



KATRIN VELS

Trade restrictions on animal welfare grounds in the European Union

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About the author:

Katrin Vels graduated from the Law Institute in Tallinn in 2000 and obtained her LL.M in International and European Law from the Riga Graduate School of Law in 2003. She is now working in RGSL as an assistant lecturer in the Legal Methods course.

She is studying at the moment in the European Postgraduate Course on Environmental Management at the University of Amsterdam that will last from September 2004 until June 2005.

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The RGSL Working Papers serve the double purpose of introducing current research at RGSL and introducing new authors, including graduates from the RGSL Master's Degree in International and European Law.

The present paper introduces Katrin Vels, who graduated in 2003 with a Masters Thesis on trade restrictions on animal welfare grounds in the European Union. Katrin Vels is presently working as an assistant lecturer at the RGSL, and the working paper is based on her work with the thesis.

The publication of the present paper follows the 1 May 2004 accession of the Baltic States into the European Union. One of the more visible effects of accession is the immediate opening of borders to trade. For a new Member State this brings an occasion for reviewing many national policies related to trade practices.

The work by Katrin Vels is important as it uses animal welfare as an example of such policies to be reviewed. The paper sets out the limitations in EU law for accepting national policies, and raises questions concerning the consistency of the present EU policy, which must also be taken into consideration when evaluating national policies.

The difficulty in animal welfare protection policy is the balancing of moral and technical issues in relation to the overall issue of promoting cross border trade. Katrin Vels examines the limits following present legislation and case law in the EU, as well as possible scenarios for further development at the EU level.

RGSL is proud to present this academic contribution to the development of trade law, which remains one of the core policy areas of the European Union.

Peter Gjørtler

Senior lecturer of EU Law at RGSL

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Introduction

The European Court of Justice ruled in 1998 that the United Kingdom could not ban the export of veal calves to Spain due to the veal crating system employed in Spain, but prohibited in the United Kingdom as a cruel and inhumane practice towards animals. This judgment is one example of the limited possibility of Member States to address non-economic interests as opposed to the objectives of free trade in the European Union. It also illustrates the problems of and the public concern over animal welfare occurring in the farming systems of the Union. It is not possible to deny the acuteness of these problems. In the words of one commentator, “environmental protection in a wide sense, including animal welfare concerns, has almost single-handedly renewed the importance of export restrictions in the internal market framework”.¹

The European Union is in the constant process of developing into something more than just an economic entity furthering the integration of Member States’ markets. As the Community’s competences encroach more on areas that were traditionally considered to comprise sovereign national interests, the Community cannot take trade interests solely as its point of departure, but has to pay attention also to non-economic interests that Member States may want to protect. Animal protection is no doubt one of these interests.²

Animal welfare became an integral part of the EC Treaty by the adoption of the Protocol on Animal Welfare annexed to the Treaty of Amsterdam.³ Until the Protocol⁴ came into effect, animals were regarded as

¹ G. van Calster, “Export restrictions - a watershed for Article 30” (Export Restrictions), (2000) *ELRev* (*European Law Review*) 335, at p 335.

² The Court stated in *Hedley Lomas* that Article 36 (now Art 30) of the Treaty “allows the maintenance of restrictions on the free movement of goods, justified on grounds of the protection of the health and life of animals, which constitutes a fundamental requirement recognized by Community law” (emphasis added). See Case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd. (Hedley Lomas)* [1996] ECR I-02553, para. 18. See also Case C-1/96 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming Ltd. (CIWF)* [1998] ECR I-01251, para. 47.

³ Article 239 (now Art 311) of the EC Treaty provides that “[t]he protocols annexed to this Treaty by common accord of the Member States shall form an integral part thereof.”. D. Wyatt (ed.), *Rudden & Wyatt’s EU Treaties & Legislation*, (8th ed.).

⁴ The Treaty of Amsterdam (including the Protocol on Animal Welfare) came into effect on 1 May 1999.

agricultural products under EC law.⁵ The reference to “sentient beings” in the Protocol suggests that the obligation to pay “full regard to the welfare requirements of animals” is a moral rather than an economic issue⁶. The Community has adopted a number of directives to address animal welfare concerns and to guarantee a minimum level of protection to animals. However, both practice and cases brought before the European Court of Justice indicate that the agreed minimum level of protection is not considered sufficient by some Member States, and that the implementation and enforcement of Community law in this area is far from successful. To address these shortcomings, Member States may want to resort to the Article 30 (ex Art 36) animal life and health protection ground to ban imports and exports of animals that have been subjected to cruel treatment or raised under inhumane conditions. However, the Court’s judgments in the two main cases on animal protection - *Compassion in World Farming*, and *Hedley Lomas*⁷ - exemplify its cautiousness or even unwillingness in allowing recourse to Article 30 by Member States. As one commentator put it, “[t]he apparent inability of Member States to prevent practices which are widely regarded as cruel by their population raises an important constitutional issue”.⁸ New Member States have brought with them their own moral standards that cannot be suppressed and left unnoticed either.

The purpose of this paper is to examine the boundaries of Member State action in imposing trade restrictions to address animal welfare concerns that go beyond what the Community considers sufficient for the proper functioning of the internal market. More specifically, the paper will discuss whether and under what conditions can a Member State ban imports from or exports to another Member State that treats animals inhumanely in cases where minimum harmonization exists and in cases where harmonization is not comprehensive or no harmonization exists at all. Analysis focuses on Article 30 (ex Art 36) and its extraterritorial character, and particularly on the link that

⁵ Live animals were specifically listed as “agricultural products” in Annex II of the EC Treaty.

⁶ The respective article can be now found in Article III-121 in the Treaty establishing a Constitution for Europe that will be signed in Rome 29 October 2004 (Brussels, 6 August 2004, CIG 87/04). Available on the Internet at: <http://ue.eu.int/igcpdf/en/04/cg00/cg00087.en04.pdf>.

⁷ See *supra*, n. 2.

⁸ M. Radford, “Animal passions, animal welfare and European policy making” in P. Craig, C. Harlow (eds.), *Lawmaking in the European Union*, London and Boston, W.G. Hart Legal Workshop Series, Institute of Advanced Legal Studies, 1998, pp 412-432, at p 431.

has to be established between animals and the Member State that seeks to protect animals (that will be) located without its territory. It is doubtful whether the animal health and life protection ground in Article 30 would allow such trade restrictions at the present stage of Community law. The second chapter proposes a redefinition of the animal health and life protection ground in Article 30 (ex Art 36) by taking into account the moral character of animal protection. It is suggested that due to the moral nature of animal welfare it is a right of a Member State to protect its public morals and prohibit imports and exports of animals or products originating from animals that have been reared by inhumane methods or otherwise subjected to cruel treatment. The last part of the second chapter proposes the most appropriate test for the European Court of Justice to apply in animal protection cases that would guarantee sufficient discretion to a Member State in animal welfare cases, and at the same time avoid the invocation of trade bans on unjustified grounds.

There is a considerable body of literature on the possibility of banning imports and exports at the World Trade Organization level on the basis of production and harvesting methods to protect the environment and animals. However, the same cannot be said about the European Community, because the Community has introduced of harmonizing legislation, which in many cases makes it unnecessary or even impossible to resort to unilateral action. None the less, at Community level unilateral action has been accorded approval to a certain extent in the field of environmental protection. This is due to country-specific risks, transboundary effects, and the concept of the so-called global/European commons. Scholarly opinion often tends to regard animal welfare as falling under environmental protection. However, conservationist and other anthropocentric considerations that purport to be the main concerns of environmental protection tend to acquire secondary importance in animal welfare. The most important aspect that has been ignored in the case of animal protection is its moral nature, in turn closely related to the historical and cultural background of a Member State's society. Although Scott has clearly pointed out this moral aspect,⁹ she still does not

⁹ J. Scott, "On Kith and Kine - Trade and Environment in the EU and WTO", Jean Monnet Center at NYU School of Law. Available on the Internet at: www.jeanmonnetprogram.org/papers/99/990303.html. Last visited on 13 April 2003.

differentiate between environmental and animal protection. The author tries to remedy this shortcoming and demonstrate that animal welfare as a morality issue deserves different treatment than animal life and health protection has been accorded so far due to the fact that animals are sentient beings capable of suffering.

The discussion may be similarly relevant for other areas of non-economic interests where the clash with economic aims may shift those interests to a secondary place and invoke questions about the boundaries of Member State action in addressing its concerns of non-economic nature in the European Union.

I Imposing trade restrictions to protect the life and health of animals: *Hedley Lomas* and *Compassion in World Farming*

*Hedley Lomas*¹⁰ and *Compassion in World Farming*¹¹ are the two main cases pertaining to the protection of animals that have made their way to the European Court of Justice (the Court or the ECJ). However, the Court in these cases did not go into the issue whether it is possible to invoke import and export restrictions on the animal health and life protection ground of Article 30 (ex Art 36). None the less, *Hedley Lomas* and *Compassion in World Farming (CIWF)* provide a fertile basis to analyze this possibility in more depth.

Both cases were referred to the ECJ for a preliminary ruling by the High Court of Justice (England and Wales). The main similarity between *Hedley Lomas* and *Compassion in World Farming (CIWF)* is that both cases discussed the possibility of invoking export restrictions for the protection of life and health of animals. In the national court, *Hedley Lomas* involved a dispute between a private undertaking Hedley Lomas (Ireland) Ltd that wanted to export animals to Spain for slaughter, and the Ministry of Agriculture, Fisheries and Food for England and Wales, which refused to issue the necessary export licence to Hedley Lomas. This case dealt with the possibility

¹⁰ Case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd. (Hedley Lomas)* [1996] ECR I-02553.

