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-energy-and-environment-subcommittee/brexit-agriculture/written/46569.htm).

[10] WTO, WT/Let/1220 (14 December 2016).

[11] WTO, G/AG/N/EU/26 (2 November 2015) Notification of domestic support by the European Union for the 2012/2013 marketing year.

[12] See, eg, L. Bartels, 'The UK's status in the WTO after Brexit' (23 September 2016) (available at: https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2841747; L. Brink, 'UK Brexit and WTO farm support limits' (13 July 2016) (available at: http://capreform.eu/uk-brexit-and-wto-farm-support-limits/); and A. Matthews, 'Establishing the UK's non-exempt limit on agricultural support after Brexit' (29 January 2017) (available at: http://capreform.eu/establishing-the-uks-non-exempt-limit-on-agricultural-support-after-brexit/).

support did form part of the calculation of the total AMS for the EU at the time of the conclusion of the URAA, it has been highlighted that any attempt precisely to determine the amount would present difficulties by reason, for example, of problems in obtaining historic data and in fixing sterling conversion rates.[14] Nonetheless, instinctively there is a sense that, since the EU Schedule has been augmented on the accession of new Member States, it should be correspondingly reduced on the withdrawal of the UK.

It has also been suggested that a stronger basis for determining the UK's entitlement to provide domestic support would be UK receipts from the CAP, 'calculated as a ratio of UK:EU CAP payments (over a representative period of three years) applied to the EU's total subsidy commitments'.[15] This would track current support levels, but questions might arise as to whether exempt support should also be included in the calculation; and the UK may suffer disadvantage as a result of a pattern of relatively low expenditure on rural development programmes when compared with other Member States. Significantly, a similar preference for current figures was shown by the Minister for Agriculture, Fisheries and Food before the Sub-Committee, with the UK entitlement to reflect the allocation of the CAP budget.[16]

In this context, a further possibility would be to find a potential model for Brexit in the splitting of Czechoslovakia into the Czech Republic and Slovakia. However, this took place under the General Agreement on Tariffs and Trade (GATT), prior to the creation of the WTO and conclusion of the negotiations for the URAA, while, in addition, both countries soon formed a customs union.[17]

Finally, it would be necessary for any agreed allocation between the UK and the remaining EU Member States to be certified before the Schedules would become binding on WTO Members.

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[13] WTO, G/AG/N/EU/26 (2 November 2015) Notification of domestic support by the European Union for the 2012/2013 marketing year.
[14] L. Brink, 'UK Brexit and WTO farm support limits' (13 July 2016) (available at: http://capreform.eu/uk-brexit-and-wto-farm-support-limits/).
[15] L. Bartels, 'The UK's status in the WTO after Brexit' (23 September 2016) (available at: https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2841747) 11-12.
[16] George Eustice MP, Minister for Agriculture, Fisheries and Food, Oral Evidence to the House of Lords EU Energy and Environment Sub-Committee (8 March 2017) (available on Parliament TV at: http://parliamentlive.tv/Event/Index/2c370f31-36d5-4167-b1c0-c9abcbfd9a40).
[17] Written Evidence of Peter Ungphakorn to the House of Lords EU Energy and Environment Sub-Committee (2 February 2017) (available at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-energy-and-environment-subcommittee/brexit-agriculture/written/46569.htm).

3. If the UK government gives financial support to farmers to provide public goods and ecosystems services post-Brexit, is such an approach compatible with WTO rules?

If the UK were to provide financial support to farmers in these ways, exemption from domestic support reduction commitments might be sought on one or more of three bases.

