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Consistency Testing in WTO Law and the Special Case of Moral Regulation

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Abstract

There is a debate in World Trade Organization (WTO) law about whether the right to regulate for public interest purposes is conditioned on a requirement to do so consistently. While the early Appellate Body (AB) jurisprudence eschewed consistency testing under the formal legal test, it refrained from explicitly rejecting the practice. Subsequent AB rulings have seemingly adopted a narrow type of consistency testing through the doctrine of 'legitimate regulatory distinctions'. A case could also be made that WTO tribunals sometimes embrace consistency testing under Article XX of the General Agreement on Tariffs and Trade, although this is not explicitly acknowledged or universally recognized. In Seals*, Canada explicitly attacked the European Union's (EU) seal products ban for its lack of consistency with the EU's broader animal welfare settings. This dispute provided an opportunity – indeed, an obligation – for the AB to establish a clear doctrine on consistency testing. This article argues that the AB shirked its duty through reasoning techniques that avoided meaningful engagement with the substance of Canada's argument. The AB did not truly reject consistency testing, but its precise views are hard to glean due to reasoning that is opaque, confused and even contradictory. This article argues that there is a compelling case for consistency testing, at least in certain 'public morals' disputes, and that the AB should provide clearer guidance.*

1 Introduction

The World Trade Organization's (WTO) landmark 'public morals' dispute, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, addressed an important debate about whether members must ensure regulatory

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consistency in their animal protection measures.[1] Specifically, Canada attacked the inconsistency between the European Union's (EU) categorical ban on seal products and its broader animal welfare settings that permit/facilitate exploitation and slaughter, even where this produces considerable suffering. This article makes three key claims about regulatory consistency in WTO law. First, it examines the legal and policy case for requiring regulatory consistency in public morals disputes. Second, even if there is no formal consistency requirement in WTO law, this article suggests that consistency can arise as a conceptual consideration. This is particularly relevant where the regulator's policy justification invokes moral concepts – including welfarism and animal welfare – which imply the consistent application of standards across like cases. Third, in *Seals*, I suggest that the Appellate Body's (AB) reasoning about consistency is amorphous and even contradictory. From a legal perspective, this raises doubts about the case's jurisprudential value. From a conceptual perspective, it raises fundamental questions about whether the AB's reasoning is underpinned by a coherent case theory.[2]

The analysis proceeds as follows. Section 2 introduces consistency testing under the General Agreement on Tariffs and Trade (GATT) and the Agreement on Technical Barriers to Trade (TBT Agreement), including the demand for such testing in *Seals*.[3] Section 3 analyses the policy arguments for and against consistency testing. Section 4 shows how consistency can arise as a conceptual consideration. Section 5 illustrates and critiques the AB's contradictory approach in *Seals*. Section 6 explores the implications of the AB's contradictory approach. Section 7 concludes.

2 Consistency Testing in WTO Law?

This article considers whether WTO law does, or should, require members to regulate consistently when they seek to justify discriminatory measures on the grounds of 'public morals'. The GATT and the TBT Agreement do not contain textual provisions requiring regulatory consistency,[4] but I suggest that a consistency requirement may arise nonetheless when panels assess the regulator's policy justification. This consistency requirement would make moral defences conditional on regulating similar ('policy-like') concerns in a broadly similar (consistent) manner.[5] My main claim is conceptual: moral concepts – including welfarism and animal welfare – imply that like cases should be treated in a like manner.[6] I suggest that it would be incoherent to

1 WTO, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, 2 November 2009, WT/DS400.

2 Specifically, the central concept of 'welfare' lacks a clear substantive meaning.

3 General Agreement on Tariffs and Trade 1994 (GATT), 55 UNTS 194; Agreement on Technical Barriers to Trade (TBT Agreement) 1994, 1868 UNTS 120.

4 This contrasts with the SPS Agreement, which explicitly requires consistent regulation but only for biosecurity measures. Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) 1994, 1867 UNTS 493, Art. 5.5.

5 For a discussion of 'policy likeness' and how it can be distinguished from 'market likeness', see Weiler, 'Law, Culture, and Values in the WTO: Gazing into the Crystal Ball', in D. Bethlehem *et al.* (eds), *The Oxford Handbook of International Trade Law* (2009) 765.

6 In other words, we should not distinguish between like cases based on morally irrelevant criteria.

deploy these concepts as a moral/policy justification while regulating inconsistently across like cases. This is an important issue in the *Seals* dispute, especially regarding the amorphous concept of seal/animal welfare.

A Seals *Dispute*

In *Seals*, Canada challenged the WTO legality of the EU seal regime under both the GATT and the specialized TBT Agreement which deals with technical regulations and standards. While the AB ultimately rejected the panel's decision to treat the seal regime as a TBT measure, this article briefly considers the panel's TBT analysis before turning to the AB's GATT approach. I focus on Canada's two main TBT claims. First, Canada argued that the EU's ban on commercial seal products was more trade restrictive than necessary to achieve the EU's policy objective.[7] The panel rejected this claim.[8] Second, Canada argued that the indigenous communities (IC) exception for seal products from subsistence hunts discriminated against Canadian exports.[9]

Under Article 2.1 of the TBT Agreement, the panel found that the IC exception produced discriminatory trade effects: indigenous and commercial seal products are like products, from a market perspective, and Canada's commercial seal products were treated less favourably.[10] The key question was whether the EU had a compelling policy justification. On this question – how to conduct the policy inquiry – there is substantive fragmentation between the TBT Agreement (discussed here) and the GATT (addressed below).

B *Narrow Consistency Testing (TBT Agreement)*

Under Article 2.1 of the TBT Agreement, allegedly discriminatory measures can be justified by showing that any 'detrimental impact on imports … stems exclusively from a *legitimate regulatory distinction*' (LRD).[11] In *Seals*, the panel ultimately found that there was a LRD: 'the protection of Inuit interests justifies the distinction between commercial and IC hunts.'[12] The EU was therefore able to use the LRD test as a 'shield' to justify its regulatory choices.

In practice, the LRD test can also operate as a 'sword' to attack measures that lack regulatory consistency, although this consistency inquiry is confined to those products found to be 'like' under Article 2.1. This occurred in *Clove Cigarettes* where the panel and the AB found that the USA discriminated between the like products at issue

7 TBT Agreement, *supra* note 3, Art 2.2.

8 The Appellate Body (AB) also assessed this question and rejected Canada's claim, but it did so under the GATT, *supra* note 3, Art. XX.

9 Essentially because far fewer Canadian exports qualified for this exception compared to Greenland.

10 The AB reached similar conclusions under the GATT's non-discrimination provisions.

11 WTO, *United States – Measures Affecting the Production and Sale of Clove Cigarettes – Report of the Appellate Body*, 24 April 2012, WT/DS406/AB/R, para. 182 (emphasis added).

12 WTO, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products – Report of the Panel*, 18 June 2014, WT/DS400/R and Add.1/ WT/DS401/R and Add.1, para 7.298. There were other problems with the exception's design that are not relevant to this article.

– clove cigarettes (banned) and menthol cigarettes (permitted) – in ways that detrimentally affected Indonesia's exports.[13]

The USA failed to justify the measure's discriminatory trade effects as there was no legitimate regulatory reason for distinguishing between these like products. Both types of 'flavoured' tobacco product raised the same policy concern by acting as a gateway for youth smokers. In other words, they were policy-like. When used as a sword, the LRD test is essentially a consistency test. It is based on the presumption that market-like products should be regulated in a like manner. Where inconsistent regulation is present, the absence of a LRD is fatal to the regulator's case due to a lack of other policy defences. However, LRD testing does not address the problem of broad consistency testing of the kind explored in this article.

