

# THE EFFECTS OF DOMESTIC REGULATION ON INTERNATIONAL TRADE LAW AS AN AVENUE FOR CHANGE BEYOND BORDERS

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## I. INTRODUCTION

The trade implications that domestic regulations may impose on other states is significant and warrants consideration. This paper will explore whether domestic regulations can be used to adequately affect change beyond a World Trade Organization (WTO) member states' jurisdiction. In the process, this paper will refer to the longstanding fight

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against animal cruelty around the globe through the implementation of laws against testing cosmetic products on animals. While it is an effective means of illustrating the influence of domestic law on the international legal landscape, this focus was also chosen in light of federal laws proposed in Canada and the United States in 2015. This paper will also refer to the amended Council Directive on Cosmetics (EU-Directive on Cosmetics), that has been implemented in the European Union (EU).

This paper is divided into three sections. The first section will briefly set out the EU-Directive on Cosmetics and the proposed Canadian and American legislation, while touching on the status of other countries' laws with similar objectives. The second section will discuss the challenges that regulations with potential trade effects could have, while considering WTO agreements, such as the General Agreement on Tariffs and Trade (GATT)<sup>1</sup> and the Technical Barriers to Trade Agreement (TBTA),<sup>2</sup> and how this necessarily limits the ability to create change beyond borders. The third section will address the nature of the effect that domestic regulations with trade implications have, and the options available to other WTO member states. Finally, this paper concludes that, although the ability to create change beyond borders through domestic regulation is passive in the sense that a WTO member state cannot directly regulate in another WTO member states' jurisdiction, the effect is arguably quite strong, given the limited number of viable options available to WTO member states in cases where a WTO challenge is unsuccessful. This effect is further strengthened by the limitations of the WTO dispute system in cases where a domestic regulation is found to be inconsistent with the GATT or TBTA.

This paper is not intended to provide a comprehensive review of the current law on cosmetic animal testing. Rather, it will refer to the proposed laws in the US and Canada, as well as the current law in the EU, when relevant to the underlying question in this paper: to what extent can domestic regulations of WTO member states push change beyond their borders? This question will be addressed by examining said laws in an effort to uncover how they interact with the WTO agreements, emphasizing the limitations and weaknesses that may affect their reach. The ability to

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<sup>1</sup> *General Agreement on Tariffs and Trade*, 30 October 1947, 55 UNTS 187 (entered into force 1 January 1948) [GATT].

<sup>2</sup> *Agreement on Technical Barriers to Trade*, opened for signature 12 April 1979, 1186 UNTS 276 (entered into force 1 January 1980) [TBTA].

indirectly promote progression on a larger scale is viewed in this paper as a positive consequence of the international trading system, given that the WTO Body ensures that regulations are not so far reaching so as to directly take away the sovereignty of member states. Using the WTO system in this way has the potential to promote many causes around the world, such as those related to animal welfare, the environment, humane working conditions and so on.

## II. SECTION ONE: STATUS OF LAW AGAINST ANIMAL TESTING

The EU is by far the most progressive state with regards to laws against testing cosmetic products on animals. Council Directive 76/768/EEC imposes regulations for cosmetic products.<sup>3</sup> In 1993, it was amended so that compliance required member states to ban the marketing of cosmetic products containing animal tested ingredients.<sup>4</sup> While the original deadline was January 1, 1998, it was postponed to 2000 and, again, to 2002, due to a lack of scientifically validated alternatives.<sup>5</sup> In 2003, the EU further amended the Directive to prohibit animal testing for cosmetic products. This amendment, made by Directive 2003/15, would phase in a full ban between 2003 to 2013 on the marketing, sale and importation of cosmetic products tested on animals.<sup>6</sup> The EU-Directive on Cosmetics now prohibits the marketing and importation of cosmetic products that have been tested on animals, as well as the testing of finished cosmetic products on animals once products are within the EU.<sup>7</sup> Of particular interest in this paper, is the ban on the importation of cosmetic products tested on animals, due to its obvious trade implications.