First, the level of support might be sufficiently low to qualify as *de minimis* support which is not to be included in the calculation of a Member's Current Total Aggregate Measurement of Support (Article 6.4(a) of the URAA). To so qualify, any product-specific domestic support must not exceed 5 per cent of a developed country Member's total value of production of a basic agricultural product during the relevant year; and any non-product-specific domestic support must not exceed 5 per cent of a developed country Member's total agricultural production. The former category would not seem immediately appropriate for payments in respect of public goods and ecosystems services, but the latter, not being tied to a particular form of production, may offer opportunities. On the other hand, the limitation to 5 per cent of the UK's total agricultural production is likely to result in levels of support considerably lower than that currently enjoyed under the CAP.[18]

Secondly, it might be possible to seek exemption on the basis that the support falls within the Blue Box by qualifying as direct payments under a production-limiting programme (Article 6.5 of the URAA). This exemption could encompass, by way of illustration, schemes to reduce stocking densities in the uplands, but the detailed provisions do not appear calculated to promote the delivery of public goods and ecosystems services, it being necessary for the direct payments to be based on fixed areas and yields; or to be made on 85 per cent or less of the base level of production; or to constitute livestock payments made on a fixed number of head. At the same time, there may be doubts in the current climate as to the political acceptability of any large-scale financing of production-limiting programmes. In any event, such an approach would not at present seem uppermost in Government thinking: as stated by the Secretary of State for Environment, Food and Rural Affairs, a

[18] A. Matthews, 'Establishing the UK's non-exempt limit on agricultural support after Brexit' (29 January 2017) (available at: http://capreform.eu/establishing-the-uks-non-exempt-limit-on-agricultural-support-after-brexit/) (including a calculation of UK average total agricultural output over the period 2013-2015).

consequence of Brexit is that 'we'll be free to grow more, sell more, and export more of our Great British food'.[19]

Perhaps the greatest scope to secure WTO compatibility may therefore be provided by the third alternative, Green Box exemption under Annex 2 to the URAA. In particular, payments for the delivery of ecosystem services and (at least, environmental) public goods look apt to qualify as 'payments under environmental programmes', the detailed criteria for which are as follows (paragraph 12 of Annex 2 to the URAA):

> (a) Eligibility for such payments shall be determined as part of a clearly-defined government environmental or conservation programme and be dependent on the fulfilment of specific conditions under the government programme, including conditions related to production methods or inputs.
>
> (b) The amount of payment shall be limited to the extra costs or loss of income involved in complying with the government programme.

In addition, all Green Box support must meet the 'fundamental requirement' of having 'no, or at most minimal, trade-distorting effects or effects on production', together with 'basic criteria', namely:

> (a) the support in question shall be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers; and
>
> (b) the support in question shall not have the effect of providing price support to producers.

In this context, three aspects may be highlighted. First, eligibility is dependent on participation in a clearly-defined government environmental or conservation programme, a criterion which would arguably be met by targeted measures such as the earlier Environmental Stewardship Scheme and the current Countryside Stewardship Scheme. On the other hand, the same criterion may prove a hurdle in the case of 'broad, but shallow' measures, such as the agricultural practices required in order to un-lock the Greening Payment, so potentially placing a considerable WTO constraint on scheme design. Secondly, stipulation that the amount of

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[19] The Rt Hon Andrea Leadsom MP, Secretary of State for Environment, Food and Rural Affairs, Speech at NFU Conference (21 February 2017) (available at: https://www.gov.uk/government/speeches/environment-secretary-speaks-at-nfu-conference).

payment is to be no more than the extra costs or loss of income involved in complying with the government programme may restrict some of the more innovative environmental programmes at present being proposed which look to incentives to generate specific outcomes.[20] In this regard, a matter of note is that the European Commission is of the view that the Greening Payment does not qualify for the Green Box by reason that it is not based on any calculation of costs incurred/income foregone.[21] Thirdly, remuneration by reference to costs incurred/income foregone may also prove less generous than, for example, the Basic Payment Scheme which provides income support without reference to financial need and so opens the possibility of a transfer of resources to farmers.[22]

Moving beyond environmental public goods, Annex 2 does not include Green Box payments to compensate farmers for adopting higher standards of animal welfare, although the possibility of introducing such payments has been raised by the EU during the course of the Doha Development Round.[23] On the other hand, in the case of food quality, the General Services category of Green Box support does expressly include expenditure (or revenue foregone) in relation to programmes providing marketing and promotion services, which are broadly defined, although there must not be expenditure for unspecified purposes that could be used by sellers to reduce their selling price or confer a direct economic benefit to purchasers; and there also must not be direct payments to producers or processors. Further, advantage may be taken of the fact that the Annex 2 list of Green Box direct payments to producers is not exhaustive, offering scope for bespoke support schemes. However, this scope is restricted by a number of limitations, with particular reference to the obligation that no production be required in order to receive such payments. Whether food security is also a 'public good' continues to be subject to debate.[24] If it is, the extent to which it can be supported under