C *Broad Consistency Testing*

In its LRD inquiry, the *Seals* panel followed the 'narrow' approach to consistency testing. It assessed whether the EU had a valid reason for distinguishing between the like products at issue: indigenous and commercial seal products. However, in *Seals*, Canada and certain scholars explicitly demanded 'broad' consistency testing. They questioned whether there was a legitimate reason for the EU's distinction between seals and factory-farmed animals. Simon Lester succinctly summarizes the claim: 'The EU does not ban bullfighting or other arguably similar cruel or inhumane practices involving livestock or other animals. The question might be raised why the EU did not pass a broad animal welfare law that sets out rules for both foreign and domestic products, instead of focusing only on the narrow sub-category of seal products.'[14]

Canada strongly pursued this claim in its formal arguments:

> Canada argues that the Panel failed to consider whether the risks associated with commercial seal hunts 'exceeded the accepted level of risk of compromised animal welfare, as reflected in the [EU's] policies and practices in this field'.[15]
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> …
>
> According to Canada, identifying such a risk requires the identification of a precise standard of animal welfare in the EU and an assessment of the incidence of suffering in commercial seal hunts against that standard.[16]
>
> …

[13] WTO, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, 7 April 2010, WT/DS406.

[14] Lester, 'The WTO Seal Products Dispute: A Preview of the Key Legal Issues', 14(2) *American Society of International Law Insights* (2010); see also Perišin, 'Is the EU Seal Products Regulation a Sealed Deal? EU and WTO Challenges', 62(2) *International and Comparative Law Quarterly* (2013) 373, at 395 (she criticizes the absence of 'any rational differentiation between seals and other animals'); Sellheim, 'The Legal Question of Morality: Seal Hunting and the European Moral Standard', 25(2) *Social and Legal Studies* (2016) 141, at 151 (he accuses the EU of being 'opportunistic').

[15] WTO, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products – Report of the Appellate Body*, 18 June 2014, WT/DS400/AB/R, WT/DS401/AB/R, para. 5.194.

[16] *Ibid.*, para. 5.196.

> Canada recalls that it presented evidence to show that 'EU policies and practices with respect to animal welfare included a tolerance for a certain degree of animal suffering, both for slaughterhouses and wildlife hunts'.[17]

The AB explicitly acknowledged that this claim required examination: 'By suggesting that the European Union must recognize the same level of animal welfare risk in seal hunts as it does in its slaughterhouses and terrestrial wildlife hunts, Canada appears to argue that a responding Member must regulate similar public moral concerns in similar ways.'[18] While regulatory consistency may seem intuitively desirable, the next section considers whether, and where, it is legally relevant under Article XX of the GATT.

D *Article XX of the GATT*

Unlike the TBT Agreement, the GATT contains a general exceptions provision that allows regulators to invoke affirmative defences for public interest purposes, including public morals. In *Seals*, the AB refrained from transposing LRD testing from the TBT Agreement into Article XX.[19] It also refrained from interpreting the Article XX chapeau, which explicitly denounces 'arbitrary discrimination', as imposing a standalone requirement for regulatory consistency in the broad sense. This section considers two other entry points for such testing under Article XX: the necessity test and the design step.

1 Necessity Test

Under the necessity test, the complainant must propose an alternative measure, which is as effective as the contested measure while being 'reasonably available',[20] to show that the regulator could have achieved its policy goals in a less trade-restrictive manner.[21] In the landmark *Korea Beef* dispute, the USA challenged Korea's 'dual retail system', which required imported and domestic beef to be sold in separate retail outlets. Korea's stated aim was to prevent imported (cheaper) beef from being fraudulently marketed as domestic beef and sold at inflated prices.

In its necessity inquiry, the panel observed that Korea had not adopted a similarly restrictive regime for other policy-like products: 'There is no requirement, for example, for a dual retail system separating domestic Hanwoo beef from domestic dairy cattle beef. Nor is there a requirement for a dual retail system for any other meat or

[17] *Ibid.*, para. 5.194.
[18] *Ibid.*, para 5.200.
[19] *Ibid.*, paras 5.311–5.313.
[20] The proposed alternative must not impose an 'undue burden' on regulators. WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Report of the Appellate Body*, 20 April 2005, WT/DS285/R, para. 308.
[21] The AB has also introduced a much-criticized (and less influential) 'weighing and balancing' test. See Regan, 'The Meaning of "Necessary" in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing', 6 *World Trade Review* (2007) 347.

food product, such as pork or seafood.'[22] The panel found the measure unnecessary as Korea had access to 'traditional enforcement measures', used for other policy-like products such as pork/seafood, including 'record-keeping, investigations, policing and fines'.[23] Korea criticized this as a 'consistency test'.[24] In its view, the panel precluded it from adopting a higher level of protection for beef products; instead, it had been forced to apply the same level of protection across all meat products.

The AB denied that the panel's approach amounted to a consistency test; the panel had merely considered other meat products as a 'useful input' in order to identify potential alternative measures before ultimately engaging in necessity testing.[25] This efficiency justification is questionable as the proposed alternative seems less effective than the dual retail system and significantly more resource intensive.[26] Korea was justified in wondering whether this was actually consistency testing, albeit without an explicit recognition by WTO tribunals that such testing was being performed. In practice, complainants could potentially follow the *Korea Beef* template and use the necessity test as a proxy for broad consistency testing. Indeed, this is what Canada did in *Seals*; it argued that, if the EU sought to protect seals for 'animal welfare' reasons, it should remove the seal products ban in favour of the less trade-restrictive welfare mechanisms it uses to protect other species.

If Korea is right, WTO tribunals might sometimes respond to such arguments by engaging in unacknowledged consistency testing. In the *Seals* context, this would mean a requirement for the EU to adopt the same level of protection for all exploited animals. Even if tribunals refrained from addressing the proposed 'animal welfare' alternative measure through consistency testing, Canada's claim nonetheless requires them to grapple with important intermediate questions, including whether seals are policy-like other exploited animals and whether they benefit from a higher level of protection.

2 Design Step

The public morals design step requires that moral measures be based on 'standards of right and wrong conduct maintained by or on behalf of a community or nation'.[27] If this legal test requires like treatment in like cases, as the notion of 'standards' implies, it arguably represents a consistency requirement for members who invoke the public morals exception. In practice, WTO tribunals have usually addressed the design

[22] WTO, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef – Report of the Appellate Body*, 10 January 2001, WT/DS161/AB/R, WT/DS169/AB/R, para. 168.
[23] *Ibid.*, para. 153.
[24] *Ibid.*, para. 169. Korea further asserted that such testing was 'illegitimate'.
[25] *Ibid.*, para. 170.
[26] See, e.g., Weiler, 'Comment on *Brazil – Measures Affecting Imports of Retreaded Tyres*', 8 *World Trade Review* (2009) 137, at 140.
[27] WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Report of the Panel*, 20 April 2005, WT/DS285/R, para. 6.465.

step by asking 'social' or 'empirical' questions,[28] like whether the contested measure is widely supported domestically or widely practised internationally.[29] These methods may serve as constraints to prevent abuse of the public morals exception, but I question whether they test for 'standards of right and wrong'. Rather than preferring a strict legal requirement, perhaps WTO tribunals are satisfied if the regulator merely frames its defence by reference to moral standards.[30] In *Seals*, the EU arguably attempts this in two different ways: 'welfarism' and 'welfare'.