Following the EU's full ban in 2013, many countries have implemented domestic regulations with similar objectives, such as India and the Brazilian

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<sup>3</sup> EC, *Council Directive 1976/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products*, [1976] OJ, L 262/169.

<sup>4</sup> Laura Donnellan, "Animal Testing in Cosmetics: Recent Developments in the European Union and the United States", (2007) 13:2 *Animal L* 251 at 256.

<sup>5</sup> *Ibid.*

<sup>6</sup> Jennifer Klein, "EU Cosmetics Directive and the Ban on Animal Testing: Compliance, Challenges, and the GATT as a Potential Barrier to Animal Welfare" (2012) 21:1 *Transnat'l L & Contemp Probs* 251.

<sup>7</sup> EC, *Council Directive 1223/2009/EC of 30 November 2009 on cosmetic products*, [2009] OJ, L 342/59[*EU-Directive on Cosmetics*].

state of São Paulo, with progress also being made in China and South Korea.<sup>8</sup> According to one article, more than thirty countries have enacted similar legislation.<sup>9</sup> While China currently requires testing on animals for imported cosmetic products upon arrival, scientists from Britain have reportedly been working with scientists from China by providing training on alternative methods.<sup>10</sup>

In 2015, Canada introduced Bill S-234, which would amend the *Food and Drugs Act*.<sup>11</sup> It completed its first reading. In the same year, the *Humane Cosmetics Act* was referred to the United States' House committee on Energy and Commerce, as well as the Subcommittee on Health, shortly after being introduced in June of 2015.<sup>12</sup> This American Bill would take effect to ban animal testing within a one year period following enactment. The second reading of Canadian Bill S-234 was to be placed on the Orders of the Day two days from its first reading, however the Bill was not debated any further. Carolyn Stewart Olsen, the same senator who proposed Bill S-234, introduced Bill S-214 in December of 2015.<sup>13</sup> Bill S-214 also seeks to amend the *Food and Drugs Act* to ban the sale of cosmetics tested on animals in Canada and at the time of this paper, this Bill was on its second reading.<sup>14</sup>

In speaking to Bill S-214, Ms Olsen stated:

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<sup>8</sup> Rebecca Aldworth, "Our Policy on Animal Testing is Distinctly Un-Canadian", *The Huffington Post* (18 March 2014), online: <[www.huffingtonpost.ca/rebecca-aldworth/animal-testing-canada\\_b\\_4987771.html](http://www.huffingtonpost.ca/rebecca-aldworth/animal-testing-canada_b_4987771.html)>.

<sup>9</sup> The Humane Society of the United States, "Federal Bill to End Cosmetics Testing on Animals Introduced" (23 June 2015), online: <[www.humanesociety.org/news/press\\_releases/2015/06/hca-reintroduction-062315.html](http://www.humanesociety.org/news/press_releases/2015/06/hca-reintroduction-062315.html)>.

<sup>10</sup> Robin McKie, "UK scientists to help China stop animal tests on imported goods", *theguardian* (7 November 2015), online: <[www.theguardian.com/world/2015/nov/07/china-cosmetics-uk-training-stop-animal-testing](http://www.theguardian.com/world/2015/nov/07/china-cosmetics-uk-training-stop-animal-testing)>.

<sup>11</sup> Bill S-234, *An Act to amend the Food and Drugs Act (cruelty-free cosmetics)*, 2nd Sess, 41st Parl, 2015 [Bill S-234].

<sup>12</sup> US, Bill HR 2858, *Humane Cosmetics Act*, 114th Cong, 2015 [Proposed Humane Cosmetics Act].

<sup>13</sup> Bill S-214, *An Act to amend the Food and Drugs Act (cruelty-free cosmetics)*, 1st Sess, 42nd Parl, 2015 [Bill S-214].

<sup>14</sup> *Debates of the Senate (Hansard)*, 42nd Parl, 1st Sess, No 150:11 (3 February 2016) at 210 (Hon Carolyn Stewart Olsen).