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[20] See, eg, A. Matthews, 'The Future of Direct Payments', in A. Matthews *et al*, *Research for Agri-Committee – CAP Reform Post-2020 – Challenges in Agriculture: Workshop Documentation* (European Parliament, Directorate-General for Internal Policies - Policy Department B: Structural and Cohesion Policies, Brussels, 2016) 3.

[21] European Commission, *Commission Staff Working Document – Impact Assessment: Common Agricultural Policy Towards 2020*, SWD (2011) 1153, Annex 2, 17; and see also, eg, A. Swinbank, 'The WTO: No Longer Relevant for CAP Reform?', in J. Swinnen (ed), *The Political Economy of the 2014-2020 Common Agricultural Policy: an Imperfect Storm* (Rowman & Littlefield International Ltd, London, 2015) 193.

[22] See, eg, FUW, 'Farming must be recognised for its critical role in maintaining countryside post-Brexit, FUW says' (28 November 2016) (available at: http://fuw.org.uk/farming-must-be-recognised-for-its-critical-role-in-maintaining-countryside-post-brexit-fuw-says/).

[23] See, eg, *European Communities Proposal: Animal Welfare and Trade in Agriculture*, G/AG/NG/W/19 (28 June 2000).

[24] See, eg, Organisation for Economic Co-operation and Development (OECD), *Multifunctionality: a Framework for Policy Analysis*, AGR/CA(98)9 (OECD, Paris, 1998); and T. Cooper, K. Hart and D. Baldock, *Provision of Public Goods Through Agriculture in the European Union* (IEEP, London, 2009).

the URAA will encounter significant headwinds, primarily the fundamental requirement applicable in the case of the Green Box which precludes measures having more than minimal effects on production. That having been said, certain measures within the General Services category, such as support for research, may be apt to boost *productivity* (as opposed to having an effect on production levels *per se*): for example, the development of robotics or drone technology.

a. If the UK government gives financial support to organisations like National Park Authorities or the National Trust to manage ecosystems services instead, with farmers applying for support to those organisations as part of designated specific ecosystems programmes, would this raise any legal issues under WTO rules, UK planning law or UK law governing agricultural holdings/tenancies?

As indicated, support for ecosystem services would most likely be available as payments under environmental programmes. If specific ecosystems service programmes were managed by organisations such as the National Park Authorities or the National Trust, a live question would be whether these programmes qualified under the URAA as part of a clearly-defined *government* environmental or conservation programme. Some light may be shed on this question by the decision of the Appellate Body in *Canada – Dairy* (1999), albeit a dispute relating to export subsidies, which addressed the meaning of both 'government' and 'government agency',[25] the two being distinguished. According to the Appellate Body '[t]he essence of "government" is…that it enjoys the effective power to "regulate", "control" or "supervise" individuals, or otherwise "restrain" their conduct, through the exercise of lawful authority', with this meaning 'derived, in part, from the *functions* performed by a government and, in part, from the government having the *powers* and *authority* to perform those functions'; by contrast, in their view, a 'government agency' is 'an entity which exercises powers vested in it by a "government" for the purpose of performing functions of a "governmental" character, that is, to "regulate", "restrain", "supervise" or "control" the conduct of private citizens', while also being capable of enjoying 'a degree of discretion in the exercise of its functions'.[26]

[25] (WT/DS103/AB/R; WT/DS113/AB/R). The relevant provision was Article 9.1(a) of the URAA. See also, generally, J.A. McMahon, *The WTO Agreement on Agriculture: a Commentary* (Oxford University Press, Oxford, 2006) 103-114.