(a) Welfarism

The EU invokes 'welfarist' arguments from animal ethics: 'The EU Seal Regime seeks to uphold a standard of conduct according to which it is morally wrong for humans to inflict suffering upon animals without sufficient justification. This basic rule reflects a long-established tradition of moral thought, which in its modern form is usually designated as "animal welfarism"'.[31]

Some scholars endorse the EU's welfarist credentials,[32] but it is a risky approach. If WTO tribunals look to rationalist moral philosophy as a benchmark, this may indirectly promote a consistency requirement.[33] The need for consistency across morally like cases is an essential feature of welfarism. Peter Singer advocates the 'equal consideration of interests', while the broader animal ethics literature refers to the prohibition against 'speciesism'.[34] Welfarists are fundamentally opposed to discrimination between animals based on species rather than morally relevant criteria like sentience.[35]

It may seem counter-intuitive but, for welfarists, the suffering of dogs and seals has no greater moral significance than the suffering of cows and pigs. Hence, Singer

[28] For a discussion of 'moral' and 'social' approaches to understanding public morals, see Czapnik, '"Moral" Determinations in WTO Law: Lessons from the Seals Dispute', 25 *Journal of International Economic Law* (*JIEL*) (2022) 390.

[29] Marwell, 'Trade and Morality: The WTO Public Morals Exception after Gambling', 81 *New York University Law Review* (2006) 816.

[30] The design step is often where panels frame the debate, especially through their characterization of the regulator's policy objective.

[31] *Ibid.*, para. 37. The EU states: '[I]t may be relevant to examine … the *doctrines of a moral school of thought*' in order 'to establish the existence of "public morals".' 'European Union's Responses to the First Set of Questions from the Panel', *European Union* (13 March 2013), question 48, para 165, available at https://circabc.europa.eu/ui/group/cd37f0ff-d492-4181-91a2-89f1da140e2f/library/eeee66c8-e331-4676-ba78-32f9861815b6/details; see also 'Second Written Submission by the European Union: *EC – Seals*', *European Union* (27 March 2013), para. 140, available at https://circabc.europa.eu/ui/group/cd37f0ff-d492-4181-91a2-89f1da140e2f/library/412bdbbf-8c8d-4b78-86ae-bc12d83b6d0e/details.

[32] Howse and Langille, 'Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values', 37(2) *Yale Journal of International Law* (2012) 367, at 378 (they cite relevant philosophical literature, including Jeremy Bentham, utilitarianism, Peter Singer and the 'new welfarism').

[33] Unlike welfarism, non-rationalist approaches (including sentiment-driven approaches) may permit inconsistency, but they are not standards-based.

[34] P. Singer, *Animal Liberation* (3rd edn, 2002).

[35] Speciesism is also criticized by leading deontological philosophers. See, e.g., Francione, 'Animal Welfare and the Moral Value of Nonhuman Animals', 6(1) *Law, Culture and the Humanities* (2010) 24.

criticizes the hypocrisy/inconsistency of people who 'protest about bullfighting in Spain, the eating of dogs in South Korea, or the slaughter of baby seals in Canada while continuing to eat eggs from hens who have spent their lives crammed into cages, or veal from calves who have been deprived of their mothers, their proper diet, and the freedom to lie down with their legs extended'.[36]

While there may be compelling political or social reasons for the EU to ban seal products, it is doubtful these reasons can be understood in 'welfarist' or 'moral' terms. The panel and AB cited the EU's welfarist arguments (it is unclear why) but refrained from meaningfully engaging with them. They did not classify the seal products ban as a welfarist measure, and they provided no general guidance on the utility of moral philosophy in public morals disputes.

That said, it is illuminating to highlight some key problems with the EU's welfarist claim. First, the EU's (implicit) definition of welfarism deviates from its standard meaning in moral philosophy. The EU invokes welfarism's utilitarian principle (suffering is morally undesirable in principle; suffering may be justifiable where it produces utility/necessity) to justify its animal protection regime. However, it overlooks welfarism's consistency principle in ways that permit species-based discrimination and special protection for seals. This produces a concept – let's call it 'welfarism without consistency' – which has no pedigree in moral philosophy.

Second, the EU engages in contradictory reasoning. In addition to invoking 'welfarism without consistency', it sometimes invokes an alternative version that is more familiar to moral philosophers – 'welfarism with consistency' – including when it declares that its measure is supported by a 'long-established tradition of moral thought'. The EU fails to cite any moral thinkers, but we can infer from its 'welfarist' approach that it evokes the tradition of Jeremy Bentham and Singer where consistency is an important feature.

Even if WTO tribunals did not formally rely on moral philosophy, there is a common misconception that the EU's measure is 'welfarist' and, therefore, moral. This misconception arguably helps the EU's case indirectly, especially since its main claim – animal welfare – can easily become confounded with welfarist philosophy.

(b) Welfare

The EU's primary claim, which attracts the most scrutiny by WTO adjudicators and scholars, is that its measure is an animal welfare law. I suggest that animal welfare is a standards-based concept that requires the consistent application of overarching standards in like cases, such as the EU's regulation requiring effective animal stunning prior to slaughter. Proponents of the seal products ban, however, contest this view. They suggest that animal welfare permits different levels of protection 'for each species', even in the absence of policy arguments or objective criteria that can justify variable treatment.[37]

[36] Singer, *supra* note 34, at 162.

[37] Howse, Langille and Sykes, 'Pluralism in Practice: Moral Legislation and the Law of the WTO after Seal Products', 48 *George Washington International Law Review* (2015) 81, at 115.

Accepting the standards-like definition of welfare does not render it impractical for policy-makers. I suggest that welfare laws can promote consistency in real-world contexts, even though they deviate from welfarism's philosophical standards in two important ways. First, whereas welfarist protection applies universally to all sentient beings, governments could choose to limit welfare laws to the narrower class of commercially exploited animals. This would allow welfare regulators to consider pragmatic and political factors when setting their boundary conditions, not just philosophically pure criteria. Welfarism cannot justify why certain societies exclude dogs or rabbits from exploitation, but such moral preferences are widely practised and accepted.[38] WTO law can defer to regulators on which animals they classify as commodity species, even if this choice is culturally and historically contingent rather than rationally justifiable, provided that standards are applied consistently across the class of commodity animals.

Second, welfarist philosophy demands a much higher level of protection than welfare laws actually provide. Singer essentially opposes all factory farming since meat is a 'luxury', not a necessity.[39] Of course, WTO law should not require the EU to ban all factory farming. Instead, it should allow regulators to choose their preferred level of animal welfare protection, even if Singer would disapprove, provided their approach is standards-based.

I return to the issue of welfare in detail in section 4. My main aim here is to highlight that welfare is a potentially equivocal concept and that the 'welfare without consistency' version is problematic. It deviates from the conventional meaning of 'welfare', and, from a WTO law perspective, it does not promote 'standards of right and wrong'.

3 The Policy Debate

This section addresses the policy debate. There is no major opposition to LRD testing, so I focus on the controversial question of whether it should be expanded to encompass broad consistency testing, including under Article XX.

A *The Case for (Broader) Consistency Testing*

Narrow consistency testing may be insufficient in certain cases. I illustrate this limitation with an animal welfare example. Let's imagine that Member A is a world leader in lab-grown beef. It imposes strict welfare/labelling requirements on traditional beef production/marketing in discriminatory ways that benefit its domestic lab-grown beef industry. These products may be 'like' from a market perspective, but there is clearly an LRD on ethical/welfare grounds. Should this LRD be sufficient to affirm the measure's legitimacy?

[38] Perišin, *supra* note 14, at 375 (who suggests that 'cuteness' is a key factor).

[39] Singer, 'Ethics beyond Species and beyond Instincts: A Response to Richard Posner', in C. Sunstein and M. Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (2006) 78, at 54.