While Canada has lagged behind in this issue, our closest trading allies and trading partners, the European Union, Israel, India, New Zealand and Turkey have moved to enact full or partial sales and marketing bans for the products which have been produced through animal testing. The European Union's 2013 Cosmetics Regulation and previously their 2003 cosmetics directive are seen as models for responsibly ending the practice of animal testing. As of now, the EU sales ban is in force in 28 countries, representing the world's largest market for beauty products.<sup>15</sup>

### III. WTO AGREEMENTS AND DOMESTIC REGULATIONS

#### A. General Agreement on Tariffs and Trade (GATT) Article III: National Treatment

The National Treatment (NT) provision is meant to guarantee that the end product of a multilateral negotiation will not be undone through *unilateral, subsequent* actions that affected trading partners cannot influence.<sup>16</sup> This would suggest that an import ban such as the one at issue in this paper would offend Article III (National Treatment) of the GATT since WTO member states would be required to abide by another member state's regulation to continue trading, while having no control over that regulation being created. The regulation would prevent the former WTO member states from being able to trade in the latter's jurisdiction without abiding by that regulation. However, certain factors must be fulfilled for the NT principle to apply. A claimant must show that a measure (being a law, regulation, or requirement) affecting the internal sale, offer for sale, purchase, transportation, distribution or use, is affording the foreign "like" product less favourable treatment.<sup>17</sup>

Given that the bans at issue in this paper have either been created or are being proposed as law in their respective jurisdictions, there can be little doubt that they are "measures" as intended under the GATT. There is also little question as to whether the measures affect the importation of products from WTO member states. However, there are greater considerations with regards to what constitutes a "like product". First, to what extent does the

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<sup>15</sup> *Ibid.*

<sup>16</sup> Petros Mavroidis, George Bermann & Mark Wu, *The Law of the World Trade Organization (WTO): Documents, Cases & Analysis* (St. Paul: Thomson Reuters, 2010) at 222 [WTO Casebook].

<sup>17</sup> *Ibid* at 240.

process in which a product is made influence whether it is “like” a product that uses a different process to reach the same end? Second, to what extent do the compounds used in making the product contribute to it being “like” a product that uses different compounds to reach the same end? The latter question was addressed in the case of a French decree which banned the sale of asbestos and asbestos-containing construction material, requiring the Panel to decide whether construction materials containing asbestos were alike construction materials that did not contain asbestos.<sup>18</sup> While the Panel found that the products were alike by focusing on the end uses of the products, this interpretation was reversed on appeal.<sup>19</sup> The Appellate Body (AB) found that the Panel should have fully considered all four factors set out in *Border Tax Adjustments*,<sup>20</sup> rather than focusing on just one. The banned product contained carcinogenic fibers whereas the other product being compared did not. The AB found that when considering this, “reasonable consumers [would have been led] to stop purchasing material containing [the carcinogenic fibers]”.<sup>21</sup> Thus, the likelihood that product composition may affect consumer choices was sufficient to raise a presumption that the two products were unlike.<sup>22</sup>

The AB in *EC-Asbestos* weighed the four factors set out in *Border Tax Adjustments* in reaching the conclusion that the products were not alike. The AB stated:

“We note that these four criteria comprise four categories of ‘characteristics’ that the products involved might share: (i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes.”<sup>23</sup>

In applying this discussion to the bans on cosmetic animal testing, there is room for debate as to whether these products rise to the level of difference

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<sup>18</sup> *Ibid* at 241.

<sup>19</sup> WTO, *Report of the Appellate Body on European Communities – Measures affecting Asbestos and Asbestos – Containing Products*, WTO Doc WT/DS135/AB/R (2001) at para 116 [*EC-Asbestos*].

<sup>20</sup> WTO *Casebook*, *supra* note 16 at 234.

<sup>21</sup> *Ibid* at 243.

<sup>22</sup> *Ibid*.