Adopting these interpretations, organisations such as the National Park Authorities or the National Trust would not readily be characterised as 'government' (and might even encounter some difficulty meeting the criteria for a 'government agency', criteria which appear more appropriate to, for example, the Rural Payments Agency).[27] Accordingly, if the measures were to be Green Box compliant as government environmental and conservation programmes, it would seem important to demonstrate a relatively high level of central government involvement, which would tend to undercut administrative and other advantages understood to flow from delegation in this way. Much would nonetheless depend on the particular case: as stated in *Japan – Film* (1998), 'the fact that an action is taken by private parties does not rule out the possibility that it may be deemed to be governmental if there is sufficient government involvement with it', it being 'difficult to establish bright-line rules in this regard, however'.[28]

The conferring of this role on specifically charitable institutions could also prove problematic for their charitable status, with careful thought likewise needed as to any adverse effects on their 'brand'. And these difficulties would be liable to increase if the role were to extend to significant acts of enforcement.

An alternative to explore, therefore, might be to enhance the profile of such organisations in the provision of advice and guidance. In the case of those which are charities, this would sit more closely with their charitable purposes; and, in all cases, this might offer the opportunity to comply with Green Box rules under the General Services category, namely as 'extension and advisory services, including the provision of means to facilitate the transfer of information and the results of research to producers and consumers'.

In addition, a somewhat different approach to achieve similar ends might be to foster the collaborative implementation of agri-environmental agreements, in line with and even expanding upon measures already being developed under the CAP. For example, Member States now enjoy the option to implement Ecological Focus Areas on a collective basis,[29] although as yet only two Member States (the Netherlands and Poland)

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[26] (WT/DS103/AB/R; WT/DS113/AB/R) para 97 (emphasis in original).
[27] Indeed, they might seem more suited to the definition of a 'non-governmental body' which, for the purposes at least of the Agreement on Technical Barriers to Trade (TBT Agreement), is described as a '[b]ody other than a central government body or a local government body, including a non-governmental body which has legal power to enforce…': TBT Agreement, Annex 1, para 8. See generally, eg, J. Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: a Commentary* (Oxford University Press, Oxford, 2007) 30-33.
[28] (WT/DS44/R) para 10.56.
[29] Regulation (EU) 1307/2013, Article 46(6).

have decided to so.[30] Further, provision has been made for agri-environment-climate payments to be granted to 'to farmers, groups of farmers or groups of farmers and other land-managers';[31] and, in the case of such schemes, recent amendment has been effected to facilitate collective claims.[32] According to a growing body of research, arrangements of this kind can deliver enhanced environmental dividends, including at landscape level, without high economic cost; and serious consideration is merited as to whether they could constitute a significant feature of an expanded ecosystems services regime in the UK.[33]

With regard to the legislative framework for both planning and agricultural holdings/tenancies, any approach with emphasis on the delivery of public goods and ecosystems services has the capacity to generate tensions with these regimes which were implemented at a time when 'production agriculture' was accorded greater priority. For example, the definition of 'agriculture' in Section 96(1) of the Agricultural Holdings Act 1986 makes no reference to environmental issues, being as follows: '"agriculture' includes horticulture, fruit growing, seed growing, dairy farming and livestock breeding and keeping, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes'. And the same definition is to be found under the Agricultural Tenancies Act 1995, with almost identical wording also under the Town and Country Planning Act.[34] At the same time, the prevalence of short-term tenancies under the Agricultural Tenancies Act 1995 does not sit easily with the long-term horizon which is required for the delivery of ecosystems services.[35] In consequence, if the UK is to change substantially the basis of its support to farmers, there would be merit in revisiting both planning and agricultural holdings/tenancies law to develop consistency of purpose.

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[30] European Commission, *Direct Payments 2015-2020: Decisions taken by Member States: State of Play as at June 2016 - Information Note* (European Commission, Brussels, 2016) 14; but see also R. Henke *et al*, *Implementation of the First Pillar of the CAP 2014-2020* (European Parliament, Directorate-General for Internal Policies - Policy Department B: Structural and Cohesion Policies, Brussels, 2015) Table 1.13, where it is indicated that the region of Flanders has also opted for collective implementation .

[31] Regulation (EU) 1305/2013, Article 28.