¹¹ Case C-1/96 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming Ltd. (CIWF)* [1998] ECR I-01251.

of banning exports to a Member State where the latter was allegedly not complying with Community standards, namely those laid down in the Community directive on the stunning of animals before slaughter.¹² In *CIWF*, the Ministry had already changed sides and was defending its grant of licences to export veal calves, which was vehemently opposed by the animal welfare organizations Royal Society for the Prevention of Cruelty to Animals, and Compassion in World Farming. *CIWF* focused on the possibility of resorting to Article 30 when an exporting Member State considered the level of protection in the importing Member State insufficient, even though the importing Member State complied with minimum Community standards. More specifically, the UK authorities refused to ban the issue of licenses for the export of veal calves to a Member State where the rearing of calves in veal crates was practised. Such practice was allowed according to the Community's minimum standards,¹³ but prohibited in the United Kingdom.¹⁴

In both cases, the respective parties claimed the possibility to ban exports on the basis of Article 30 of the Treaty and that the prohibitions were consequently compatible with Community law.¹⁵ The Court's conclusion in both cases was simple and straightforward: because the Community directives have harmonized the respective areas comprehensively, recourse to Article 30 (ex Art 36) is no longer possible.¹⁶

1. A question of comprehensive or non-comprehensive harmonization - a tool of the Court towards further integration

The grounds for the Court's conclusion in *Hedley Lomas* and in *CIWF* that the respective areas of Community law had been harmonized exhaustively and

¹² Council Directive 74/577/EEC of 18 November 1974 on stunning of animals before slaughter (OJ 1974 L 316, p 10, hereinafter "the Slaughter Directive"). This Directive is no longer in force. The respective requirements on stunning animals before slaughter have been incorporated into the Council Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing (OJ L 340, 31/12/1993, p 21).

¹³ Council Directive 91/629/EEC of 19 November 1991 laying down minimum standards for the protection of calves (OJ 1991 L 340, p 28, hereinafter "the Calves Directive").

¹⁴ The veal crate is a solid-sided wooden box, with a slatted floor and of a size that makes it impossible for the calf to turn around. Each calf is enclosed in a crate its whole life, approximately 26 weeks when it is slaughtered. R. McLeod, "Calf exports at Brightlingsea", (1998) *Parliamentary Affairs* 345, Vol. 51, under the heading "Veal crate system and European legislation". Available at ProQuest database. Last visited on 2 May 2003.

¹⁵ In *Hedley Lomas*, para. 12; in *CIWF*, paras. 39-40.

¹⁶ In *Hedley Lomas*, para. 21; in *CIWF*, para. 64.

therefore recourse to Article 30 was precluded were different. Without descending into a detailed discussion on whether the Court's conclusions were justified, especially in light of their potential policy implications, only a few notions are made in this regard.

In *Hedley Lomas* the Court referred to Articles 5(1) and 189(3) of the EC Treaty, and stated that the lack of monitoring procedures or penalties did not preclude the exhaustive character of harmonization and this simply meant that Member States were obliged to take all measures necessary to guarantee the application and effectiveness of Community law.¹⁷ It is argued here, however, that the protection of animals will be considerably undermined if Member States are not provided with concrete guidelines as to the implementation and enforcement of Community law. Furthermore, lack of precision in the Community enforcement standard greatly restricts effective control over possible violations of Community law. Moreover, Member States may be unwilling to sanction non-compliance to create a less costly environment to companies engaged in the relevant activities on that State's territory. Therefore, the reasons for the Court's conclusion on the exhaustiveness of the Slaughter Directive may be called into question on the above grounds.¹⁸

The Court's conclusion in *CIWF* that harmonization introduced by the Calves Directive is exhaustive does not sit easy with the fact that the Directive foresees temporary derogations, some of them extending to a period of more than ten years.¹⁹ The Court's finding may have serious consequences for the functioning of the internal market. That is, as Munoz has correctly pointed out, the possibility to use Article 30 should be granted to secure the application of national rules until Community law is applied.²⁰ Otherwise, in

¹⁷ In *Hedley Lomas*, para. 19.

¹⁸ This interpretation that there is no full harmonization if monitoring procedures have not been included in the directive is endorsed also by Kurcz and Van Calster. See B. Kurcz, "Harmonisation by means of Directives - never-ending story?", (2001) *European Business Law Review* 287, at p 289; G. van Calster, "Export restrictions - a watershed for Article 30" (Export Restrictions), (2000) *ELRev (European Law Review)* 335, at pp 343-344.

¹⁹ Article 3(4) of the Calves Directive provides that the use of installations that are built before 1 January 1994 and which do not meet the requirements of the Directive, shall under no circumstances extend beyond 31 December 2003; if the installations have been built during the transitional period, their use shall not extend beyond 31 December 2007. See *supra*, n. 13.

²⁰ R. Munoz, "Case C-1/96, *The Queen v Minister of Agriculture, Fisheries and food, ex parte Compassion in World Farming Limited*, Judgment of 19 March 1998, [1998] ECR I-1251", (1999) *CMLRev (Common Market Law Review)* 831, at pp 837-838.

the case of a postponement of the application of Community law there is no space for the protection of non-economic interests. Hence, until the transposition periods have expired, harmonization should not be considered comprehensive.

These cases demonstrate that the Court's findings may rather reflect its desirability to further the aims of market integration and do not necessarily constitute inevitable conclusions derived from the formal application of the law on the facts of the case at hand.²¹ It must be noted as well that directives that introduce minimum harmonization can regulate an area of concern exhaustively or non-exhaustively, depending on its scope of application materially and territorially. Minimum harmonization directives are the most common legal acts in the field of animal welfare in the EC and the question of exhaustive harmonization calls for a case-by-case assessment.

2. The concept of extraterritoriality under minimum harmonization and under Article 30

After ascertaining whether recourse to Article 30 is possible, it is important to determine the territorial scope of Member State action in guaranteeing the welfare of animals on the basis of a harmonizing directive and of Article 30. *Hedley Lomas* and *CIWF*, like other cases arising from national measures that differentiate between products on the basis of their production methods, turn to a large extent on the question whether a Member State is allowed to protect animals that are (or will be in case of export restrictions) situated *outside its territory*. Whether one considers both import and export restrictions or only import restrictions to be extraterritorial, there is no doubt that such national measures have implications on trade that are not just a matter of one State. Their acceptability must be assessed in the light of the relevant trade system.²²

²¹ See also M. P. Maduro, *We The Court*, Oxford, Hart Publishing, 1998, at p 22.

²² Nollkaemper claims that although the fur ban aims to influence the conduct of legal subjects abroad, it does not legally regulate such conduct. However, according to him the question is whether States have 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. See A. Nollkaemper, "The Legality of Moral Crusades Disguised in Trade Laws: An Analysis of the EC "Ban" on Furs from Animals taken by Leghold Traps", (1996) *Journal of Environmental Law* 237, Vol. 8, at pp 244-245.

The problem with extraterritorial application of domestic standards also lies in the fact that allegedly unilateral action goes against the principle of mutual recognition, developed by the Court in the *Dassonville* and *Cassis de Dijon* cases,²³ according to which goods produced lawfully in one Member State should be allowed on the markets of other Member States.

In the following, ECJ case law that is relevant in predicting the possible outcome of cases concerning animal health and life protection, if the Court had not restricted itself to finding that minimum harmonization was comprehensive, will be analyzed in detail.

2.1. Applying higher standards to foreign products than provided for in the minimum harmonization measure

It may be the case that a directive already stipulates that higher standards apply only within the territory of the Member State that is invoking them, or that products conforming to the minimum standard have to be accepted.²⁴ If no such provision is included, then the issue whether stricter rules could be extended to out-of-state goods is mainly influenced by policy considerations on market integration. In *CIWF*, no question of extraterritorial application of stricter standards adopted in the UK arose, at least not on the basis of Article 11(2) of the Calves Directive,²⁵ because the Directive explicitly foresees that a Member State can make use of the derogations only within its own territory.²⁶

Different factors have to be taken into account when assessing whether higher standards could be invoked on imports of foreign products and exports of domestic products on the basis of a Community minimum harmonization measure. First of all, it is important to point out that according to the

²³ Case 8/74 *Procureur du Roi v B. And G. Dassonville (Dassonville)* [1974] ECR 837; Case 120/78 *Rewe Zentralverwaltung AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649.

²⁴ Van Calster in *Export Restrictions*, see supra, n. 1, at p 344, footnote 40.

²⁵ It has to be emphasized that *CIWF* argued for the possibility to adopt extraterritorial measures on the basis of Article 30. This issue will be discussed below.

²⁶ See supra, n. 13. In addition, the Calves Directive was adopted in the framework of the common organization of the market in beef and veal (Regulation (EEC) No 805/68 of the Council of 27 June 1968 on the common organisation of the market in beef and veal (OJ, English Special Edition 1968 (I), p 187)). In case of such common organization unilateral action cannot undermine or create exceptions to this common organization, or interfere with its proper functioning, even if the matter has not been exhaustively regulated by Community rules (Case 31/74 *Galli* [1975] ECR 46; Case 5/79 *Buys, Pesch, Dullieux and Denkavit* [1979] ECR 3203). However, in *Holdijk* (Cases 141-143/81 *Gerrit Holdijk and others* [1982] ECR 1299) the Court approved such national measures despite of the common organization of the market.

traditional “floor/ceiling” approach, a minimum harmonization measure “establishes a “floor” of obligations below which Member States may not sink, and the “ceiling” circumscribing the legitimate scope of more stringent measures introduced by Member States is constituted by the EC Treaty and in particular by Articles 28-30 thereof”.²⁷ Secondly, the Treaty Article on which the harmonization measure is based also plays an important role. Namely, Community measures adopted on the basis of Article 95 (ex Art 100) aim at the establishment and functioning of the internal market, whereas Articles 176 (ex Art 130t), 137 (ex Art 118) and 153 (ex Art 129a), the Treaty provisions governing environmental, social and consumer protection respectively, are not primarily directed at the integration of markets, and therefore might allow the application of host State rules.²⁸ Weatherill has stated that applying the home State rule and thereby granting market access furthers market integration, whereas “denying market access is necessary to ensure the low-regulator has incentive to emulate the high-regulator”.²⁹ Indeed, it seems that in certain areas the Court is willing to allow a “race to the top,” which is the consequence of giving preference to host State control, thereby denying access to goods that do not pass that control (even if they comply with the Community’s minimum rule). *Buet* illustrates that this may be so in the case of consumer protection.³⁰ Similarly, in *Aher-Waggon*³¹ Germany was allowed to impose higher domestic noise limits on foreign airplanes and make compliance with these higher limits a precondition to registration.³² Furthermore, protecting the so-called European commons

²⁷ See Scott, *supra*, n. 9, under the heading “Case Study One: Compassion in World Farming and Calves in Crates”.

²⁸ Applying the home State rule means that the product has to conform with the rules of the place of production. The host State rule requires the product to conform with the standards established in the importing country.