<sup>23</sup> *EC-Asbestos*, *supra* note 19 at para 101 (see also WTO Website).

as found in *ECAsbestos*. In *ECAsbestos* a human health concern influenced the AB's finding that the products were unlike, especially given the role this concern would play in consumer perception of the two products. It is logical that many individuals would take the opportunity to reduce this serious health risk if it was brought to their attention. *ECAsbestos* emphasized the importance of research in confirming the health concern present in materials containing asbestos.<sup>24</sup> In that case there was strong evidence that the fibres used in the asbestos materials were cancer causing. Although the purpose of cosmetic testing on animals is to ensure safety for human use, the health concern argument that might otherwise suggest that animal tested and non-animal tested cosmetic products are unlike is weakened. Testing alternatives exist and are replacing animal testing, so that non-animal tested products are not going on the market untested.<sup>25</sup> In this particular respect, human health concerns are essentially a nonissue, and consumers may be indifferent as to whether products are tested on animals or using alternative testing methods. This indifference argument can be applied to countries where animal testing is currently allowed, such as Canada or the US where many large cosmetic brands test on animals and are thriving in business. In this sense, the consumer effects of products tested on animals versus those using cruelty-free testing arguably demonstrates a more niche preference.

It is interesting that many Non-Government Organizations (NGOs) pushing these cruelty-free policies put forward data to exemplify consumer support, such as where “[a] November 2012 poll by The Strategic Counsel on behalf of Animal Alliance of Canada and HSI revealed that 88 percent of Canadians agree that testing new cosmetic products is not worth the animals' pain and suffering, and that 81 percent would support a national ban on animal testing of cosmetics and their ingredients.”<sup>26</sup> Using this data, NGOs have crafted an argument based on consumer perception and demand that could help differentiate products that are tested on animals from those that use cruelty-free testing methods, lessening their competitive relationship, and therefore making them less alike.

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<sup>24</sup> *Ibid* at para 151.

<sup>25</sup> Thomas Hartung, “From Alternative Methods to a New Toxicology” (2011) 77:3 *European J Pharmaceutics & Biopharmaceutics* 338 at 342.

<sup>26</sup> Aldworth, *supra* note 8.

Assuming there is enough evidence to support an argument that the alternative testing methods are less reliable than the animal tests, such an argument is of little use at this stage of the GATT analysis for a party hoping to have the measure found to be inconsistent with GATT. It simply works against the requirement of finding the products to be alike. In *EC-Asbestos*, the products were found to be unlike largely owing to the human health concerns present in the prohibited asbestos containing materials which were not present in the non-asbestos material, and this difference was said to affect consumer perception. In the context of animal-tested cosmetics, if it is found that products using alternative testing methods pose health concerns not present in products tested on animals, and this difference affects consumer perception, then the products are unlike. Accordingly the ban cannot be found inconsistent with the GATT under Article III:4. This is illogical, since it would promote the use of tests deemed dangerous for human health. If this was the concern, the issue is best addressed through other avenues. France did attempt to challenge the EU-Directive on Cosmetics through Parliament, in part on the ground that it posed human health risks, however they were unsuccessful. The AG found that France failed to adduce any evidence of human health concerns beyond mere hypotheticals.<sup>27</sup> The argument of human health concern is best addressed under the GATT Article XX analysis in the context of zero alternatives existing. However, as discussed in section 2.2, the bans at issue in this paper substantially mitigate any risk to human health through the exceptions created for situations in which there are no alternative methods to animal testing. On the other hand, one supporting the ban may want to discredit animal testing by using evidence showing its inadequacy as compared to the new alternatives. This would differentiate the products and contribute to finding the products unlike, assuming there is conclusive evidence. This would be similar to the argument made in *EC-Asbestos*.