Let's imagine that Member A has much lower welfare/labelling standards for dairy milk production. Milk does not compete with beef, but its production raises similar moral concerns. Opponents of broad consistency testing would preclude any consideration of dairy regulation as wholly irrelevant. By contrast, proponents of broad consistency testing would question this constraint. If the broader context indicates that the stated policy justification may be dubious, WTO tribunals should dig deeper. It would be derelict to simply declare: 'Milk is not a like product (from a market perspective), hence any consideration of regulatory inconsistency is precluded.'[40]

There is a widespread view that this type of broad regulatory inconsistency should undermine a regulator's policy justification. Lester, Tamara Perišin and Nikolas Sellheim promote this view in *Seals*. This type of 'inconsistency' rationale may well underpin the WTO's (widely supported) rejection of Korea's dual retail system. It is true that consistency testing might potentially constrain regulatory autonomy by introducing another tool for reviewing domestic regulation, but it is not necessarily more intrusive than existing forms of review, including 'balancing' and the alternative measures test.[41]

B *The Case against Consistency Testing*

This section interrogates the current policy case against consistency testing. First, I critique two common techniques for framing the consistency debate. Second, I challenge two leading arguments against consistency testing. I suggest the current academic debate on broad consistency testing is incomplete and merits further examination.

1 Framing Techniques

(a) Framing Animal Welfare Regulation as Species Specific

Robert Howse, Joanna Langille and Katie Sykes imply that animal welfare standards are normally species specific, as regulators set an 'appropriate level of protection *for each species*'.[42] However, this view does not reflect the reality of animal regulation. In practice, governments often establish overarching standards that apply even-handedly across species, including the EU's 'minimum rules for the protection of animals at the time of slaughter': 'Business operators or any person involved in the killing of animals should take the necessary measures to avoid pain and minimise the distress and suffering of animals during the slaughtering or killing process.'[43] The EU regulates all commercially exploited 'vertebrate animals' under a single standard.[44] This seems sensible: if cow and pig slaughter raise the same policy (and moral) concerns, they do not require separate regulatory solutions. Of course, regulators sometimes single out

[40] There are comparable environmental regulation cases where market likeness and policy likeness do not align seamlessly.

[41] See, e.g., Regan, *supra* note 21.

[42] Howse, Langille and Sykes, *supra* note 37, at 115 (emphasis added).

[43] Council Regulation 1099/2009, OJ 2009 L 303/1, preamble (first and second recitals) (on the protection of animals at the time of killing). I return to stunning and slaughter issues below.

[44] *Ibid.*, preamble (nineteenth recital).

certain species for special protection, such as endangered species, but this is normally because policy likeness is absent: endangered species raise a different policy concern.

It is not always easy to neatly demarcate the family of policy-like issues – for example, the EU made the questionable decision to exclude 'farm fish' from its slaughter regulation.[45] However, the best solution is to require transparency about the regulator's underlying policy justification. It is not constructive to address this complex issue by simply treating species as some sort of natural dividing line that confers on governments an unfettered discretion to vary their levels of protection. This fails to accurately describe the reality of animal regulation while also shutting down important policy discussions. If the EU wishes to offer special protection to seals, it should offer a cogent policy justification for this choice.

(b) Framing Consistent Treatment as 'Same Treatment'

Howse, Langille and Sykes claim that consistency testing would require governments to treat all animals the same way: 'Canada's argument implies that the European Union does not have the right to treat certain animals differently from others if it wishes to do so.'[46] I respectfully disagree: there are critical differences between treating animals 'consistently' and treating them 'the same'.

Even where a consistency requirement is present, there are at least two cases where different treatment would remain permissible. First, it could be justified where cases are not policy-like. Consistency testing does not require endangered species and factory-farmed animals to be regulated in the same way. Second, even where two animals are policy-like, the consistent application of a standard may justify different treatment due to contextual differences or variable risk profiles. A regulator seeking to ensure pain-free slaughter could legitimately mandate different stunning techniques for cows and chickens. Calibration across different contexts is possible without necessarily producing inconsistency.[47] It is therefore unhelpful to characterize consistency testing as a 'same-treatment' obligation.

2 Policy Arguments against Consistency

(a) The Claim against 'Fanatical' Consistency

Critics of consistency testing insist that WTO law should not require regulators to be 'perfectly philosophically consistent' or 'fanatical'.[48] In *Seals*, I consider these arguments to be hyperbolic. Canada does not advocate perfect consistency,[49] and neutral observers need not be 'fanatical' to notice differences between seal and cow treatment. Opposition to fanaticism is legitimate, but this can be addressed through a deferential

[45] *Ibid.*, preamble (sixth recital).
[46] Howse, Langille and Sykes, *supra* note 37, at 115.
[47] On 'calibration of standards to respond to varying degrees of regulatory risk', see Lydgate, 'Is It Rational and Consistent? The WTO's Surprising Role in Shaping Domestic Public Policy', 20 (2017) *JIEL* 561.
[48] Howse, Langille and Sykes, *supra* note 37, at 99, 115. Lydgate also rejects 'rigid ideological consistency' as this 'does not match the reality of how regulation emerges'. Lydgate, *supra* note 47, at 580–582.
[49] Canada's proposed alternative (a welfare standard) permits calibration across different contexts.

standard of review. WTO tribunals should avoid intrusive assessments about the technicalities of slaughter, but this should not prevent them from questioning extreme instances of inconsistency where the regulator fails to articulate a credible policy justification.

(b) The Claim That Consistency Testing Blocks Incremental Reform

Opponents of consistency testing further suggest that it has a chilling effect by hampering the 'incremental change of moral positions through legislation'.[50] To illustrate this concern, let's imagine a law protecting sentient animals by prohibiting the painful removal of body parts without anaesthetic, such as the tail docking of sheep, the dehorning of cattle, the debeaking of chickens or the castration of piglets. Philosophical purists, including welfarists, would insist on consistency: it would be morally objectionable to ban the dehorning of cows while allowing the castration of piglets. While this moral view is intuitively appealing, the 'incremental reform' argument suggests that it is idealistic, that improved animal protection is achieved through piecemeal species-specific reforms and that, if governments are forced to take an all-or-nothing approach, they will invariably opt for 'nothing'. I have already rejected the species-specific view of animal welfare, and I question the assumption that consistency requirements invariably drive standards down to 'nothing' rather than up to 'all'.[51]

Let's imagine that Member A phases out 'extreme methods of farm animal confinement' by banning cage eggs, pig gestation crates and veal cages.[52] Member B pursues the same objective but only for chickens (it excludes pigs and calves) in ways that also produce discriminatory trade effects. If this measure failed a WTO consistency test, would this lead to lower animal welfare standards? This ultimately depends on how Member B pursues compliance. If Member B reintroduces battery cages, this would certainly reduce welfare, but it could choose to comply by banning gestation crates and veal cages, thus increasing welfare. Consistency requirements are value neutral: whether they drive standards up or down depends on the regulator's choices based on the depth of its concerns and on considerations of political feasibility.

Emily Lydgate's case studies suggest that lost 'consistency' disputes frequently lead governments to double down on their social policy objectives rather than backtrack.[53] In both *US – Tuna II* and *Seals*, she argues that 'strong and engaged animal welfare lobbies' led the USA and the EU to strengthen the degree of animal protection when

[50] Howse, Langille and Sykes, *supra* note 37, at 145. This claim seems predicated on 'fanatical' consistency.

[51] I agree that 'all' was not politically feasible in *Seals*. Obviously, there was no possibility of the EU banning all commercial animal products.

[52] This is based on Farm Animal Confinement Initiative, California Proposition 12, available at https://ballotpedia.org/California_Proposition_12,_Farm_Animal_Confinement_Initiative_(2018) (which was approved on 6 November 2018). This law recently survived a Constitutional challenge under the Dormant Commerce Clause.

[53] Like Howse, Langille and Sykes, *supra* note 37, Lydgate, *supra* note 47, is wary of consistency testing, but she contests the empirical claim that it invariably lowers animal protection standards.

they introduced compliance measures.[54] In practice, California's approach to animal confinement followed a comprehensive, consistent and standards-based approach. It banned any confinement practice that 'prevents the animal from lying down, standing up, fully extending the animal's limbs, or turning around freely'.[55] Like the EU's slaughter regulation, this approach uses overarching standards that can be calibrated to different species or contexts.