²⁹ S. Weatherill, “Pre-emption, Harmonisation and the Distribution of Competence to Regulate the Internal Market” in C. Barnard, J. Scott (eds.), *The Law of the Single European Market. Unpacking the Premises*, (Harmonization in the Internal Market), Oxford and Portland, Oregon, Hart Publishing, 2002, pp 41-73, at p 60.

³⁰ Case 382/87 *R. Buet and Educational Business Services (EBS) v Ministère public (Buet)* [1989] ECR 1235. In *Buet*, the Court allowed to apply stricter domestic rules also to foreigners and prohibit doorstep selling of certain materials.

³¹ Case C-389/96 *Aher-Waggon GmbH v Bundesrepublik Deutschland (Aher-Waggon)* [1998] ECR I-4473.

³² This case is particularly interesting, because it demonstrates that the base Article on which the Directive was adopted may give way to other considerations in determining its objective. Dougan points out that in *Aher-Waggon* the Directive at issue - Directive 80/51/EEC - was adopted under Article 80(2) (ex Art 84(2)) EC within the framework of Common Transport Policy. However, the measure pursued a singularly environmental objective without any

seems to allow such extraterritorial application as well.³³ For example, in *Van den Burg*³⁴ the Court limited the extraterritoriality of stricter standards to migratory and endangered species only, denying it to other species.^{35,36} Consequently, granting extraterritoriality may depend on the specific field of concern and involves the balancing of economic and non-economic interests that underlie the mechanisms of home and host State control.

The notions made from the above cases might endorse the extraterritorial application of higher domestic standards in certain areas, but do not appear to provide such authority for animal protection. This is due to the fact that in all of these cases a *direct connection* between the products or services at issue and the territory of the (host) Member State could still be established.³⁷ In the case of animal welfare, the connection between the territory of a Member State willing to impose higher standards and animals situated in another Member State seems *indirect (or non-physical) only*: as the Advocate General pointed out in *CIWF*, the rearing system practiced outside British borders would alarm British public opinion³⁸, and this is the only connection. Moreover, at this point of Community development animal life and health protection does not deserve independent attention from

commercial or economic ambitions. M. Dougan, “Minimum Harmonization and the Internal Market”, (2000) *CMLRev* 851, at p 877.

³³ L. Krämer, *EC Treaty and Environmental Law*, (2nd ed.), London, Sweet & Maxwell, 1995, at p 113; R. Schenkel, “Environmental Protection and the Free Movement of Goods” in C. Demmke (ed.), *Managing European Environmental Policy: The Role of the Member States in the Policy Process*, European Institute of Public Administration, 1997, pp 161-186, at p 167.

³⁴ Case C-169/89 *Criminal proceedings against Gourmetteria Van den Burg (Van den Burg)* [1990] ECR I-2143.

³⁵ In essence, the Court agreed with the Advocate General’s opinion in that the more stringent measures could be allowed in case where there was a question of common heritage of the Community or the specific interests of the Member State in which the bird inhabited.

³⁶ However, Weatherill asserts that the application of stricter rules against imports is constitutionally pre-empted. He bases his assertion mainly on the *Tobacco Advertising case* (Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising)* [2000] ECR I-8419) which, in his opinion, is a reversal of the Court’s preceding approach. In Weatherill’s view, the decision of the Court suggested a more integrationist view by indicating that market access should be allowed to out-of-state goods that conform to the minimum Community rule. See Weatherill in *Harmonization in the Internal Market*, supra, n. 29, at pp 60-61. Weatherill’s conclusion, however, seems too hasty. In the *Tobacco Advertising case* the Court dealt with the matter of imposing higher standards to foreign products only indirectly, when establishing the nature of the directive at issue (namely, whether the directive aimed at eliminating obstacles to the free movement of goods). Especially in case of minimum harmonization the conclusions may be different. The directive does not have to be adopted only to remove obstacles to the free movement of goods, but also to protect certain non-economic values that are important to the Member States.

³⁷ In *Aher-Waggon* the foreign planes sought for registration on the German territory; in *Buet* the doorstep selling was directed at consumers located on French territory.

³⁸ Opinion of the Advocate General in *CIWF*, paras. 92-93.

Community institutions, but is more of an ancillary concern to the functioning of the internal market. Neither does animal welfare have the transboundary character that protected environmental interests may have (e.g., conservation of migratory birds, preserving an endangered species protected at the European level, transboundary pollution), unless there is a danger of animal disease that could affect animals beyond the borders of a single Member State.³⁹ Therefore, it is highly doubtful whether the Court would consider this link (alarming public opinion) to be sufficient to apply higher welfare standards extraterritorially.

2.2. Extraterritorial character of Article 30 (applying higher standards to foreign products on the basis of Article 30)

The possibility of invoking Article 30 extraterritorially has been under considerable debate. In practical terms, Article 30 could become operable in those areas of animal welfare that have not been subject to exhaustive Community harmonization (which calls for a case-by-case assessment), or in case a Member State is not complying with the harmonizing directive.

One commentator has correctly stated that Article 30 would lose its meaning in relation to Article 29 (ex Art 34) if export restrictions were not allowed to be justified on the basis of processing methods employed in other Member States.⁴⁰ Namely, as Article 29 deals with trade restrictions on *exports* then this is bound to lead to consequences outside the territory of the Member State applying the measure. According to Munoz the wording of Article 30 does not indicate that there should be a difference in treatment between its application to import and export restrictions. Similarly, “a Member State is unlikely to ban the import or export of animals because of possible cruelty to those animals *within its own territory*” (emphasis in the original).⁴¹ Hence, it cannot be claimed that all State actions, undertaken to

³⁹ Theoretically, it might be possible to establish a physical link in animal protection cases between the country exporting the animals and the country importing them. Namely, if the exporting country has raised the animals under inhumane conditions, they may be more prone to illness, and thereby affect the stocks of farm animals raised in the importing country. However, no such link can be established in the case of exports.

⁴⁰ See Munoz, *supra*, n. 20, at p 839.

⁴¹ M.A. Jarvis, *The Application of EC Law by National Courts. The Free Movement of Goods*, Oxford, Clarendon Press, 1998, at p 281. Notaro notes that the wording of Article 30 does not provide conclusive evidence of either admitting or excluding the extraterritorial application of national legislation in the absence of Community harmonization. See N. Notaro, “The New Generation Case Law on Trade and Environment”, (2000) *ELRev* 467, at p 474.

protect animals that can have effects on the territories of other Member States, are prohibited, because it would go against the very wording of Article 30.

The above conclusion is further supported by the Opinion of the Advocate General in *Van den Burg*, where he elaborated thoroughly on the extraterritoriality of Article 30 and admitted that Article 30 does not expressly state that the interests it protects must be located in the legislating Member State.⁴² He gave a wide scope of application to Article 30 by justifying his approach with the “transfrontier nature of the protection of birds”. At the same time, the Advocate General pointed out that encouragement of such extraterritorial application cannot be accepted either, because it contradicts the principle of mutual recognition.⁴³ The principle of mutual recognition does not, however, mean blind trust in the practices of other Member States,⁴⁴ especially when application of Article 30 is at issue.⁴⁵ None the less, it has to be kept in mind that conservationist concerns are separate from welfare concerns, and therefore, no definitive conclusions can be drawn from the *Van den Burg* case.

The issue of imposing stricter standards on out-of-state goods is relevant also in the light of a Member State’s failure to apply the established minimum rules, as was the case in *Hedley Lomas*. Although the possibility to impose retaliatory measures - or in other words, ban imports or exports on the basis of Article 30 - has been condemned, Community law does not rule out this possibility altogether.⁴⁶ Non-compliance with a Community act that

⁴² The Commission in the *Van den Burg* case actually took the position that “it is immediately apparent from Article 36 that the aim of protecting animal life can apply equally well to animals which do not occur in the country adopting protective measures as to animal species actually found there”. See the Opinion of Advocate General van Gerven in *Van den Burg* [1990] ECR I-02143, para. 7(2).

⁴³ *Ibid.*, para. 7(2).

⁴⁴ Kurcz notes on the mutual recognition that “Member States are left with a margin of assessment as to whether real equivalence between the rules exists. The recognition can either take the form of acceptance of national rules of the other country or the recognition of controls”. See *supra*, n. 18, at p 295.

⁴⁵ Radford has opined in the context of animal transportation in Europe that “[t]his confidence in [Member States’] good faith does not sit easily with the Commission’s own admission that the transport directives have been systematically flouted”. See Radford, *supra*, n. 8, at p 431.

⁴⁶ Betlem also states that “even where Community law insists on home State control, the Court allows double enforcement provided the second State seeks to uphold so-called *general protective rules*” (emphasis added). At the same time he admits that it is not yet clear what provisions will be covered by this notion. See G. Betlem, “Cross-border Private Enforcement of Community Law”, in J.A.E. Vervaele, G. Betlem, R. De Lange, A.G. Veldman (eds.),

aims to protect the health and life of animals endangers the attainment of the aims stipulated in Article 30. The Advocate General in *CIWF* noted that “failure to implement measures enabling the aim stated by Article 36 to be achieved can make recourse to that provision legitimate”.⁴⁷ In the area of waste, Ziegler has pointed out that if it becomes clear that exported goods will be handled contrary to the security provisions of the importing Member State, then “the exporting Member State has a certain responsibility towards the importing Member State and population concerned”⁴⁸ and may ban the exportation. He derives this from the principle of mutual loyalty and co-operation within the Community. Although this assertion is made in relation to the specific area of waste management, it shows that a Member State’s concerns do not necessarily end at its borders.

There is some support towards extraterritorial action under Article 30 in cases where serious danger to human life is involved.⁴⁹ Advocate General Jacobs found in *Leifer and Werner*⁵⁰ that it would be indefensible to interpret the concept of protecting human life and health as “not allowing certain export restrictions aimed at not aggravating the loss of life *in general*”

Compliance and Enforcement of European Community Law, Hague, Kluwer Law International, 1999, pp 391-418, at p 412.

⁴⁷ Opinion of Advocate General in *CIWF*, para. 82. The Advocate General’s suggestion in *Hedley Lomas* (see Opinion, para. 30) that the UK could have, in the infringement proceedings brought against Spain, obtained authorization under Article 186 of the EC Treaty (now Art 243) to suspend temporarily the issue of licenses for the export of live animals to Spain, is undermined due to the fact that Member States are reluctant to bring proceedings under Article 227 (ex Art 170). See Betlem, *supra*, n. 46, at p 398. Article 227 provides: “(1) A Member State which considers that another Member State has failed to fulfil an obligation under this Treaty may bring the matter before the Court of Justice. (2) Before a Member State brings an action against another Member State for an alleged infringement of an obligation under this Treaty, it shall bring the matter before the Commission. (3) The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party’s case both orally and in writing. (4) If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court of Justice”. Weatherill also states that litigation can be no more than a single component of a more broadly based strategy for securing a viable internal market and it is especially “vulnerable to criticism for its patchy effect in the field of positive rather than negative law”. See Weatherill in *Harmonization in the Internal Market*, see *supra*, n. 29, at p 71.