There is, however, a major difference between *EC-Asbestos* and the bans on cosmetic animal testing. In *EC-Asbestos* the ban addressed human health issues inherent in the composition of the product itself. Our present case deals with a prohibition regarding the Product and Production Method (PPM). This difference begs the earlier question: to what extent does the process in which a product is made contribute to it being “like” a product that uses a different process to reach the same end? Kruse’s article discusses

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<sup>27</sup> Donnellan, *supra* note 4 at 264.

this debate and its potential consequences under GATT Article III and GATT Article XX.<sup>28</sup> The burden for establishing the substantive element under GATT Article III is on the party making the claim, after which the burden will shift to the respondent to rebut this presumption of “likeness”.<sup>29</sup> In *ECAsbestos*, the AB stated that, where there is evidence that products are physically quite different, there is a heavier burden on the complainant to establish that these products are in a competitive relationship that gives rise to “likeness”.<sup>30</sup> Kruse notes that in cases where the difference between two products is based on their PPMs, a complainant will have an easier job establishing a prima facie case of likeness based on the factors set out in *Border Tax Adjustments*,<sup>31</sup> suggesting a lower burden on the complainant. This is because two products may differ in PPMs, but be physically quite similar, therefore lacking the characteristic of being physically different that *ECAsbestos* states would result in a higher burden on the complainant. In our case, as the bans are in regard to the process used to make the product, it may be easier to prove “likeness” since the products may share the same physical qualities. Read discusses how PPMs stem from “qualitative criteria” for trade regulation where, “in many cases, the physical characteristics of the PPM products concerned are identical or very similar, such that they cannot be distinguished easily or, possibly, at all, by means of scientific analysis.”<sup>32</sup> It is this “goods based” approach that could be detrimental to a product only distinguishable by PPM, as it ignores this qualitative element of perception based on PPM.

This is concerning for bans like the one at issue in this paper. As Fitzgerald explains, “since animal welfare measures are often concerned with the manner in which individual animals are treated...the focus is

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<sup>28</sup> Rudi Kruse, “Process and Production Methods and Burden of Proof: A Procedural Limitation on the ‘Like’ Products Debate” (2013) 16 Intl Trade & Bus L Rev 377 at 378.

<sup>29</sup> *Ibid* at 382.

<sup>30</sup> *ECAsbestos*, *supra* note 19 at para 118.

<sup>31</sup> Kruse, *supra* note 28 at 382.

<sup>32</sup> Robert Read, “Process and Production Methods and the Regulation of International Trade” in Nicholas Perdikis, Robert Read, International Economics Study Group, eds, *The WTO and the Regulation of International Trade: Recent Trade Disputes Between the European Union and the United States* (UK: Edward Elgar Publishing Limited, 2005) 239 at 245.

primarily on the question of ‘how’ those goods are produced.”<sup>33</sup> Fitzgerald also relates this using the example of an egg produced free-range as compared with those produced in less humane ways. The former is viewed as unlike from an animal welfare perspective, and illustrates how “disregarding PPMs when deciding what products should be treated alike for trade purposes ... potentially frustrates the objective behind a good deal of animal welfare regulation.”<sup>34</sup> Swinbank puts forward that it has always been a basic tenant of the trading system that PPMs are not relevant criteria on which trading partners can differentiate between goods.<sup>35</sup> He goes on to say that, the concept of “like” products “focuses on the objective characteristic of the product, and implies that the particular processes and production methods deployed to produce the good are irrelevant.”<sup>36</sup> This is problematic, since PPMs are at the center stage of any ban on animal testing. Consequently, the products do not appear to fit within most of the categories set out in *Border Tax Adjustment* for assessing whether products are alike.

However, *ECAsbestos* states that “[the *Border Tax Adjustment* categories] are neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of products.”<sup>37</sup> It would follow that arguments may still be made outside these criteria to assess “likeness”, and so, one is open to make an argument that products are unlike based on PPM, despite being otherwise similar. Read states that, in *ECAsbestos* “the Appellate Body’s analysis rejected any hierarchy of like product criteria but decided that a negative finding under one criterion was sufficient to justify a failure to satisfy Article III.4.”<sup>38</sup> Further, the term “like products” is not defined and “should be determined on a case by case basis”.<sup>39</sup> In this sense, a PPM may be considered in the “like products” part of the analysis, even if only on the

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<sup>33</sup> Peter Fitzgerald, “‘Morality’ May Not Be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law” (2011) 14:2 J Intl Wildlife Law & Policy 85 at 101.