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The current debate on consistency testing is unfinished. I suggest that opponents have tended to critique a strawman version of consistency testing that does not truly respond to its essential features or likely consequences. If consistency testing is undesirable, the case against it has not been effectively articulated. It is perplexing that narrow (LRD) testing inspires little opposition but broad consistency testing is so controversial. In *Seals*, there is a widespread intuition that seals merit full protection even if this is inconsistent with the treatment of factory-farmed animals. There may be compelling moral or legal reasons for this apparent inconsistency, but it would not be justified to simply reject consistency testing *a priori* or to underplay the significant role it often plays in animal welfare regulation. Consistency testing deserves its day in court where its legal and policy credentials can be assessed on their merits.

4 Consistency as a Conceptual Matter

If certain moral concepts carry an implicit consistency requirement as part of their meaning, as I argue, this would remain relevant even if WTO law rejects consistency testing on legal and policy grounds.[56] Proponents of the EU's measure advocate versions of 'welfarism' and 'welfare' that permit inconsistency across like cases, but I suggest that this leads to incoherent and illogical reasoning. This section critiques the concept of 'welfare without consistency'. I illustrate this phenomenon in the literature before turning to the dispute reports in detail.

I have already critiqued the scholarship that defines animal welfare in species-specific terms. In this section, I suggest that proponents of this view sometimes deviate from their own definition, in contradictory ways, by implying that welfare laws promote a single (consistent?) level of protection for all animals: '[I]t is ultimately the predominant moral beliefs of a particular society that will determine how much and

[54] Lydgate, *supra* note 47, at 563. Lydgate uses a different definition of consistency. Her claims about *Seals* relate to the exceptions; this differs from my focus on whether the seal products ban is consistent with the EU's broader animal welfare settings. WTO, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* – Report of the Appellate Body (US – Tuna II), 15 Septembers 2011, WT/DS381/R.

[55] California Proposition 12, *supra* note 52, s. 4I.

[56] This example illustrates the point: X adopts a 'gay rights' law but limits protection to one group (let's say lesbian women only). Even if there is no legal barrier preventing this type of discrimination, it is conceptually problematic to describe this law in terms of 'gay rights' as this deviates from conventional understandings of the term. To reason coherently about this law we should characterize it in different (less confusing) terms.

what kinds of suffering are acceptable or unacceptable to that society, and therefore *the level of protection it demands against animal suffering*.'[57]

Do societies have a single level of protection 'against animal suffering', or do they have varying levels of protection 'for each species'? When lauding the EU's moral credentials, Howse and Langille speak about 'animal suffering' in general terms, as though a single moral standard applies; they do not consider each species a standalone moral/policy problem with a separate level of protection. I suggest that it is fallacious to rely on this 'welfare with consistency' concept while simultaneously invoking the 'welfare without consistency' concept to justify discrimination between species. I argue in section 5 that the AB replicates this fallacy.

A *Case Theories and Touchstones*

Oscillation between different meanings of welfare can be hard to spot. I seek to make it visible here by constructing two different case theories with conflicting approaches to the question of consistency. First, welfare with consistency treats seals as a 'commodity species' that raises the same moral/policy concerns as other exploited animals. Seals are policy-like factory-farmed animals and, therefore, subject to the same moral standard and level of protection, but there is a nuance: seal hunting occurs in a different context with a higher risk profile than abattoirs, so the regulatory design can be 'calibrated' to take this into account. This may well justify bespoke (stricter) seal protection, although a categorical ban seems questionable.

Second, welfare without consistency allows the EU to treat seals as special and thus to offer a different moral standard or higher level of protection, including through a categorical ban. This approach renders irrelevant any comparisons between seals and other exploited species. There are two pathways to eliminating consistency from the equation: (i) by declaring that WTO law (and the concept of welfare) offers governments an unfettered discretion to vary their level of protection and (ii) by arguing that seals do not raise the same moral concerns as 'commodity' species – for example, because they are a 'charismatic species' instead, like dogs or koalas. The first method obviates the need for a policy justification, while the second method justifies differentiation by denying policy likeness.[58]

The EU alludes to this 'charismatic species' justification: '[P]eople rate animals as morally more or less important, and therefore more or less worth protecting, according to a number of factors. These include how useful the animal is, how closely one collaborates with the individual animal, how cute and cuddly the animal is, how harmful the animal can be, and how "demonic" it is perceived to be.'[59] This approach has the benefit of explicitly justifying the EU's alleged inconsistency, but it has the weakness of

[57] Howse and Langille, *supra* note 32, at 371 (emphasis added).

[58] Each of these case theories has different strengths and weaknesses from a World Trade Organization (WTO) law perspective, but I lack space to comprehensively address them here.

[59] 'First Written Submission by the European Union', *European Union* (21 December 2012), para. 73, available at https://circabc.europa.eu/ui/group/cd37f0ff-d492-4181-91a2-89f1da140e2f/library/e873cae7-961f-4bc2-b3ab-e829dc9f19da/details, citing P. Sandøe and S. Christiansen, *Ethics of Animal Use* (2008).

relying on non-rationalist considerations such as cuteness and cuddliness. The *Seals* adjudicators avoid this weakness by embracing 'welfare without consistency' without explicitly acknowledging the 'charismatic species' argument or otherwise specifying which variant they follow.

Substantively, these two different case theories (with and without consistency) are mutually exclusive. It may be possible to advocate both theories as alternative claims, but it is impossible to simultaneously accommodate both under the same conception of 'welfare'. Under 'welfare with consistency', the substantive analysis will treat seals as policy-like other commodity animals, and it will assume the consistent application of the same moral standard and level of protection. All of these features are excluded from the welfare without consistency case theory.

These WTO law concepts (policy likeness, consistency, moral standards, level of protection) can therefore serve as touchstones to determine which substantive meaning of welfare is being applied in any given context.[60] They can also help reveal if the concept is being deployed in equivocal ways across different contexts. If equivocation occurs, this should be noticeable – or at least it can be made visible – by comparing the substantive meaning of 'welfare' across different sections of a legal judgment.

B *Characterizing the EU's Policy Objective*

WTO law contains a mechanism that should prevent the concept of welfare from being deployed equivocally: the requirement for panels to characterize the regulator's objective.[61] This should be done with 'a certain minimum level of clarity' so that policy defences can be 'assessed in a meaningful manner'.[62] In *Seals*, the policy objective was characterized as 'seal welfare':

> The objective of the EU Seal Regime is 'to address the moral concerns of the EU public with regard to the welfare of seals'. The Panel elaborated that these concerns have two specific aspects: (i) 'the incidence of inhumane killing of seals'; and (ii) 'EU citizens' 'individual and collective participation as consumers in, and exposure to ("abetting"), the economic activity which sustains the market for seal products derived from inhumane hunts'.[63]

This characterization appears welfare-based, but its amorphous definition is problematic.[64] Does it represent welfare with or without consistency? Are seals policy-like, and, therefore, subject to the same moral standard and level of protection as, other commodity animals? The definition of seal welfare does not clearly address these underlying touchstone issues, thus creating space for its equivocal use, both with and without consistency, throughout the analysis.

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[60] Scientific arguments are also a useful touchstone, but I do not address them here.

[61] This complements the general obligation to avoid logically fallacious reasoning.

[62] WTO, *European Union and Its Member States – Certain Measures Relating to the Energy Sector – Report of the Panel*, 10 August 2018, WT/DS476/R and Add.1, paras 7.1152–7.1153 (appealed by the EU).

[63] *Seals – Report of the Appellate Body*, *supra* note 15, para. 5.139.