[32] Commission Implementing Regulation (EU) 809/2014, Article 14*a* (as amended by Commission Implementing Regulation (EU) 2015/2333).

[33] See, eg, K. Prager, M. Reed and A. Scott, 'Encouraging collaboration for the provision of ecosystem services at a landscape scale - Rethinking agri-environmental payments', (2012) 29 Land Use Policy 244; and J. Leventon *et al*, 'Collaboration or fragmentation? Biodiversity management through the common agricultural policy', (2017) 64 Land Use Policy 1.

[34] See generally M. Cardwell and L. Bodiguel, 'Evolving definitions of "agriculture" for an evolving agriculture?', [2005] Conveyancer 419.

[35] See, eg, House of Commons Library – Research Briefing: Tenant Farming (9 May 2016) (available at http://www.tfa.org.uk/wp-content/uploads/2016/05/16-May-09-HofC-Research-Briefings-Tenant-Farming.pdf).

4. **Under what circumstances, if any, will the UK be able to restrict imports of agri-food products into the UK post-Brexit on the grounds that those imported products do not meet the UK's animal welfare standards?**

The extent to which WTO Members may restrict imports on the basis that they do not meet domestic animal welfare standards is an issue which remains contested, even as evidence grows that the manner in which farm animals are reared is of great interest to many consumers.[36] Attempts to condition imports on the basis of such concerns have not generally met with success before the WTO Dispute Settlement Body, but more detailed examination of the decisions would indicate that the door is not necessarily closed. A key factor is the need to ensure that the detailed rules which are imposed do not result in the measures being characterised as 'protectionist'.

First, under Article XX of the GATT, general exemption is granted in the case of, *inter alia*, measures:

'(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health;…

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption'.

Where these provisions have been subject to consideration by the Dispute Settlement Body, there have been occasions when *prima facie* justification of the measures has been successfully established in the specific context of animals. For example, in *US – Shrimp/Turtle* (1998) measures restricting the import of shrimp and shrimp products so as to reduce the incidental take of sea turtles could be *prima facie* justified on grounds that they related to the conservation of exhaustible natural resources (Article XX(g)).[37] And, subsequently, in *EC –Seals* (2014) the Appellate Body found that an EU prohibition of the importation and sale of

[36] For discussion of this early issue in the Doha Development Round, see RSPCA, Food for Thought: Farm Animal Welfare and the WTO (RSPCA, 1999). For more recent emphasis in the context of Brexit, see Hansard (24 January 2017) Vol 620, Cols 80-96WH; and Written Evidence of Compassion in World Farming (31 January 2017) (available at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-energy-and-environment-subcommittee/brexit-agriculture/written/46792.pdf).

[37] (WT/DS58/AB/R).

processed and unprocessed seal products could be *prima facie* justified on grounds of public morality (Article XX(a)).[38] In reaching this latter decision, particular weight was attached to the EU legislative history which articulated high levels of public concern based upon ethical reasons; and, in this regard, an interesting point is whether a similar level of public concern could be invoked so as to, for example, restrict the trade in calves reared in veal crates.[39] On the other hand, in the same dispute the Panel found that the EU failed to establish a *prima facie* case under Article XX(b) (with this matter not being subsequently addressed by the Appellate Body).

As settled in WTO jurisprudence, once *prima facie* justification has been established, it is then necessary to consider whether the measure concerned meets the requirements of the *chapeau* to Article XX, these being that it is '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'. In *EC –Seals* and, at least initially, in *US – Shrimp/Turtle* the measures failed at this hurdle. For example, in *EC – Seals* the EU regime conferred an exemption from the prohibition on Inuit or other indigenous communities and this provision was not applied even-handedly in that the Inuit from Greenland were treated more favourably. Yet it is important also to note that in subsequent compliance proceedings in *US – Shrimp/Turtle* (2001) the Appellate Body adjudged that the revisions effected to the measure by the United States allowed it to satisfy the *chapeau*: not least, the United States had made serious, good faith efforts to negotiate an international agreement, and that was sufficient.[40]

Accordingly, the general exemptions in Article XX afford opportunities with respect to animals, but at the same time there must be full recognition of the need for the measures to be so designed as to avoid arbitrary or unjustifiable discrimination, or a disguised restriction on international trade; and that *animal welfare* (as opposed to animal *life or health*) is not expressly included within the exemptions (although matters of life and health may inherently engage matters of welfare).