<sup>34</sup> *Ibid.*

<sup>35</sup> Alan Swinbank, “Like Products, Animal Welfare and the World Trade Organization” (2006) 40:4 Journal of World Trade 687 at 687.

<sup>36</sup> *Ibid* at 697.

<sup>37</sup> *ECAsbestos*, *supra* note 19 at para 102 (see also *WTO Website*).

<sup>38</sup> Read, *supra*, note 32 at 263.

<sup>39</sup> Swinbank, *supra*, note 35 at 697.

third *Border Tax Adjustment* category of consumer perception and wants alone. This relates directly to the idea that, “consumer preferences are at the heart of market-driven economic systems, and where consumers express preferences for particular process characteristics to be embedded in goods then producers, and policy-makers must take notice ... Otherwise the credibility of the WTO system is itself at stake.”<sup>40</sup>

Howse looks to the language in GATT Article III:4 and finds that, when taken in their ordinary meaning, the words to “affect the sale ... of products” show nothing to indicate that PPMs would be excluded.<sup>41</sup> Here the words are given a broad meaning, something that the author suggests is supported in WTO case law.<sup>42</sup> One case mentioned was *Italian Discrimination Against Imported Agriculture Machinery*, which involved the Italian government subsidizing loans for the purchase of Italian farm machinery but not imports. That case stated that, “the selection of the word ‘affecting’ [implies]... that the drafters of the Article intended to cover in paragraph 4 not only the laws and regulations which directly governed the conditions or sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market.”<sup>43</sup> More generally Howse argues that PPM regulations have been applied to GATT Article III:4 in the past.<sup>44</sup>

Howse makes another interesting argument. If it is the case that PPMs do not apply to GATT Article III:4 and the PPM regulation does not fall within any other GATT section (e.g. Article XI on quantitative measures), it would escape review entirely, which “insulates internally enforced process-based measures from an inquiry into disguised protectionism and puts them in a better state than product-based measures, which no one intends.”<sup>45</sup> On the other hand, if we include PPM measures under GATT Article III:4, but

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<sup>40</sup> *Ibid* at 707–08.

<sup>41</sup> Robert Howse & Donald Regan, “The Product/Process Distinction - An Illusory Basis for Disciplining ‘Unilateralism’ in Trade Policy” (2000) 11:2 *European J Intl Law* 249 at 254.

<sup>42</sup> *Ibid* at 255.

<sup>43</sup> *Italian Discrimination Against Imported Agricultural Machinery*, L/833 - 7S/60 (23 October 1958) at para 12.

<sup>44</sup> Howse & Regan, *supra* note 41 at 255 (see especially WTO, *Report of the Panel on United States - Measures affecting Alcoholic and Malt Beverages*, WTO Doc DS23/R - 39S/206 (1992), online: <[https://www.wto.org/english/tratop\\_e/dispu\\_e/91alcohm.pdf](https://www.wto.org/english/tratop_e/dispu_e/91alcohm.pdf)>).

<sup>45</sup> Howse & Regan, *supra* note 41 at 256.

ignore the process method as a distinguishing factor, the burden on the party trying to find the measure GATT consistent becomes much heavier. The latter here is arguably the more likely result, but regardless, there appears to be little balance with respect to assessing PPM regulations under GATT Article III:4.

The policy issue raised by PPM regulations is that allowing WTO member states to differentiate products based on PPM would result in the regulating WTO member state legislating beyond their jurisdiction. As Howse states, it is the “notion that, when a country specifies the production process for products it is importing, it is engaging in inappropriately or illegitimately ‘unilateral’ behavior, determining something on its own that ought to be decided through international cooperation and negotiation”.<sup>46</sup> Stevenson picks up this point and states that it is a common belief in the trade world that, “while a WTO member may act to protect animals within its own territory, it may not adopt measures that affect animals located outside its territorial jurisdiction, for doing so involves one country unilaterally forcing their legislation onto another country, which is viewed as an affront to that nation’s sovereignty.”<sup>47</sup> This however, as the author puts forward, is not clear cut. To speak to the alternative, if a WTO member state limits their PPM regulation to only domestic products it would result in a comparative advantage to imported products of WTO member states that are not required to abide by those regulations, thus putting domestic manufactures at a disadvantage in the market.<sup>48</sup>