[64] Confusingly, WTO tribunals and scholars frequently call this policy objective 'animal welfare' (without defining this term) rather than 'seal welfare'.

Certain moral concepts, including welfare (and welfarism), require the consistent application of standards as part of their meaning. It is confusing to deploy these concepts in ways that deny their consistency requirement. It may also lead to logically fallacious reasoning if we oscillate between different meanings of these concepts, both with and without consistency. This conceptual/logical claim is softer than a legal claim. It does not oblige the EU to regulate consistently. It merely suggests that any failure to consistently apply standards across like cases precludes the EU from constructing its defence around the concept of welfare.

5 The AB's Approach in *Seals*

This part critiques the AB's approach to consistency testing. I do not make a legal claim that it should have engaged in consistency testing. Instead, I make the conceptual claim that its reasoning about consistency, and other related touchstone issues, was logically fallacious. I focus on how the AB justifies its choice to avoid/reject Canada's claim that the EU should regulate consistently, while engaging with and even endorsing the EU's claim that it does regulate consistently.

A *Avoiding/Rejecting Canada's Consistency Claims*

1 Avoidance

The AB responds to Canada's consistency claim by asserting: 'Even if Canada were correct that the European Union has the same moral concerns regarding seal welfare and the welfare of other animals … we do not consider that the European Union was required by Article XX(a), as Canada suggests, to address such public moral concerns in the same way.'[65] A superficial reading might suggest that this statement rejects consistency testing, but it would be more precise to say that it merely avoids the issue. On the key question of policy likeness – whether seals raise 'the same moral concerns' as other animals – the AB avoids taking a stance. Instead, it contorts Canada's claim into a 'same-treatment' claim, which enables it to conclude that the EU is not required to treat seals and commodity animals in 'the same way'.

This approach to consistency testing obscures the key underlying issues.[66] Does the AB tolerate differential treatment because (i) the EU has an unfettered discretion to vary its level of protection; (ii) seals are not policy-like factory-farmed animals; or (iii) seals are policy-like but calibration is necessary due to the specific context of seal hunting? The AB should adopt a clear stance on whether seals are policy-like other animals and what the justification is for any differential treatment. Its failure to commit to a clear case theory is a red flag. It opens the door to fallacious reasoning.

[65] *Seals – Report of the Appellate Body*, *supra* note 15, para. 5.200.
[66] See section 3.B.

2 Rejection

In addition to its avoidance strategy, the AB arguably rejects consistency testing: 'Members have the right to determine the level of protection that they consider appropriate, which suggests that Members may set different levels of protection even when responding to similar interests of moral concern.'[67] Howse, Langille and Sykes consider this a categorical rejection of consistency testing: '[T]he AB rejected Canada's [consistency] argument, stating that Member states have a right to set the level of protection that they desire.'[68] Lester concurs in his blog posting entitled 'There's No "Consistency" Requirement for Animal Welfare and Public Morals'.[69] I question this rejection conclusion on both legal and conceptual grounds.

(a) Legal Claim

The AB's stated justification for rejecting consistency testing is highly questionable. It is true that regulators have the right to choose their preferred level of protection; this 'fundamental principle' underpins the WTO's negative integration model.[70] Indeed, it is the mechanism that allows the EU to adopt higher animal welfare standards than other countries.[71] However, in *Seals*, the AB implies that members also have an unfettered right to vary their level of protection, even in policy-like situations. This is a separate, contestable claim; it is not based on a well-established principle, nor is it entailed in the WTO's negative integration model.[72] In reality, there are two separate 'rights' at play: (i) the right to set a level of protection against a given policy concern and (ii) the right to vary that level of protection in cases that raise the same policy concern.

The LRD jurisprudence suggests that deference on the level of protection does not automatically imply deference on the question of consistency. The *Clove Cigarettes* decision allowed the USA to adopt a high level of protection for flavoured tobacco (a ban), but it precluded the USA from varying that level of protection – between clove and menthol cigarettes – without a compelling justification.[73]

Does the *Seals* jurisprudence suggest that, under the GATT, regulators have an unfettered right to vary their level of protection for clove and menthol cigarettes? This cannot be right. While no member or commentator would consider it appropriate to second-guess the regulator's level of protection on animal welfare or tobacco control, it is not necessarily absurd to question the inconsistent application of a level of protection. LRD testing permits this for clove and menthol cigarettes and, presumably,

[67] *Seals – Report of the Appellate Body*, *supra* note 15, para. 5.200.

[68] Howse, Langille and Sykes, *supra* note 37, at 114.

[69] Lester, 'There's No "Consistency" Requirement for Animal Welfare and Public Morals', *International Economic Law and Policy Blog* (22 May 2014), available at https://ielp.worldtradelaw.net/2014/05/theres-no-consistency-requirement-for-animal-welfare.html.

[70] WTO, *Brazil—Measures Affecting Imports of Retreaded Tyres* – Report of the Appellate Body (Brazil Tyres), 17 December 2007, WT/DS332/AB/R, para. 210.

[71] It also allows other members to adopt low or no animal welfare standards.

[72] Before *Seals*, there was no explicit jurisprudence rejecting consistency testing but, rather, a long-standing tradition of silence.

[73] Essentially, the USA failed to establish a legitimate regulatory distinction.

for animal welfare standards as well. The AB can choose to reject consistency testing under the GATT, even if this produces fragmentation across agreements, but I contest that this is entailed in the WTO's deferential approach to the level of protection. If the AB wishes to reject consistency testing, a cogent justification is needed. I question whether the *Seals* reasoning provides this justification.

(b) Conceptual Claim

When the AB rejects Canada's claim, it does not merely reject consistency testing as a legal requirement; it also makes a conceptual choice about how to define welfare. By treating regulatory consistency as an irrelevant consideration, the AB essentially elects to work with the concept of 'welfare without consistency'.[74] I have already questioned this definition of the term 'welfare' in general. I consider the choice particularly questionable in this dispute since the AB frequently deploys the conflicting concept of 'welfare with consistency' when endorsing the EU's claims, as I argue below.

B *Accepting the EU's Consistency Claims*

The AB embraced 'welfare without consistency' as both a legal and conceptual matter in order to reject Canada's consistency claim. However, this section shows that it embraces the conflicting concept of 'welfare with consistency' to accept certain EU claims under the design step and necessity test.

1 Design Step

To defend its measure, the EU invokes instruments showing that animal welfare is a widely recognized moral concern, including a 'comprehensive body of legislation on the welfare of farm animals' and the 'OIE's [World Organization for Animal Health] Guiding Principles for Animal Welfare'.[75] However, these instruments focus exclusively on factory-farmed animals; they do not mention or address seal protection/exploitation.

WTO tribunals cite this evidence with approval, but in what way does it actually support the EU's case? Under a 'welfare without consistency' framework, these instruments should be utterly irrelevant. This 'animal welfare' evidence can only support the EU's 'seal welfare' defence if both cases are policy-like under the same moral standard. In other words, the AB must be implicitly relying on the 'welfare with consistency' concept.

2 Necessity Test

Canada argues that a species-wide ban is excessive: '[T]he types of measures applied with respect to the welfare of other animals – including setting animal welfare requirements, certification, labelling, monitoring, and enforcement – raise doubts with

[74] If the AB chose the 'welfare with consistency' definition, it could not dismiss regulatory consistency as irrelevant, at least as a conceptual matter.

