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SOME POSSIBLE WAYS OF PROVIDING A BETTER BALANCE BETWEEN TRADE LIBERALISATION AND ANIMAL PROTECTION

The WTO is still in its infancy. This gives some hope that it will, in time, become more willing to ensure that its rules do not have detrimental effects on animal protection. Indeed, the shift in WTO S*hrimp-Turtle* rulings between 1998 and 2001 gives grounds for some optimism. This note looks at two areas in which progress would be most helpful in reducing the animal protection problems.

1. Process and production methods

Compassion in World Farming (CIWF) believes that the World Trade Organisation's position on process and production methods (PPMs) should be re-examined.

The current position on PPMs has led to the absurdity that, starting off from a rule (GATT, Article III: 4) that prevents imported products being discriminated against, we arrive at the position where imported products must be treated *more* favourably than domestic ones. Under the present thinking on PPMs, a WTO member can, for example, prohibit the sale of domestically produced stall & tether-pigmeat, but cannot extend that ban to imported pigmeat. Similarly, a WTO member can prohibit battery cages, but cannot restrict the import of battery eggs.

The WTO rules' detrimental influence on animal protection would be much reduced if WTO members could, in their import and marketing regulations, distinguish between products on the basis of their PPMs, with such PPM distinctions being permitted for imported products as well as domestic ones.

We wish to stress that the assumption that the 'rule' on PPMs is set in stone and that WTO members may never make PPM distinctions in respect of imported products is not necessarily correct. The following factors suggest that this conventional wisdom may not be well-founded:

i) The 'rule' against making PPM-based distinctions between otherwise like products does not appear in the text of the GATT; it depends purely on the interpretation of the term "like products".

ii) The interpretation of "like products" flows primarily from the Panel reports in the two *Tuna-Dolphin* cases—neither of which was adopted and so neither is binding.

iii) The case law indicates that consumers' tastes and habits are among the factors that may be taken into account in assessing "likeness." Indeed, in the recent *European Communities-Asbestos* case, the Appellate Body laid great weight on the importance of considering consumers' tastes and habits and stressed that they must be examined in determining "likeness" in cases where the products are physically different. In cases where the evidence shows that consumers are unwilling to substitute one product for another because they are unhappy with the way one has been produced, a future panel or the Appellate Body may be willing to rule that, despite being physically identical or similar, two products are not "like" each other because a significant number of consumers in fact view them as being different and not substitutable for each other.

CIWF wishes to stress the legitimacy of taking account of consumer tastes which in an increasing number of countries do distinguish between products derived from cruel practices and those coming from more humane practices.

Moreover, the Panel in the *European Communities-Asbestos* case noted with approval the statement by the Appellate Body in *Japan-Alcoholic Beverages* that panels must use their best judgment when determining likeness and that no single approach would be appropriate to every single case. In *European Communities-Asbestos*, the Appellate Body stressed the need for an assessment utilising "an unavoidable element of individual, discretionary judgment" to be made on a case-by-case basis. We wish to emphasise the need for each case to be decided on the basis of its facts and merits and for recognition that, in some cases, PPM distinctions may indeed be legitimate.

Interestingly, in the *Shrimp-Turtle* case, the Appellate Body did not criticise the United States for distinguishing between imported shrimp on a PPM basis. In that case, the United States only permitted the import of shrimp if they came from a country that requires the use of a device to exclude the incidental taking of sea-turtles in the shrimp nets. Although this is a PPM distinction, it was not one of the issues considered by the Appellate Body. It is nonetheless encouraging that the Appellate Body made no attempt to condemn the United States for making a PPM distinction.

The position on PPMs must be eased to permit WTO members to make PPM distinctions. Some fear that this would lead to protectionist abuse, with unjustifiable PPM distinctions being made. To prevent such abuse, the ability to make PPM distinctions could be made subject to certain provisos. For example, rules could provide that PPM distinctions must:

a) be transparent, non-discriminatory and proportionate and must not constitute a disguised restriction on trade;

b) be science-based, i.e. there must be a body of science which shows the distinction being made is legitimate in pursuit of the policy objective trying to be achieved;

c) be supported by a significant proportion of the citizens of the country making the distinction; and

d) be concerned with a matter of substance rather than an insignificant point.

2. Can an importing country condition access to its markets on would-be exporters meeting certain animal welfare standards?

CIWF is particularly heartened by both the Panel's and the Appellate Body's statement in *Shrimp-Turtle* in 2001 that an importing country may make it a condition of access to its markets that would-be exporting countries adopt a programme of environmental protection that is comparable in effectiveness (but not essentially the same as) to that of the importing country. CIWF can see no reason why this thinking should not be extended to animal welfare policies.

When *Shrimp-Turtle* was first considered in 1998, the WTO Appellate Body stated in a passage of great importance for the role of GATT, Article XX within the overall GATT rules:

> "It appears to us, however, that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognised as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognised as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies . . . prescribed by the importing country,

> renders a measure a priori incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply."

When the WTO Dispute Panel returned to *Shrimp-Turtle* in 2001, it pointed out:

> "whereas [earlier in the case] the Appellate Body found that requiring the adoption of essentially the same regime constituted arbitrary discrimination, it accepted – at least implicitly – that a requirement that the U.S. and foreign programmes be "comparable in effectiveness" would be compatible with the obligations of the United States under the chapeau of Article XX. This is because it would "permit a degree of discretion or flexibility in how the standards for determining comparability might be applied, in practice, to other countries" ".

The Panel went on to state that it is its understanding that the Appellate Body:

> "found that, while a WTO Member may not impose on exporting members to apply the same standards of environmental protection as those it applies itself, this Member may legitimately require, as a condition of access of certain products to its market, that exporting countries commit themselves to a regulatory programme deemed comparable to its own."

The new Panel's approach was later confirmed as correct when the Appellate Body considered an appeal by Malaysia. The Appellate Body stated that:

> "conditioning market access on the adoption of a programme comparable in effectiveness, allows for sufficient flexibility in the application of the measure so as to avoid "arbitrary or unjustifiable discrimination"."

In the light of the above statements from the WTO Dispute Panel and Appellate Body, the Government should re-examine its thinking about what can be done under the existing WTO rules to restrict imports derived from animals reared to welfare standards which are not comparable in effectiveness to those obtaining in the EU.

The EU may, for example, be able to rely on this approach in, in some way, restricting the import of battery eggs when its own prohibition comes into force in 2012, provided it takes the other measures referred to in the Panel's 2001 *Shrimp-Turtle* ruling such as providing technology transfer. The EU could, for example, offer

to help egg exporting countries with the know-how as to how to successfully operate perchery and free-range systems.

Moreover, the EU has recently decided that it is consistent with the WTO rules for it to ban the testing of cosmetics on animals and also to ban the *sale* of animal-tested cosmetics in the EU, with the sales ban applying to both imported and domestic cosmetics. Surely a similar approach could be taken in the case of eggs. The EU could extend its ban on cages to a ban on the *sale* of cage eggs in the EU, such sales ban to apply to both imported and domestic eggs. This would prevent EU farmers from being undermined by imported cage eggs.

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