⁴⁸ A.R. Ziegler, *Trade and environmental law in the European Community*, Oxford, Clarendon Press, 1996, at p 90.

⁴⁹ See Betlem, *supra*, n. 46, at p 400.

⁵⁰ Case C-83/94, *Criminal Proceedings against Peter Leifer, Reinhold Otto Krauskopf, Otto Holzer (Leifer)* [1995] ECR I-3231; Case C-70/94, *Fritz Werner Industrie-Ausrüstungen GmbH v Federal Republic of Germany (Werner)* [1995] ECR I-3189.

(emphasis added).⁵¹ The Court, however, did not rule on this matter, and it remains an open question whether the Court would share the interpretation given by the Advocate General, or whether the Court would require the establishment of a Community or Member State interest in protecting human life abroad.⁵² It may be analogically proposed that considerations over bad living conditions and cruel treatment should allow protecting the life and health of animals in general as well. Moreover, a Member State has sufficient interest in protecting the welfare of animals destined for export (and banning the export of these animals to that effect) due to the simple fact that the animals are located on its territory before exportation, so that no further interests have to be established if the animals were to be exported. Even if human health and life rank as the highest of all interests to be protected under Article 30, it must be noted that the level of protection and the importance attached by Member States to different justifications provided for in Article 30 is not for the Community, but for the Member States to decide; and it is not up to the Court to question their legislative choices in this respect.

In conclusion, although theoretically there is a certain leeway for extraterritorial application of the animal health and life protection ground in Article 30, the Court seems unlikely to be open to that view. However, this may not necessarily hold true in relation to the public morality ground. The next chapter aims to show why the animal life and health protection ground should be redefined and how this redefinition affects Member States' possibility to uphold their animal welfare standards in relation to goods imported or exported within the Community.

⁵¹ Jointed Opinion of Advocate General Jacobs in *Werner and Leifer* [1995] ECR I-03189, para. 59.

⁵² I. Govaere, "Comment on the Court decisions in Case C-70/94, *Fritz Werner Industrie-Ausrüstungen GmbH v Federal Republic of Germany*, [1995] ECR I-3189 and Case C-83/94, *Criminal Proceedings against Peter Leifer, Reinhold Otto Krauskopf, Otto Holzer (Leifer)*, [1995] ECR I-3231; judgments of the Court of 17 October 1995", (1997) *CMLRev* 1019, at p 1034.

II Imposing trade restrictions to protect public morals on animal welfare grounds

Animal welfare is a concept that is closely bound up with the moral perception as to what is right and wrong, instead of pure understanding of what is good or bad in relation to the commercial value of animals. The Community has adopted harmonizing measures that cannot be considered only as a means of protecting the health and life of animals, but as a means of avoiding their unnecessary suffering. Protecting animal life and health is a moral rather than a purely physical concept. It is proposed here that such an approach towards animal protection should allow tackling it in a way that permits extraterritorial implications, i.e. making it possible to impose trade restrictions within the European Community.

1. Animal welfare in Article 30: falling under the animal life and health protection or public morals justification

The subsequent discussion will show that national trade measures that aim to guarantee the welfare of animals can be justified on either ground: animal life and health protection, or public morality. It is asserted that the animal life and health protection ground entails moral considerations, and therefore ought to be treated in a similar way as the public morality ground.

1.1. Animal welfare in Article 30: falling under the animal life and health protection ground

In the following it will be demonstrated that due to the different scopes of protection attributable to the so-called animal protection directives and to the Article 30 animal life and health protection ground, a Member State should be able to adopt measures on the basis of Article 30's animal life and health protection justification.

For the purposes of establishing the difference in relative scope of the directives and of Article 30, it is necessary to ascertain the specific scope of animal welfare considerations in Article 30 and the respective animal protection directives.

The concept of unnecessary suffering is inherently related to the concept of welfare and in the words of Dawkins involves "unpleasant

subjective feelings”.⁵³ According to Broom, “welfare” is a wider term than “suffering” in the sense that suffering is associated with poor welfare but there can be poor welfare in the absence of suffering.⁵⁴ Animal welfare has been characterized through the Five Freedoms: freedom from thirst, hunger and malnutrition, freedom from discomfort, freedom from pain, injury and disease, freedom to express normal behavior, and freedom from fear and distress.⁵⁵ Hence, animal welfare is considered also to encompass situations that can *lead* to unnecessary suffering, i.e. the suffering need not occur at all times.

Opinions differ on the existence of animal welfare as an ethical concern in the Article 30 animal health and life protection justification. However, the Court has impliedly endorsed this ethical welfare approach in Article 30 in *CIWF* as well as in *Hedley Lomas* when deciding on the comprehensiveness of the directives in these cases. Namely, the Court recalled in *Hedley Lomas* that “recourse to Article 36 is no longer possible where the Community directives provide for harmonization of the measures necessary to achieve *the specific objective which would be furthered by reliance upon this provision*” (emphasis added).⁵⁶ The export restrictions, invoked on the basis of Article 30, were aimed at the avoidance of unnecessary suffering of animals destined for export to Spain, where allegedly no proper stunning was performed on the animals before slaughter. Similarly, the potential export restrictions sought by animal protection organizations in *CIWF* were aimed at protecting veal calves, which was also the aim of the Calves Directive, the only difference being in the level of protection. As the Court found the relevant directives further the same aims as the (actual or potential) export restrictions, recourse to Article 30 to impose trade restrictions was precluded. This indicates that the Article 30 animal health and life protection ground also includes the subjective aim of protecting

⁵³ Referred to by D.M. Broom in “Welfare and Conservation” in *Animal Welfare & The Environment. An RSPCA Book*, pp 90-101, at p 92.

⁵⁴ *Ibid.*, at p 93. Broom brings an example of an animal reared throughout its life in a situation of sensory deprivation. The animal may not function normally or even not feel the suffering to the normal extent as a consequence of this sensory deprivation. Broom concludes that if there is a substantial enough change in the functioning of the animal, it is possible to say that its welfare is poor, even if the animal itself does not detect that its welfare is poor.

⁵⁵ M. Winter, C. Fry, S.P. Carruthers, “European agricultural policy and farm animal welfare”, (1998) *Food Policy* 305, Vol. 23.

⁵⁶ In *Hedley Lomas*, para. 18.

animals from unnecessary suffering and/or guaranteeing their welfare. Indeed, the definition of “health” does not necessarily encompass only the physical state of the animal’s body.⁵⁷ Furthermore, although there is no express reference to animal welfare in the EC Treaty, the Protocol on Animal Welfare⁵⁸ requires that full regard be paid to the welfare requirements of animals as sentient beings. In sum, there should be no doubt that the Article 30 animal health and life protection justification at the very least aims to protect animals from unnecessary suffering.

It may be argued that Article 30 embodies an even broader scope in protecting animal health and life than the harmonizing directives, which only aim to avoid unnecessary suffering (and therefore deal mainly with the consequences of poor welfare conditions). As indicated above, the scope of the concepts of welfare and suffering is itself different.⁵⁹ It is logical that constant poor welfare can lead to suffering and that such suffering can only be avoided by eliminating the reasons leading to such suffering. It may also be argued that poor welfare advances the likelihood of animals falling ill, and in order to prevent such damage to animals’ health, poor welfare conditions ought to be removed. For these reasons, it is possible to argue that the animal life and health protection ground encompasses also guaranteeing animal welfare, not just avoiding unnecessary suffering.

On the basis of the above observations, it may be proposed that the broader scope of the Article 30 animal health and life protection ground (i.e. animal welfare as opposed to the narrower concept of unnecessary suffering) renders Community directives on animal protection non-exhaustive, so that recourse to Article 30 to pursue the welfare of animals is possible.⁶⁰ However,

⁵⁷ Michaud brings out one definition of the term “health”: “1. the general condition of the body and mind with reference to soundness and vigor.... 2. soundness of body and mind; freedom from disease or ailment.” (taken from the Random House College Dictionary, 609, rev. ed. 1982). On the basis of this definition he concludes that such a definition may include pain experienced by an animal while trapped in a leghold trap. P.V. Michaud, “Caught in a Trap: The European Union Leghold Trap Debate”, (1997) 6 *Minnesota Journal of Global Trade* 355, footnote 123.

⁵⁸ See *infra*, n. 71.

⁵⁹ See Broom, *supra*, n. 53.

⁶⁰ Van Calster supports this view as well, but he classifies animal welfare as a mandatory requirement and not an Article 30 exception. Furthermore, he takes even a bolder approach and does not compare the scope of the Calves Directive with the scope of the animal welfare ground (as a mandatory requirement), but he considers them to be qualitatively different and mutually exclusive, the first concentrating on animal health issues, while the latter on animal welfare. He opines that the Calves Directive under discussion in *CIWF* “did not seek to

it must not be forgotten that the relevant Community directives have been adopted to facilitate the functioning of the internal market, and Article 30, as an exception to one of the fundamental principles of the Treaty, has to be interpreted narrowly.⁶¹ Therefore, the conclusion that animal health and life protection justification in Article 30 is wider in its scope than the relevant Community directives may appear too bold.

None the less, a Member State seeking to promote animal welfare, and not just the avoidance of unnecessary suffering, could have the possibility to resort to Article 30 on the public morality ground. Allowing resort to Article 30's public morality justification to promote welfare of animals is not based on the use of different scientific data or better welfare indicators,⁶² but on the moral judgment inherent in the decision on the level of protection considered appropriate by a Member State. This proposal is rather based on considerations of value than law. Subsequently, it will be examined in detail whether public morality is a suitable ground to address animal welfare concerns.⁶³

1.2. Animal welfare in Article 30: falling under the public morals justification

In *CIWF*, the Advocate General acknowledged the possibility of considering the unnecessary suffering caused to animals reared in veal crates as a matter of public morality.⁶⁴ The Court, on the contrary, perceived public morality as an aspect of justifying animal health protection, and thereby constituting an

harmonize national rules that protect the animal as a sentient being, and such national rules are therefore not pre-empted by the Community legislation at issue". However, it has been shown above that the relevant Directive actually did seek to avoid the unnecessary suffering of veal calves, and it should not make a difference whether the underlying motive of the Council in inserting such an aim into the preamble of the relevant directive was to reduce the state of distress of animals or to protect their health that could be damaged by such a constant state of distress. Van Calster in *Export Restrictions*, supra, n. 1, at p 348.