[75] *Seals – Report of the Panel*, *supra* note 12, paras 7.405–7.410.

respect to the necessity of the more restrictive EU Seal Regime.'[76] Canada proposes 'strict animal welfare standards' as an alternative measure,[77] including 'a certification system that would operate to exclude all inhumanely killed seals'.[78] The EU contests the appropriateness of this proposed alternative:

> Unlike the animals stunned in a slaughterhouse, which are restrained and immobile, seals are freely moving targets and can react in unpredictable ways when alarmed by an approaching seal hunter.[79]
>
> ...
>
> Veterinary advice and the regulations that result from it have thus focused not solely on how to ensure that the killing is humane (as required in established commercial slaughter) but, rather, on how to make it less inhumane by adopting methods that are practical on the ice (but which would be considered primitive in a slaughterhouse on land).[80]

The AB accepts the EU's distinction: '[T]he two situations differ significantly in areas of great relevance to the application of humane killing methods', and 'the evidence did not establish comparable effective stunning rates in seal hunts and commercial abattoirs'.[81] Is this a valid basis to distinguish seal hunting from slaughterhouses? Rather than invoking an unfettered right to vary levels of protection, the AB identifies a regulatory distinction between seal hunting and abattoirs, but this distinction does not deny policy likeness. In both cases, the moral concern is 'humane' treatment/slaughter. Instead, the AB focuses on the higher risk profile for hunting. It uses a 'calibration' argument: seal regulation may be stricter, due to context and risk, but it is nonetheless consistent.[82]

This raises two noteworthy problems. First, it perpetuates a double standard: since the AB blocked Canada's consistency arguments, surely it is unfair to accept the EU's consistency claims.[83] Second, this calibration approach, which invokes a higher risk profile for seals, cannot really justify a ban under the same moral standard applied to factory-farmed animals.

(a) Double Standards

The AB's consistency analysis is based on an underlying double standard. To Canada, the AB purports to stay silent on whether seal hunting raises the same moral concern as slaughterhouses, but, to the EU, it confirms the presence of a shared moral concern. The AB explicitly rejected Canada's request to identify a moral benchmark/standard

[76] *Seals – Report of the Appellate Body*, *supra* note 15, para. 2.25.
[77] *Ibid.*, para. 2.79.
[78] *Ibid.*, para. 5.267.
[79] 'First Written Submission', *supra* note 59, para. 127.
[80] *Ibid.*, para. 108.
[81] *Seals – Report of the Appellate Body*, *supra* note 15, para. 5.278. Why does the AB group all 'abattoir' species together? Are they all policy-like with the same level of protection?
[82] This is not an *arguendo* 'welfare with consistency' claim; this consistency claim forms part of the AB's justification for rejecting the welfare-based alternative measure.
[83] Can regulatory consistency be a valid 'shield' even if complainants are precluded from using it as a 'sword'?

to compare seal hunting to abattoirs;[84] however, in its consistency analysis, the AB establishes 'effective stunning rates' as a benchmark/standard to conclude that seal hunting is riskier. Regardless of which legal element hosts this analysis, the AB should steadfastly maintain a coherent view of what welfare means, whether seals are policy-like factory-farmed animals and whether seals are subject to the same moral standard.

The AB's approach also raises methodological problems. If it chooses to establish a moral benchmark – as it does with effective stunning rates – it should acknowledge this fact and transparently spell out its method. It should allow both sides to press their case, in an adversarial manner, and to present their arguments and evidence. The AB should justify why it decided that 'effective stunning rates' were the most appropriate benchmark and what empirical data underpinned its analysis. It is actually doubtful whether effective stunning rates are a fundamental concern in EU animal welfare regulation. EU law mandates no minimum effective stunning rates for abattoirs or data collection on this issue.[85] The EU does not ban other imports, such as US chickens, even where they receive no regulatory protection requiring stunning before slaughter.[86] Importantly, the AB cites no empirical data on effective stunning rates, either for seals or abattoirs, to support its findings.[87]

Finally, one further problem merits attention. The AB arguably establishes that seal hunting, as currently practised, achieves lower welfare outcomes than commercial slaughter. However, this is an insufficient basis to justify a categorical ban. I will illustrate this in quantitative terms. The literature suggests that up to 42 per cent of seals are skinned while conscious,[88] an appalling figure but not necessarily much worse than commercial slaughter. Worker testimonies reveal that 30 per cent of cows in some slaughterhouses are ineffectively stunned; they are therefore 'routinely scalded, bled, skinned, dismembered and/or eviscerated while awake and fully conscious'.[89]

If commercial slaughter is the point of comparison, surely any alternative measure only needs to reduce ineffective seal stunning from 42 per cent to 30 per cent. The EU's measure seriously overshoots this benchmark by banning commercial seal products and fully eliminating the risk. Can this zero-tolerance benchmark for seals truly be justified with calibration arguments? I suggest not. Instead of drawing on such ill-suited arguments, an alternative would be to explicitly recognize that Europeans do not perceive seals as policy-like factory-farmed animals, that seals are protected by a higher

[84] *Seals – Report of the Appellate Body*, *supra* note 15, para. 5.196. Canada requested 'the identification of a precise standard of animal welfare in the European Union, and an assessment of the incidence of suffering in commercial seal hunts against that standard'.

[85] See, e.g., Council Regulation 1165/2008, OJ 2008 L 321/1 (concerning livestock and meat statistics).

[86] D. Simon, *Meatonomics* (2013), at 47 (discussing the Humane Methods of Slaughter Act, 1978, 92 Stat. 1069).

[87] The choice to focus on suffering only at the moment of slaughter is also questionable as it downplays morally relevant suffering on factory farms throughout the animal's life. P. Singer, *Practical Ethics* (3rd edn, 2011), at 55–56.

[88] Sellheim, *supra* note 14, at 144.

[89] Simon, *supra* note 86, at 48. Sophie Atkinson suggests that ineffective stunning ranges from 9 per cent to 35 per cent. S. Atkinson, A. Velarde and B. Algers, 'Assessment of Stun Quality at Commercial Slaughter in Cattle Shot with Captive Bolt', 22 *Animal Welfare* (2013) 473, at 473.

moral standard and that the charismatic species case theory offers a more compelling framework for reasoning about this measure. Under this approach, consistency and calibration arguments would be redundant.

(b) Justifying the Categorical Ban

The EU seeks to reconcile its categorical seal products ban with its broader animal welfare settings by arguing that it is unfeasible to effectively stun seals and that the industry is therefore 'inherently inhumane':

> Commercial seal hunts are *inherently inhumane* because humane killing methods cannot be effectively and consistently applied in the field environments in which they operate.[90]
>
> …
>
> Canada's commercial seal hunt *can never be made acceptably humane* because of the conditions in which the hunt takes place.[91]
>
> …
>
> Deteriorating ice conditions, extreme and unpredictable weather, high winds and ocean swells are all deterrents to humane killing and accuracy in clubbing and shooting and in the timely retrieval of animals in the case of shooting.[92]
>
> …
>
> Even in the case of clubbing, it is unlikely that the four-step killing process can be effectively implemented in a consistent manner.[93]

If substantiated, the 'inherently inhumane' argument is extremely powerful. It seemingly justifies a categorical ban for seal hunting under the same moral standard applied to abattoirs where, scientists advise, 'it should be possible to ensure adequate stunning in almost 100% of animals'.[94] When identifying the EU's moral standard, what is the benchmark? The EU implies that, where effective stunning is theoretically possible, we should deem animal slaughter humane, but this cannot be right. Our moral assessment of abattoirs must surely rest on how animals are actually treated in practice rather than on what level of protection is theoretically feasible. If abattoir stunning is ineffective in 30 per cent of cases, this surely represents the EU's level of protection. The fact that those animals could have been stunned effectively is irrelevant.[95] If the AB chooses to compare seal slaughter with abattoirs, the key question should be whether an effective stunning rate of 30 per cent is feasible for seals. Based on this benchmark, rather than a 0 per cent benchmark, it is hard to reject Canada's proposed alternative.