Nevertheless, arguments may be made on both sides. One may argue that the products are similar since it is only the process that differs and, furthermore, that this would not alter consumer perception of the banned and unbanned products. On the other hand, another may argue that the products are different due to inadequacy of the animal tests (assuming there is sufficient evidence), and that in some way consumer perception is altered by these testing methods. Outside a human health concern argument

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<sup>46</sup> *Ibid* at 251.

<sup>47</sup> Peter Stevenson, “European and International Legislation: A Way Forward for the Protection of Farm Animals?” in Sankoff & White, eds, *Animal Law in Australasia* (Federation Press Sydney 2009) 307 at 326.

<sup>48</sup> Swinbank, *supra*, note 35 at 694. See also Andrew Lurié & Maria Kalinina, “Protecting Animals in International Trade: A study of Recent Success at the WTO and in Free Trade Agreements” (2015) 30:3 *American University International Law Review* 431 at 433.

supporting the ban, it is arguably harder to prove products are unlike based on the PPM since the factors set out in *Border Tax Adjustment* would weigh in favour of “likeness” in those cases. However, Kruse argues that although it may be easier to prove a prima facie case of “likeness” at the substantive part of the GATT claim in cases involving PPM-based regulations, the effect is minimal due to the role of PPM regulations in the GATT Article XX part of the analysis.<sup>49</sup> This will become clearer in part 2.2 of this paper.

It is necessary to find the products to be alike to move on to the less favourable treatment (LFT) part of the test. All cosmetic products in the EU now use cruelty-free testing methods. If cosmetic products are deemed to be alike despite their testing methods, then the EU-Directive on Cosmetics would be affording LFT to those like products that are tested on animals from other jurisdictions. We will assume for the purposes of this paper, that those products tested on animals are deemed to be like the products that use cruelty-free testing methods and that LFT is afforded to other WTO member states. The more contentious issue of whether the measure can be justified under GATT Article XX will be addressed next.

## B. General Agreement on Tariffs and Trade (GATT) Article XX

While assuming that the cosmetic products are alike and that LTF is afforded to those products being imported, we will discuss GATT Article XX to determine if the exception applies. *ECAsbestos* set out that GATT Article XX could justify a regulation found to be inconsistent with GATT Article III.<sup>50</sup> GATT Article XX is set up as a two-tier test, where “the substantive conformity of a measure... is provided by the sub-paragraph of the provision invoked, whereas compliance with the requirement set out in the opening language of GATT Article XX, known as the *chapeau*, ensures that a national measure is *applied* in a GATT consistent manner”.<sup>51</sup> It has now been settled that WTO member states may make their own policies so long as they comply with GATT Article XX.<sup>52</sup> The burden remains on the party invoking GATT Article XX.<sup>53</sup> The standard of judicial review must be

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<sup>49</sup> Kruse, *supra* note 28 at 378.

<sup>50</sup> *ECAsbestos*, *supra* note 19 (see also *WTO Casebook*, *supra* note 16 at 685).

<sup>51</sup> *WTO Casebook*, *supra* note 16 at 686.

<sup>52</sup> *Ibid* at 688.

<sup>53</sup> WTO, *Reports of the Appellate Body on Standards for Reformulated and Conventional*

confined to the *means* used to achieve the objective, which does not extend to an examination of the legitimacy of the *ends* themselves.<sup>54</sup> It is clear that more deference will be provided in cases where human life and health is at stake.<sup>55</sup>