⁶¹ Cases 46/76 *Bauhuis v Netherlands* [1977] ECR 5 and C-367/89 *Richardt* [1991] ECR I-4621.

⁶² According to Winter, "[w]hile philosophy- or science-based definitions may differ radically, they often translate into similar practical criteria, with the result that there is a fairly general consensus as to the main determinants of the welfare of farm animals". See Winter et al., supra, n. 55, at p 307.

⁶³ Although the Advocate General in *CIWF* tackled, and the Court touched upon, the public policy justification as well, it is not addressed in this paper, because the point of departure, due to its specific character, is animal protection as a moral issue and not as a policy issue.

⁶⁴ Opinion of the Advocate General in *CIWF*, para. 104. The Advocate General opined that "the fact that a Member State should consider that harm unjustifiably caused to the life or health of domestic animals, even for economic purposes, through the use of a particular rearing method is a matter of public morality in that State does not appear to be manifestly contrary to Article 36".

object of the harmonizing directive.⁶⁵ This conclusion does not seem to be totally wrong. However, the consequences that the Court attached to such a conclusion - that the public morality aspect fell into the realm of the harmonizing directive - seem questionable.

Moral considerations form part of Community decision-making in the area of animal life and health protection. Firstly, Community directives that aim to protect animals⁶⁶ not only include *objective criteria* to guarantee normal health conditions to animals in order to avoid illnesses and death, but also *subjective criteria* to avoid illness and death accruing from the psychological state of animals (e.g. enabling animals to behave as naturally as possible⁶⁷). It may be difficult to distinguish between these two criteria due to their causal relationship and the effects they have on animals' health: animals who are in constant distress are more prone to fall ill than animals not suffering such distress.⁶⁸ According to Camm and Bowles⁶⁹ it is not so clear in the context of common agricultural policy whether Directives addressing protection of animals are driven by welfare concerns or rather by concerns for the commercial value of farm stocks. However, they state that by the introduction of the Protocol on Animal Welfare⁷⁰ in the Amsterdam Treaty,

⁶⁵ In *CIWF*, para. 66.

⁶⁶ These directives are: (1) the use of animals in experiments (Directive 86/609/EC; OJ L 358, p 1); (2) import of species: animal health requirements for importing species into the Community (Directive 92/65/EC; OJ L 268, p 54), and veterinary checks on the import of certain animals (Directive 90/425/EC; OJ L 224, p 29); (3) Council Directive on the protection of animals during transport (Directive 91/628/EEC; OJ L 340, p 17); (4) Council Directive laying down minimum standards for the protection of pigs (Directive 91/630/EEC; OJ L 340, p 33); (5) Council Directive laying down minimum standards for the protection of laying hens (Directive 1999/74/EC; OJ L 203, p 53); (6) Council Directive laying down minimum standards for the protection of calves (Directive 91/629 EEC; OJ L 340, p 28); (7) Council Directive concerning the protection of animals kept for farming purposes (Directive 98/58/EC; OJ L 221, p 23); (10) the import of certain seal products (Directive 83/129; OJ L 91, p 30).

⁶⁷ To have freedom of movement and to be able to perform most if not all natural behavior patterns are considered the two essential needs of animals. The company of other animals, particularly of the like kind, is also regarded important. D. Wilkins, "Animal Welfare and the Environment: Are They Always Compatible?" in R.D. Ryder (ed.), *Animal Welfare & The Environment. An RSPCA Book*, Duckworth Publishing, 1992, pp 73-80, at p 74.

⁶⁸ It has been established that transportation impairs the immune system of horses and cattle. „...The weight of the evidence is sufficient to clearly establish that links between stress and disease can already be related to known aspects of immune function". T.E. Gibson (ed.), *The Proceedings of the BVA Animal Welfare Foundations' Fifth Symposium "Animal Disease - A Welfare Problem?*, London, The BVA Animal Welfare Foundation, 1988, at pp 14-15.

⁶⁹ T. Camm, D. Bowles, "Animal Welfare And The Treaty Of Rome - A Legal Analysis Of The Protocol On Animal Welfare And Welfare Standards In The European Union", (2000) *Journal of Environmental Law* 12(197). Available on LexisNexis database. Last visited on 1 April 2003.

⁷⁰ Protocol No. 33, 1997 on Animal Welfare stipulates that "[t]he High Contracting Parties, desiring to ensure improved protection and respect for the welfare of animals as sentient beings, have agreed upon the following provision which shall be annexed to the Treaty

resort to the Treaty provisions concerned with the main four areas mentioned in the Protocol have a so-called welfare flavor, and should be applied and interpreted accordingly. Moreover, some of the so-called animal protection directives also establish in the preamble that one of the Community's aims in adopting them is to avoid unnecessary suffering of animals.⁷¹

Secondly, although the setting of standards in the so-called animal protection directives is based on scientific data,⁷² the choice of level of protection still depends on the balancing of costs and benefits accruing to the economic operators and the animals, and this choice inherently involves a moral decision. As one commentator put it: "Whatever the conclusions which may be drawn from empirical research, there will always be a need to draw the line between acceptability and non-acceptability and that decision can only be made through an application of moral and pragmatic reasoning".⁷³ Consequently, it may be asserted that moral considerations form an inherent part of decision-making in this area. However, this should not preclude

establishing the European Community, 'In formulating and implementing the Community's agriculture, transport, internal market and research policies, the Community and the Member States shall pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.'". D. Wyatt (ed.), *Rudden & Wyatt's EU Treaties & Legislation*, (8th ed.).

⁷¹ Council Directive 88/166/EEC of 7 March 1988 complying with the judgment of the Court of Justice in Case 131/86 (annulment of Council Directive 86/113/EEC of 25 March 1986 laying down minimum standards for the protection of laying hens kept in battery cages; OJ L 074, 19/03/1988, p 83) acknowledging that the respective means of housing may, in certain cases, lead to unnecessary and excessive suffering on the part of the animal. Council Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing (OJ L 340, 31/12/1993, p 21) states that at the time of slaughter or killing animals should be spared any avoidable pain or suffering. The different Community directives do not seem to support solely the welfare or solely the unnecessary suffering approach. These terms are used interchangeably. For example, the Directive on the protection of animals kept for farming purposes refers mostly to avoiding unnecessary suffering, whereas the more specific directives, such as the Directive laying down minimum standards for the protection of pigs, do not use that phrase. In sum, it may be said that each Directive has to be assessed contextually in the light of the relevant national rules that establish higher standards.

⁷² Broom refers in this case to the term "measurement". He states that "measures of poor welfare include finding that, because of the way an animal is kept or treated, it is not able to live as long or finding that it is not able to grow or is not able to breed. Also an increased susceptibility to disease is a measure of poor welfare. In addition, self-narcotisation is a method which animals can use to cope with difficulties using endogenous opioids. The measurement of these opioids in their bodies can indicate the state of the animals' welfare". See *supra*, n. 53, at pp 91-92.

⁷³ S.R. Harrop, "The International Regulation of Animal Welfare And Conservation Issues Through Standards Dealing With The Trapping Of Wild Mammals", (2000) *Journal of Environmental Law* 12(333). Harrop adds that the decisions concerns (*inter alia*), first, the extent to which we are prepared to allow animals to suffer in the interests of the commercial fur trade and, second, the extent to which the market will bear the inevitable increased cost of humane methods.

invoking the public morality justification to protect animals within the Community.

The decision on the level of animal protection is closely related to the values of the respective society. For this reason, moral considerations taken into account at the time of adoption of the directive should not be equated with the moral response made on the part of the public of a Member State in relation to the standards laid down in the directive. This should be even more so due to the fact that most of the directives on animal welfare only establish minimum standards. Notaro is right in asserting that the Court in *CIWF* seemed to confuse cause (low level of welfare) with effect (public discontent with this low level).⁷⁴

Moreover, the Court has expressed in *Henn and Darby* that it is in principle for each Member State to determine the requirements of public morality in its territory, in accordance with its own scale of values and in the form selected by it.⁷⁵ Although animal welfare and public morality are closely related and even intertwined, they are still two distinct concepts that cannot be put under one and the same umbrella. Hence, as long as Member States have not given up their competence in protecting public morality, the Court should not interpret animal protection directives in a way as if they had either.⁷⁶ Consequently, recourse to the public morality ground as an *independent justification* should still be possible.

There is a further issue as to whether animal welfare can fit into the concept of public morality. No specific guidelines for the interpretation and application of the public morality concept exist on the European or the international level. At the one extreme, it is proposed that a measure aimed at the protection of human, animal or plant life or health could also be considered to be justifiable as protecting public morals, i.e. that the two simply coincide.⁷⁷ Such an approach seems over-inclusive. Charnovitz has suggested in the WTO context that international human rights law should be

⁷⁴ See Notaro, *supra*, n. 41, at pp 474-475.

⁷⁵ Case 34/79 *Regina v Maurice Donald Henn and John Frederick Ernest Darby (Henn & Darby)* [1979] ECR 3795, para. 15.

⁷⁶ Munoz argues that as the Calves Directive does not deal with public morality, there is still no harmonization concerning this ground. See *supra*, n. 20, at p 834.

⁷⁷ C.T. Feddersen, "Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and "Conventional" Rules of Interpretation", (1998) 7 *Minnesota Journal of Global Trade* 75, at p 108.

used to ascribe meaning to the vague terms of article XX(a).⁷⁸ However, this approach seems too restrictive. It has been acknowledged at the Community level that although it is up to individual States to furnish the phrase “public morality”, this cannot be done without limits. In *Henn and Darby*, Advocate General Warner, although acknowledging that “[t]he concept of “public morality” is not one that can be made the subject of ... a Community-wide definition”,⁷⁹ none the less limited Member States’ power of appreciation and cited a passage from the European Court of Human Rights’ decision in *Handyside* to that effect: “The domestic margin of appreciation ... goes hand in hand with a European supervision ...”. In similar vein, the Advocate General in *CIWF* opined that the public morality ground has to be subjected to minimal review by the Court,⁸⁰ in spite of the specific character accorded to it. He proposed the subsequent test: to remove from the concept of “public morality” practices or domestic rules pursuing aims that *clearly* cannot be a matter of public morality.⁸¹

Legal history and scholarly opinion provide evidence that animal welfare can be considered a public morality issue.⁸² Therefore, it seems that animal welfare can be inserted under the concept of “public morality” without constituting a manifest contradiction with Article 30.