The preamble to Council Regulation 1007/2009 on trade in seal products recognizes that 'it might be possible to kill and skin seals in such a way as to avoid unnecessary

[90] 'First Written Submission', *supra* note 59, para. 54 (emphasis added).
[91] *Ibid.*, para. 94 (emphasis added).
[92] *Ibid.*
[93] *Ibid.*
[94] Atkinson, Velarde and Algers, *supra* note 89, at 473.
[95] It arguably undermines the EU's moral credentials.

pain, distress, fear or other forms of suffering'.[96] The EU's regime was originally designed as a welfare measure before parliamentary committees transformed it into a 'total ban'.[97] Perišin criticizes the EU's failure to 'allow countries or individual traders to prove that their seal products are derived from humane hunts'.[98] She suggests that 'it is not really clear from all the data taken together why a ban was chosen as the most suitable type of measure'.[99]

Sellheim is equally wary of the EU's 'inherently inhumane' claim. While the EU considers it 'cruel' to club seals during the slaughter process, this is a legitimate slaughter technique for other animals.[100] The European Food Safety Authority, which produced the report on seal cruelty underpinning the EU's ban,[101] recommends clubbing piglets and lambs, in certain circumstances, by 'holding the piglet with both hands around its hindlegs and swinging the piglet's head towards a hard surface'.[102]

Notwithstanding these problems, the AB accepts the EU's 'inherently inhumane' argument when it cites 'extensive scientific evidence' showing 'inherent obstacles that make it impossible to kill seals humanely on a consistent basis'.[103] I suggest this line of reasoning is flawed. Even as a purely theoretical matter, species-wide categorical bans are dubious under welfare-based frameworks. To reconcile welfare-based reasoning with the ban, the AB resorts to contorted reasoning. For example, it endorses the panel's 'number of seals killed' proxy to assess the ban's effectiveness at lowering the 'number of seals being killed inhumanely'.[104]

However, this approach cannot truly be reconciled with a welfare-based framework that regulates how animals are killed (and how they live) but is wholly indifferent to the numbers killed. When the AB invoked 'animal welfare' under the design step, it clearly did not signify reducing the number of animals killed (to zero) as it does in this context. In any case, if the AB truly rejects consistency testing, on both legal and conceptual grounds, these flawed 'inherently inhumane' arguments would be wholly unnecessary as there would be no need to demonstrate moral consistency.

[96] Council Regulation 1007/2009, OJ 2009 L286/36, preamble (eleventh recital) (on trade in seal products). However, the regulation also states that this is 'not feasible in practice or, at least … very difficult to achieve in an effective way'.

[97] Perišin, *supra* note 14, at 385. For a detailed discussion of the policy-making history, see Sellheim, 'Policies and Influence: Tracing and Locating the EU Seal Products Trade Regulation', 17 *International Community Law Review* (2015) 3, at 3.

[98] *Ibid.*, at 398.

[99] *Ibid.*, at 387.

[100] Sellheim, *supra* note 97, at 26–27 (including footnote 98). Sellheim calls this a 'double standard'. See also Council Regulation 1099/2009, *supra* note 43 (where this method is described as a 'percussive blow to the head' with the aim of 'provoking severe damage to the brain').

[101] European Food Safety Authority (EFSA), 'Scientific Opinion of the Panel on Animal Health and Welfare on a Request from the Commission on the Animal Welfare Aspects of the Killing and Skinning of Seals', 610 *European Food Safety Authority Journal* (*EFSA Journal*) (2007) 1.

[102] EFSA, 'Scientific Opinion on Welfare of Pigs during Killing for Purposes Other Than Slaughter', 18(7) *EFSA Journal* (2020) 6195.

[103] *Seals – Report of the Appellate Body*, *supra* note 15, para. 5.284.

[104] *Ibid.*, paras 5.245–5.247.

6 Discussion

I have argued that the *Seals* reports are deeply flawed. The amorphous definition of 'seal welfare' allowed the WTO tribunals to apply it in contradictory ways as both 'welfare without consistency' and 'welfare with consistency' while purporting to apply the same substantive concept. This is typified by the AB's logically questionable approach of avoiding, rejecting and engaging with the key question of regulatory consistency without offering any justification for the variability of its approach between contexts.

The report also suffers from a lack of clarity on key underlying issues. Are seals policy-like factory-farmed animals? Are they subject to the same moral standard and level of protection? Many of the problems addressed in this article could have been avoided simply by adopting a clear and coherent definition of welfare. Characterizing the policy objective in a clear manner is a critical step that WTO tribunals should use to identify and frame the most important disputed issues. This step should not be performed in ways that cause difficult issues to be obscured or overlooked.

To the extent that the AB's reasoning is flawed, this is not always obvious, as it does not make directly contradictory statements but, rather, relies on silence or implicit contradictions. It purports to be silent about whether seals are policy-like other animals but then implicitly treats them as policy-like by accepting factory farming laws as relevant evidence. It implicitly relies on the concept of 'welfare without consistency' to reject Canada's claims but then applies the concept of 'welfare with consistency' to substantiate the EU's claims. These contradictions may not jump off the page, but they are there, and they have an impact.

I suggest that the AB's use of double standards has the effect of favouring the EU's case. The AB rejected, in principle, Canada's request to 'identify a relevant standard or benchmark of animal welfare' to determine if seal hunting 'exceeded the accepted level of risk of compromised animal welfare'.[105] However, it accepted consistency arguments from the EU both in principle and in practice. It used 'effective stunning rates' as a benchmark to find that seal hunting is 'inherently inhumane' (unlike abattoirs)[106] and that a categorical ban is therefore the least trade-restrictive way for the EU to achieve its objective.

Since the AB oscillates between different case theories, it does not assess either conception of welfare comprehensively under Article XX's legal test. The 'welfare with consistency' framework has some serious weaknesses. Animal welfare laws clearly are and should be permissible under Article XX, but it seems artificial to describe the seal products ban as a welfare law according to any conventional definition. Further, this line of reasoning leads to the counter-intuitive conclusion that the EU's so-called 'seal welfare' objective cannot be achieved through welfare standards.A more plausible (descriptive) case theory would acknowledge that seals are not policy-like other commodity animals from the EU's perspective. However, the AB rejects calls for it to

[105] *Ibid.*

[106] Does this mean abattoirs are morally acceptable if they are merely 'actually inhumane' without being 'inherently inhumane'?

explicitly recognize that the EU considers seals special or that it applies a higher moral standard. The 'charismatic species' view of seals raises some thorny legal questions. It is doubtful that such measures are based on 'moral standards', especially if the EU is motivated by non-rationalist considerations such as 'cuteness'. It is also unclear whether, or on what legal basis, such measures could pass the public morals design step, especially since 'animal welfare' evidence would be irrelevant and inadmissible. The AB's flawed approach to 'welfare' caused it to sidestep the most thorny and interesting questions that lay at the heart of the dispute. As a result, it created much confusion about WTO law, particularly regarding the role of consistency testing.

7 Conclusion

This article has advanced compelling doctrinal and policy reasons for WTO law to embrace consistency testing for certain 'moral' measures. The *Seals* discussion reinforces the point that consistent treatment across like cases is necessary to ensure coherent reasoning when advocating animal welfare or welfarism. At a technical level, this article has critiqued the AB's specific reasons for rejecting consistency testing. At a deeper level, it has suggested that the AB's oscillating views on consistency throughout the report cannot be aggregated into a coherent package. While the contradictory nature of the AB's reasoning may not be immediately obvious, it can be made evident through close textual analysis to show that the substantive meaning of 'welfare' shapeshifts throughout the report.

Most controversially, the article has suggested that the *Seals* jurisprudence and literature is ultimately built on defective foundations. This is a collective failure that raises questions about how we, as a legal community, could permit this kind of foundational incoherence to take root in a body of law. And what we can do differently to remedy it.