Secondly, under the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), it is expressly provided under

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[38] (WT/DS400/AB/R; WT/DS401/AB/R). See also A. Herwig, 'Too much zeal on seals? Animal welfare, public morals, and consumer ethics at the bar of the WTO' (2016) 15 World trade Review 109.

[39] In this context, an appeal to public morality did not succeed before the Court of Justice of the European Union: Case C-1/96, *R v Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming Limited* [1998] ECR I-1251.

[40] (WT/DS58/AB/RW).

Article 3.3 that 'Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions' of Article 5 (on the assessment of risk and determination of the appropriate level of sanitary and phytosanitary protection). Accordingly, there is an 'autonomous right' to establish a higher level of protection, but this right is not 'an absolute or unqualified right'. [41] In particular, when departing from international standards, guidelines and recommendations, there must be a 'turn to science'.[42]

At the same time, despite the fact that the precautionary principle receives no express mention in the SPS Agreement, Article 5.7 stipulates that, '[i]n cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary and phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members'. In *EC – Hormones* the Appellate Body stated that Article 5.7 (and also Article 3.3) may be regarded as a reflection of the precautionary principle, while declining to take a position on whether or not the precautionary principle itself has become one of general or customary international law.[43]

While these provisions do permit the introduction and maintenance of higher standards and the adoption of at least provisional measures where scientific evidence is insufficient, the focus of the SPS Agreement is again on animal life and health as opposed to animal welfare: Annex A.1 (although express reference is made in the Annex to requirements in relation to animal transport and, more generally, the scope of the SPS Agreement was broadly interpreted in *EC – Biotech* (2006)).[44] Further, the same *EC – Biotech* dispute also clearly illustrated the importance of complying with procedural obligations, including the proper conduct of a risk assessment where mandated.

[41] *EC – Hormones* (WT/DS26/AB/R; WT/DS48/AB/R) paras 104 and 173 (the Appellate Body also observing that Article 3.3 'is evidently not a model of clarity in drafting and communication': para 175).
[42] See, eg, J. Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: a Commentary* (Oxford University Press, Oxford, 2007) 76-138.
[43] *EC – Hormones* (WT/DS26/AB/R; WT/DS48/AB/R) paras 123-124.
[44] *EC – Biotech* (WT/DS291/R).

Thirdly, under the Agreement on Technical Barriers to Trade (TBT Agreement), the protection of animal life and health and the environment are 'legitimate objectives' in the case of technical regulations (technical regulations being by definition mandatory): Article 2.2.[45] But once more there is emphasis on the imperative of avoiding 'protectionism'. Accordingly, the full provision requires that, with respect to their central government bodies, Members are to ensure that 'technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade'; and that, '[f]or this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create'. The relatively strict demands which this wording places on Members has recently been confirmed in *US – Tuna II (Mexico)* (2012), a decision relating to 'dolphin-safe' labelling.[46]

Finally, an overarching question is the extent to which WTO rules may accommodate distinctions between products based upon process and production methods which leave no trace in the product itself (often termed 'non-product-related process and production methods'). In this context, much debate currently centres on 'eco-labels' based on full life-cycle analysis, but there is also particular resonance in the field of animal welfare. Argument can be made that there are many instances (such as levels of confinement) where the manner in which livestock is reared is not evident in the physical characteristics of the product purchased by the consumer, yet the manner of rearing remains of concern to the consumer. And, although it has long been cogently contended that distinctions on the ground of such non-product-related process and production methods are indeed permitted in WTO law,[47] it would take a bold person to consider the issue no longer moot.

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[45] And the list of 'legitimate objectives' is not exhaustive.
[46] (WT/DS381/AB/R).
[47] See, with reference to the environment, eg, S. Charnovitz., 'The law of environmental "PPMs" in the WTO: Debunking the myth of illegality' (2002) 27 Yale Journal of International Law 59.