However, in *CIWF* the Court denied the possibility of resorting to the public morality ground in order to unilaterally challenge a harmonizing measure adopted by the Community *when the Member State relies on the views or the behavior of a section of national public opinion*.⁸³ This approach of the Court has been heavily criticized. For example, Van Calster equates the

⁷⁸ S. Charnovitz, “The Moral Exception in Trade Policy”, (1998) 38 *Virginia Journal of International Law* 689, at p 742.

⁷⁹ Opinion of Advocate General Warner in *Henn & Darby* [1979] ECR 3818, at pp 3821-3822.

⁸⁰ Opinion of Advocate General Léger in *CIWF*, para. 101. In his opinion it is necessary to allow “national authorities sufficient discretion to determine the requirements which ensue from public morality, within the bounds imposed by the Treaty”. *Ibid.*, para. 102.

⁸¹ Opinion of Advocate General Léger in *CIWF*, para. 103.

⁸² Charnovitz summarizes, after analyzing several international treaties, that “it seems clear that the international lawmaking regarding slavery, firearms, opium, pornography, and animal cruelty sprung from beliefs about morality and rectitude”. See *supra*, n. 78, at p 713. In similar vein, at pages 729-730, he concludes that “the range of policies covered by Article XX(a) would seemingly include slavery, weapons, narcotics, liquor, pornography, religion, compulsory labour, and animal welfare”. Article XX(a) of the General Agreement on Tariffs and Trade (GATT) is a counterpart of Article 30 of the ECT public morality exception, and provides a Member State with the possibility to impose trade restrictions to protect public morals. GATT Agreement available on the Internet at: http://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm. Last visited on 31 July 2003.

⁸³ In *CIWF*, para. 67.

Court's position with the adoption of a *de minimis* rule as to the scale of a nation that expresses public opinion and asserts that "public morality is hardly a terrain for quantification".⁸⁴ The question arises whether the Court would have accepted resort to the public morality ground if the respective UK laws had specifically provided for a ground to impose export bans in order to protect animals.⁸⁵ But this is not a matter for the Court to elaborate on; it is purely a matter of internal procedure of the Member State. It should be up to the Member States themselves to establish the objectives and decide on the choice of measures to achieve those objectives. The Court's task is to ascertain whether such measures serve protectionist interests or not.

2. Extraterritorial application of the public morals ground

In the previous chapter it was demonstrated that Member States should have the possibility to resort to the public morality ground in Article 30 to protect animals. Subsequently, it will be examined by using one of the ECJ's public morals case - *Henn and Darby*⁸⁶ - how this affects invoking import and export bans by a Member State, specifically addressing the requirement of direct connection between the Member State banning the trade and the animals it seeks to protect, and the non-acceptability of extending domestic standards to foreign products, even if they comply with the Community's minimum standard.

2.1. Similarities and differences in protecting public morals in *Henn & Darby* and in animal welfare cases

In *Henn and Darby* the Court held that the UK ban on the import of indecent and obscene materials originating in Germany was compatible with Article 30. Consequently, it was acceptable that the UK applied its public morals

⁸⁴ Van Calster in *Export Restrictions*, see supra, n. 1, at pp 346-347.

⁸⁵ Betlem suggests that where the whole public opinion, and not just a sector of it is affected then the justification ground of public morality does come into play. See supra, n. 46, at p 400. Betlem does not, however, elaborate on the issue how to establish when the public opinion constitutes "whole" and when it is just an opinion of a sector of a public, and whether the public opinion should be documented anywhere.

⁸⁶ Case 34/79 *Regina v Maurice Donald Henn and John Frederick Ernest Darby (Henn & Darby)* [1979] ECR 3795. A later case - Case 121/85 *Conegate Limited v HM Customs & Excise (Conegate)* [1986] ECR 1007 - confirms the approach taken by the Court in *Henn and Darby* and is therefore not dealt with separately.

standards to foreign goods and prevented them from being marketed on its territory. The only precondition for the imposition of such a trade restriction was the prohibition of any lawful trade in the same goods within the UK's own territory.⁸⁷ The special nature of the public morality concept explains why such a restriction on the marketing of pornographic materials was permitted in *Henn and Darby*. Public morality cannot be subject to objective assessment and thereby to common European standards (compliance with which would guarantee access to the markets of all Member States). As Advocate General Warner pointed out in his opinion in *Henn and Darby*, public morality "is a matter of individual opinion, rather than expert opinion".⁸⁸ The Advocate General went on to differentiate the public morality ground from other exceptions provided for in Article 30:⁸⁹

[A]lthough no doubt the opinions of experts may differ on what may be justifiably prescribed for the protection of indications of origin, of consumers generally, and of the health and life of humans, animals or plants, those are matters which, at the end of the day, are susceptible of objective assessment. They are, moreover, matters on which it is, by and large, possible to prescribe a solution applicable uniformly in all Member States. ... A different approach is, however, in my opinion, inevitable, when the question under consideration is that of the circumstances in which a Member State may be justified in imposing prohibitions or restrictions on imports on grounds of public morality.

The objective assessment referred to by the Advocate General involves use of scientific criteria for the purposes of establishing the appropriate level of animal welfare. However, it is difficult to agree with the Advocate General on one important point. The decision on the appropriate level of animal life and health protection also involves, as shown in the previous section, subjective elements - that is, moral considerations. The final decision on the costs and benefits is an ethical one, and the different level of protection granted to animals in different Member States proves the subjective nature of the issue.⁹⁰

⁸⁷ In *Henn & Darby*, para. 22.

⁸⁸ Opinion of the Advocate General in *Henn & Darby*, see supra, n. 79, at p 3821.

⁸⁹ Ibid.

⁹⁰ Although human health and life protection may also involve moral considerations, it is different from the animal health and life protection ground, because the latter seeks to encompass a much wider spectrum of protection due to the lack of other instruments of protection and due to the legal status of animals in human societies. For example, human life and health protection focuses mainly on dangerous chemical substances in foodstuffs or in the

It may be argued that the *Henn and Darby* type of cases are different from animal protection cases, because in the former cases the detriment to the public morals in the UK derives from the pornographic materials themselves (product characteristics) if these products were marketed in the UK, whilst in the latter cases there can be no moral detriment, because the animals or animal products remain the same products regardless of the way the animals were bred, reared, or slaughtered. The debate ultimately comes down to distinguishing between products depending on their inherent characteristics (composition, appearance) and products depending on the way they have been produced or harvested.⁹¹ There are several reasons that endorse a change of approach in this respect.

Firstly, increasing state practice and advanced consumer awareness differentiates products on the basis of their production methods. This indicates that treating products as like products, although they have been produced or harvested by different methods, is becoming out-dated. For example, over 60 countries prohibit marketing of furs from animals caught by inhumane methods. For these countries, the impact of trapping methods is inherently related to the product.⁹²

Furthermore, it seems that once the Court has accepted an import ban of the kind under discussion in *Henn and Darby*, the Court cannot deny a Member State this possibility in animal welfare cases: important parallels can be drawn between the *Henn and Darby* case and a case where an import ban is invoked to protect animals. The same concerns apply in the importation of indecent and obscene materials: society does not want to promote the production of these materials. In animal protection cases, the object of protection, or the source of unacceptability, is qualitatively the same:⁹³ the

surrounding environment, whereas animal health and life protection also aims to prevent unnecessary suffering, which is distinct from medical and sanitary considerations (they may be intertwined, but this connection does not have to occur). Human beings are protected by human rights instruments in these cases.

⁹¹ In the European Community, the distinction between product characteristics and process standards has not been so stark, because many process/production methods have been subject to Community regulation.

⁹² See Nollkaemper, *supra*, n. 22, at p 252. Charnovitz also asserts that “the requirement that all tuna sold be dolphin-safe is functionally equivalent to the requirement that all soft drinks sold be in recyclable bottles”. S. Charnovitz, *Environmental Harmonization and Trade Policy* (Environmental Harmonization). Available on the Internet at: <http://www.geocities.com/charnovitz/Ciel.htm>. Last visited on 7 September 2003.

⁹³ Scott also argues that an import ban to protect animals in other states might be considered comparable to a ban on the importation of pornographic or racist literature introduced “not

interest in banning imports lies “in the value which that society attaches to knowing that it is not participating, through trade, in practices which it considers wrong”.⁹⁴ By providing a market for the exporting Member State, the importing Member State indirectly promotes production or harvesting methods that it considers morally repugnant.⁹⁵ However, in *Henn and Darby*-type cases, there is an additional concern not related to the production phase. Society also seeks to protect its members from the negative effects on morals caused by the use of the imported products. Hence, the time factor in *Henn and Darby* has been extended to include not only the production phase, but also the consumption phase. This should not, however, affect the importance a society attaches to the production phase.

As to export bans, these would not be directed at protecting the morals of the importing state, but the morals of the exporting state on a similar ground as proposed above in relation to import restrictions: with the export ban the exporting State condemns and does not want to contribute to immoral practices exercised by the importing state. It ought to be considered a legitimate interest of a State to protect its moral beliefs and impose a trade ban on animals or animal products, which have been or will be treated in a way it abhors.⁹⁶

However, Howse and Regan abstain from assigning a “physical location to an essentially non-physical effect”.⁹⁷ At the same time they state that “it is

on the basis of evidence of a resulting rise in racism or abuse of women or children, but on the basis quite simply that it is wrong”. See *supra*, n. 9, under the heading “Trade and Environment in the EU and WTO: Conclusions”.

⁹⁴ *Ibid.*, under the heading “Trade and Environment in the EU and WTO: Conclusions”.

⁹⁵ Howse and Regan also acknowledge that the importing country may have a justification for the import restriction which does not depend on influencing behaviour abroad. Using the Shrimp/Turtle dispute (United States - Import of Certain Shrimp and Shrimp Products, Report of the Appellate Panel, WT/DS58/AB/R, 12 Oct. 1998) as an example, they claim that a State may merely want to avoid encouraging the use of [turtle-unfriendly] techniques by buying turtle-unfriendly shrimp. See R. Howse, D. Regan, “The Product/Process Distinction - An Illusory Basis For Disciplining “Unilateralism” In Trade Policy”, (2000) *European Journal of International Law*, 11(249). Available at LexisNexis database. Last visited on 7 May 2003.

⁹⁶ On this basis it is possible to develop a further argument that the protection of the moral autonomy of its society constitutes an interest of that Member State, and the animal rearing practices exercised outside the UK cannot be considered merely as effects produced “on the British territory in which public opinion, like specialized veterinary circles, opposes its maintenance in certain Member States” (Opinion of the Advocate General in *CIWF*, para. 92). This conclusion would do away with the opinion of the Advocate General in *Dassonville* who limited Article 30’s scope to those actions a State takes “exclusively in its own national interests”, and “not for the protection of the interests of other States” (Opinion of the Advocate General in *Dassonville* [1974] ECR 855, at 860).

⁹⁷ See Howse and Regan, *supra*, n. 95.

the country's business (if it chooses) to avoid encouraging or being associated with what it regards as harmful or wicked behavior, regardless of where the physical effects are felt".⁹⁸ The ECJ has not yet definitively ruled on the nature of a connection between the territories of two Member States if one of them wishes to impose trade restrictions. The above observations, however, suggest that the Court should be more open to consider not only physical, but also moral effects.

There are several examples in trade history where trade bans have been imposed on moral grounds, in the absence of any direct physical links between the country imposing the restrictions and the country engaging in immoral practices. In 1983, the European Commission prohibited the importation of skins of certain seal pups due to public outrage at the killing of baby seals by Canadians.⁹⁹ The Commission has forbidden the importation of animal pelts unless the country of origin has banned leghold traps or unless the trapping methods used for the species meet "internationally agreed humane trapping standards".¹⁰⁰ Similarly, U.S. law forbids the importation of meat products unless the livestock from which they were produced was slaughtered in accordance with U.S. statutory requirements. Among these requirements is that the slaughtering be "humane".¹⁰¹ However, neither the European Community¹⁰² nor the United States has adopted a uniform approach regarding trade bans on moral grounds, because both are "influenced and influencing states".¹⁰³ For the purposes of clarity this is of course regrettable.

In conclusion, the unfavorable approach towards trade restrictions on the basis of production methods should be abandoned due to the strong impact of these methods on animal welfare and due to the importance States and consumers attribute to this impact by considering them as an inherent part of the product itself. But more importantly, because of the moral implications that certain production methods may have, trade restrictions

⁹⁸ *Ibid.*

⁹⁹ Council Directive concerning the importation of skins of certain seal pups (Directive 83/129; OJ L 91, p 30).

¹⁰⁰ See Charnovitz, *supra*, n. 78, at p 697.

¹⁰¹ *Ibid.*

¹⁰² For example, in *Tuna/Dolphin II*, the representatives of the Commission and the Netherlands postulated that under Article XX(a), "it could only make sense for a country to take border measures designed to protect its own public morals, not the public morals outside its national jurisdiction." Cited by Charnovitz, *supra*, n. 78, at p 724.

¹⁰³ See Nollkaemper, *supra*, n. 22, at p 246.

should be allowed in some instances, even if no direct physical effects from these production methods on the territory of the State seeking to impose these restrictions can be established.

Even more, the Court's objective in preventing protectionist measures is a legitimate one, but should not be exclusively directed towards trade restrictions imposed on the basis of process methods.¹⁰⁴ The same concerns apply to trade restrictions imposed on the basis of product characteristics, which the Community seems more willing to accept. The protectionist nature has to be ascertained with the test of necessity and proportionality *stricto sensu* by respective institutions. It seems unjustified to exclude process methods from the realm of State interests in their entirety only due to the fact that they may serve protectionist interests, which may be similarly true in relation to product characteristics.

2.2. Import and export bans to protect the public morals of a Member State

It was argued in the previous section that consumers should not tolerate a product that offends their morals (non-physical effect) more than a product that may harm their health (physical effect). Opponents of trade bans might suggest that instead of an outright prohibition on the import and export of animals or products originating from animals that will or have been treated in a way that is morally unacceptable to the importing or the exporting country, a more lenient approach should be adopted. Namely, consumers can make a purchase choice on the basis of the information provided on the product and thereby do not have to tolerate a product that is not acceptable to them for its non-physical effects. This means that the market, through competition among rules, would be entrusted with the task of subsequently determining the best level of protection of animals to be applied throughout the Community.¹⁰⁵

¹⁰⁴ A similar explanation has been given under the WTO legal framework: “[t]he focus on end-use rather than process and production methods (PPMs) was made to prevent protectionist trade barriers from being put in place to protect, for example, textile manufacturers in developed countries from imports produced in developing countries based on labour-intensive technologies”. See Hobbs, G.E. Isaac, W.A. Kerr, “Ethics, domestic food policy and trade law: assessing the EU animal welfare proposal to the WTO”, (2002) 27 *Food Policy* 437, at p 441.

¹⁰⁵ However, “legislative competition, under mutual recognition, will not bring about the “best” legislation in regulatory terms, but in market terms”. See Maduro, *supra*, n. 21, at p 132.

However, there are several reasons that render labeling an inefficient means of providing the necessary level of protection to animals and thereby protecting the public morals of a Member State. First of all, consumers need information on the way animals are caught, bred, reared, and slaughtered. In most cases, these practices remain hidden from the eyes of the consumer. Consumers also need information on collective behaviour to feel that their choice really does make a difference. This information is not provided by mere labeling. Secondly, consumers who are affected by the regulation directed towards producers, do not purport to have sufficient opportunity, even if they had the information, to express their opinion in relation to that regulation.¹⁰⁶ The main addressees of animal protection directives - the producers - tend to have economic rather than moral considerations in mind. For these reasons, it may be appropriate that the State instead of the market makes the decision on the level of protection by introducing a trade ban.¹⁰⁷ This would prevent sending the wrong signals on market participants' preferences, caused by the particular nature of animal protection and the inadequate participation of consumers in expressing their views on a moral issue.

Due to the Community's objective of removing obstacles to trade between the Member States, States cannot impose trade bans without being subjected to strict scrutiny as to their proportionality. However, before turning to the question of proportionality, it is important to elaborate briefly on the difference in treatment granted to import and export restrictions. Charnovitz has pointed out that import measures to safeguard the morals of a foreign population would receive the strictest scrutiny.¹⁰⁸ This is because imposing export bans usually affects the State's own traders and does not

¹⁰⁶ Maduro also acknowledges that consumers' opportunities of exit are much more limited than those of other groups affected by a regulation. Exit refers to a situation where preferences for a certain regulation over another are expressed by moving to a different jurisdiction. Maduro points out another problem with respect to the representation of consumer interests in regulation: those who are regulated can normally send a clearer and stronger signal to the political process than those who are not regulated but none the less are affected by the regulation. He gives an example from the environmental area: those who are harmed by cross-border pollution are outside the jurisdiction of the pollution regulator and thus cannot exert any form of voice or exit in the decision-making process. See *supra*, n. 21, at pp 141-143.

¹⁰⁷ Interestingly, Howse and Regan point out that no one suggests that a country that wants to prevent the import of assault weapons, or leaded gasoline, or pornography must content itself with labeling requirements. See Howse and Regan, *supra*, n. 95.

¹⁰⁸ See Charnovitz, *supra*, n. 78, at p 731.

have such detrimental effects as import bans on trade between States. Indeed, the case law of the ECJ also supports a different application of Articles 28 and 29: the first creates a positive right of market access, while the second only a negative right not to be discriminated against.¹⁰⁹ However, the Court has considered straightforward restrictions on and/or prohibitions of exports incompatible with Article 29.¹¹⁰ Therefore, a justification under Article 30 may be required also in case of export bans, even if they are invoked in accordance with the principle of non-discrimination.¹¹¹ This does not, however, necessarily imply that Article 29 creates, similarly to Article 28, a general right of market access. It is a sovereign right of a State to impose obstacles to exports as long as the same restrictions apply to products destined for the domestic market and products destined for export. Of course, the scope of this sovereign right has been reduced if a harmonizing Community directive is in force. In this case, however, the Member States may have retained the competence to impose higher standards (minimum harmonization), or may invoke such higher standards to protect public morals.

At the end of the day, it all comes down to the fundamental balancing of the interests of free trade against non-economic interests, or, as Howse and Regan put it, to “the deepest divide between competing understandings”¹¹² of the relevant trade agreement.¹¹³ It is a question of

¹⁰⁹ Van Calster asserts that in the absence of discriminatory aim, Article 29 does not apply. This is the result of the *Groenveld* jurisprudence, which has been sustained ever since. G. van Calster, “Commentary on Hedley Lomas”, (1996/1997) 3 *Columbia Journal of European Law* 132. Available at LexisNexis database. Last visited on 8 July 2003, at p 136. Article 28 catches a wider range of national measures, i.e. also those that are not necessarily discriminatory, but which are indistinctly applicable. In the latter case the rule of reason (mandatory requirements) is applied to save the relevant national measure. Van Calster points out, however, that the rule of reason will be applied also to export restrictions that fall under the common organization of the market (e.g. in Case 190/73 *Officier van Justitie v J.W.J. van Haaster* [1974] ECR 1123).

¹¹⁰ Case C-47/90 *Et. Delhaize Freres SA v Promalvin SA and Bodegas Unidas SA* [1992] ECR 3669; Case 53/76 *Procureur de la Republique v Claude Bouhelier et al.* [1977] ECR 197.

¹¹¹ The paper does not elaborate on the issue whether and under what conditions trade restrictions fall under Articles 28 and 29. It is important to note that the parties did not dispute in *CIWF* nor in *Hedley Lomas* that the actual or potential export restrictions fell/would fall under Article 29. The Advocate General or the Court did not touch upon that issue either. However, there is disagreement among scholars as to the scope of Article 29 and the applicable test to ascertain which national measures fall under the prohibition stipulated in Article 29. For present purposes, it is necessary to show the difference in application of these two Articles in order to illustrate the extent to which Member States have given up their sovereignty in relation to import and export trade that might have adverse effects on the non-economic interests of a Member State.

¹¹² See Howse and Regan, *supra*, n. 95.

balancing the costs and benefits accruing from a trade ban and from the particular interest to be protected, and thereby calls for a case-by-case analysis.

3. Assessing the proportionality of trade restrictions aiming to protect public morals: the constitutional context and the test to be applied in animal protection cases

Allowing recourse to the Article 30 public morality ground to protect animals, or the animal life and health protection ground, calls for a cautious assessment of the national measure in question to eliminate all attempts to disguise protectionist aims under the public morality justification. At the same time, Member States should be granted sufficient discretion to protect their non-economic interests.

The decision on who should assess the necessity/proportionality of a national trade restriction that aims to protect the public morals of a Member State is inherently related to the Court's decision on the applicable test.¹¹⁴ According to Maduro, there are two alternative general concepts behind the control over applying Article 30: to guarantee "economic due process" (in case the ECJ conducts the proportionality test), or to prevent State protectionism (in case the ECJ conducts the necessity test).¹¹⁵ These alternative concepts serve the achievement of three constitutional models: centralization and competition among rules are achieved through guaranteeing economic due process, whereas decentralization is achieved through preventing State protectionism. Therefore, the choice on the

¹¹³ In the opinion of Howse and Regan, the claims on extraterritoriality and sovereignty "are just arguments to elucidate what the trade agreement requires". *Ibid.*

¹¹⁴ Balancing under proportionality is broader and more discretionary than balancing under necessity. "Proportionality implies that the policy objective pursued by a measure can be reconstructed or even abandoned, in part or completely, depending on the costs imposed by the measure. On the other hand, an assessment of necessity of a measure will leave the definition of the policy objective untouched and will concentrate exclusively on determining whether the measure could be achieved in a manner which imposes a less burden on trade." Maduro concludes that the necessity test would be aimed at preventing protectionism and not at controlling the degree of public intervention in the market. See Maduro, *supra*, n. 21, at p 55.

¹¹⁵ See Maduro, *supra*, n. 21, at pp 59-60. The phrase "economic due process" is used by Maduro. *Ibid.*, at p 129. Economic due process aims to protect a fundamental freedom from interventionist public policies that may constitute an obstacle to free trade for market participants of different Member States and of one Member State.

applicable test depends ultimately on the decision as to what kind of Community do Europeans desire.

The opinions of Advocates General in *CIWF*, *Hedley Lomas* and *Van den Burg* and the Court's decision in *Henn and Darby* illustrate the different level of activism adopted in assessing the proportionality of the national measures in question. The different areas involved in these cases may explain the difference in activism:

- the *Van den Burg* case tackled the improvement of stocks of non-endangered bird species;
- the *Hedley Lomas* case dealt with the protection of animal health and life;
- the *CIWF* case, similarly to *Hedley Lomas*, addressed the protection of animal health and life, but through the lens of public morality;
- the *Henn and Darby* case dealt with public morality.

The decision on the level of protection of animal life and health inherently involves a value judgment. For this reason, the Advocate General in *Hedley Lomas* only assessed the necessity of the measure and did not perform the proportionality test *stricto sensu*. By contrast, the Advocate General in *CIWF* did not even perform the necessity test, similarly to the *Henn and Darby* case. In *Henn and Darby*, the Court introduced the principle of equivalence, which means that the national measure can be upheld if the same level of protection is also introduced domestically.¹¹⁶ In contrast, the *Van den Burg* case dealt with a conservation issue, which is a question more objective in its character than animal welfare.¹¹⁷ In *Van den Burg* the Advocate General performed the proportionality test in its fullness. It may be concluded from the tests adopted in the above cases that the Community tends to abstain from encroaching on those areas that embody the values of a

¹¹⁶ The Court stated in *Henn & Darby* that “if a prohibition on the importation of goods is justifiable on grounds of public morality and if it is imposed with that purpose the enforcement of that prohibition cannot, *in the absence within the Member State concerned of a lawful trade in the same goods*, constitute a means of arbitrary discrimination or a disguised restriction on trade contrary to Article 36” (emphasis added). See *supra*, n. 75, para. 22. The phrase “principle of equivalence” is not used here to express the meaning accorded to it in the *Cassis de Dijon* case under the concept of mutual recognition.

¹¹⁷ Although animal conservation as an environmental issue can also involve moral considerations, its aims are generally established in relation to the needs of humankind (e.g. preservation of animal species for future generations), so that a more objective assessment of the measures taken for the purpose of conservation can be applied.

Member State's society and which are therefore traditionally considered to fall under Member State competence, even if this results in trade-hindering consequences.

Taking into account the above considerations, it seems that the most appropriate test for the ECJ to assess the proportionality of national trade measures aiming to protect public morality on the animal life and health protection ground, is the test of necessity. This includes establishing a causal link and the least trade-restrictive character of the measure. Such a test is similar to that adopted by the Advocate General in *Hedley Lomas*. In this case, the Court would ask whether a particular measure is really necessary to attain a certain objective,¹¹⁸ and it does not have to proceed with the balancing of different objectives (and thereby questioning the particular choices of a Member State). The subjective character of animal welfare measures renders the proportionality test in the broader sense too intrusive into the Member State's interests. On the other hand, the *Henn and Darby* kind of equivalence test would probably be too wide for animal welfare cases,¹¹⁹ where objective scientific evidence is still the basis for introducing a national measure to protect public morals on animal welfare ground.

The causality part of the necessity test seems to be satisfied in case the Member State imposing the trade measure has, in its own legislation, introduced the same level of protection that it seeks on the part of another Member State. As to the least-trade restrictive prong of the necessity test, this has to be approached cautiously by the Court, in order not to lower the level of protection sought by a Member State. In *Hedley Lomas* the Advocate General stated that the UK could have imposed on the exporter "measures more conducive to the free movement of goods, such as production of a certificate of conformity for the slaughterhouse of destination".¹²⁰ However, this proposal may seem to constitute a measure less restrictive of trade *de iure*, but ignores the fact that the less restrictive measure may not be as

¹¹⁸ See Notaro, *supra*, n. 41, at pp 486-487.

¹¹⁹ The Commission has stated that a Member State may not ban imports of battery-reared poultry, even where the practice of battery rearing is prohibited within its territory (Answer to written question 375/77; OJ 1977, C 265/8).

¹²⁰ Case 76/86 *Commission v Germany* [1989] ECR 1021, para. 47. The Advocate General in *Hedley Lomas* also pointed out in paragraph 44 that "[i]n refusing to issue any export licences at all, the United Kingdom imposed a blanket ban on exports of live sheep to Spanish slaughterhouses and thereby adopted the measure most restrictive of trade. Such a prohibition is generally regarded as being disproportionate".

effective as the one adopted by the UK, and may, in the end, result in the lowering of the level of protection *de facto*.¹²¹

In addition, it has been suggested that a trade ban should not be policy-oriented, but rather oriented to industrial practices.¹²² In relation to animal protection, this would mean that the import and export ban would not be directed to goods that originate in, or are destined for, countries that have not banned inhumane rearing, slaughtering or other practices related to the treatment of animals in their legislation. Instead, such a ban would concentrate on distinguishing between premises that employ, or do not employ, humane practices. In this case, however, there is no guarantee that animals will not be transported from approved premises to premises that have not been approved, and vice versa. Here, then, the only guarantee appears to be a “blunt” trade ban.¹²³

It has to be noted, however, that in a situation where Community harmonization exists on standards for animal protection, then a “blunt” trade ban invoked on the ground of alleged non-compliance with Community standards by another Member State may not pass the necessity or the proportionality *stricto sensu* test (performed by a national court). This may be so, because a Member State imposing a trade ban does not command the necessary means to establish a violation of the relevant standards by a foreign undertaking. In this case, it seems reasonable firstly to resort to Article 227 procedures, and if no results accrue from that (but after establishing that such alleged infringements actually have occurred or still occur in the other Member State), then invoking trade bans may be considered.

¹²¹ The refusal to issue export licences by the UK arose initially from the failure of the Spanish authorities to monitor compliance with Community law. Whether it is possible to remedy this failure by the production of a certificate of conformity for the slaughterhouse of destination is doubtful, because issuing of such a verification requires constant monitoring, which was actually the weak point in the Spanish authorities' performance in the first place.

¹²² See Charnovitz, *supra*, n. 78, at p 739. Thus, a trade ban on fur caught with a leghold trap (industry-oriented) would be tighter than a ban on fur from countries that permit leghold traps (policy-oriented), because in the latter case a State would be prevented to export its furs even in case when these furs have been caught by humane methods.

¹²³ In Nollkaemper's opinion “the problem of over-inclusiveness is an inevitable consequence of this and in itself is not unreasonable approach”. He also adds that “a choice for alternatives that entail a significant risk that substantial amounts of morally tainted furs enter the market will be a covert way of lowering the level of protection”. See *supra*, n. 22, at pp 253-255.

Conclusion

Although a decision on the level of protection of animals depends on objective scientific data - i.e. determinants that indicate the physical state of the animal - the final decision on the conditions under which animals are kept and on the treatment of animals is made on the basis of a moral assessment of these determinants and the costs that have to be made to guarantee the appropriate level of protection. This implies that the final decision is dependent on the assessor and its moral values. Morality is a concept closely related to the cultural and historical background of a society and therefore varies from State to State. On the basis of these observations this paper proposes that animal welfare, as a moral concept, should allow a Member State to address its public sensibilities and impose trade restrictions on imports from and exports to other Member States where Community standards are not complied with or where the animal welfare standards applied are lower. The specific ground for imposing such trade restrictions would be Article 30 (ex Art 36) animal life and health protection, or alternatively the public morals exception.

At the end of the day it all depends on what kind of Community Europeans desire: are we ready to find a compromise for the sake of unhindered trade, and therefore grant non-economic interests only second place, or is it possible to find a solution that equally satisfies both interests? It may be proposed that Member States should give up more sovereignty to the Community for the establishment of a Community enforcement agency that could coordinate the enforcement of animal welfare legislation in all Member States. This would ease the problem of poor enforcement of Community animal welfare standards. Until these efforts have been made, Member States should have the opportunity to resort to the public morality exception on animal welfare considerations. On the other hand, due to the moral nature of animal protection, it may be claimed that animal welfare cannot be subject to Community harmonization at all. The mechanism provided for in Articles 95(4) and 95(5) could provide more certainty in invoking exceptions to Community standards and in extending the application of domestic standards to foreign products. In that case, Article 95(5) would have to be amended to encompass animal welfare concerns as well.