We will first address the exception clause by basing our analysis under GATT Article XX(b), with respect to those measures “necessary to protect human, animal or plant life or health”.<sup>56</sup> The test here is that: it must be *necessary* (while considering the *relative importance* of the interests furthered<sup>57</sup>) to achieve the *ends* pursued; if two measures exist, the one that is GATT consistent is chosen; and there must be no other measure which is *less restrictive* to international trade transactions that can achieve the same result.<sup>58</sup> The burden is on the respondent to show that the measure is necessary, and then switches to the claimant to show it is not the least restrictive. If the claimant can show this, the onus reverts back to the respondent to prove that the less restrictive measure does not allow it to reach its objective.<sup>59</sup>

In the case of a law prohibiting animal testing, the objective could reasonably fall within GATT Article XX(b), as means to protect animal life. What is interesting is that there is also an argument under this section regarding human health, thus complicating the issue. Pauwels and Rogiers point out “that the major problem of the current [EU-Directive on Cosmetics] comes down to the coexistence of two currently irreconcilable objectives, namely (i) the adequate protection of consumer health and (ii) the complete abolition of animal tests.”<sup>60</sup> Fitzgerald states that “assessing the

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*Gasoline*, WTO Doc WT/DS2/AB/R (1996), online: <[https://www.wto.org/english/tratop\\_e/dispu\\_e/2-9.pdf](https://www.wto.org/english/tratop_e/dispu_e/2-9.pdf)>. (see also WTO *Casebook*, *supra* note 16 at 691).

<sup>54</sup> WTO *Casebook*, *supra* note 16 at 691.

<sup>55</sup> *EC-Asbestos*, *supra* note 19 (see also WTO *Casebook*, *supra* note 16 at 691).

<sup>56</sup> GATT, *supra* note 1, art XX(I)(b).

<sup>57</sup> WTO, *Report of the Appellate Body on Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (2005), online: <[https://www.wto.org/english/tratop\\_e/dispu\\_e/285abr\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/285abr_e.pdf)>. See also WTO *Casebook*, *supra* note 16 at 694.

<sup>58</sup> WTO *Casebook*, *supra* note 16 at 693.

<sup>59</sup> Kruse, *supra* note 28 at 391.

<sup>60</sup> M Pauwels & V Rogiers, “Human Health Safety Evaluation of Cosmetics in the EU: A Legally Imposed Challenge to Science” (2010) 243:2 *Toxicology & Applied*

necessity of a measure is seen as a process that involves balancing a number of factors regarding the specific measure at issue, the objective to be achieved, and any reasonably available alternatives to achieving that objective.”<sup>61</sup> These points are important when looking at the EU-Directive on Cosmetics and its history. We have seen that the EU did try to implement the ban as early as 1993, however this was postponed many times over the years due to inadequacy of alternative testing methods. This is demonstrative of the fact that the EU is not sacrificing the objective of human health in order to meet that of animal welfare.

Tests used on animals are designed to identify issues with chemicals that could affect human health. Although banning these tests may appear to be placing animal welfare over human health, a closer look at the measures at issue in this paper, clearly show otherwise. Canada’s Bill S-214 clearly places human health above animal welfare by way of exceptions as well as the scope of “cosmetics”, as determined by its definition.<sup>62</sup> Similar definitions are used in the proposed American *Humane Cosmetics Act* and the EU-Directive on Cosmetics which limit the application of the ban to cosmetics products.

The EU-Directive on Cosmetics goes even further to state:

“This Regulation relates only to cosmetic products and not to medicinal products, medical devices or biocidal products. The delimitation follows in particular from the detailed definition of cosmetic products, which refers both to their areas of application and to the purposes of their use.”<sup>63</sup>

The EU-Directive on Cosmetics also contains an exception for dual-purpose ingredients (ingredients also used for pharmaceuticals).<sup>64</sup> In Klein, the dual-purpose exception in the EU-Directive on Cosmetics is recognized as a potential loophole, allowing cosmetic companies to test on animals in the name of the dual-purpose nature of the chemicals.<sup>65</sup> Although Klein views this as a weakness in the EU-Directive on Cosmetics, it is arguably quite necessary for its survival. If the policy were to be so far reaching to include a ban on animal testing for drugs used in the development of pharmaceuticals, a GATT Article XX(b) challenge would have more

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Pharmacology 260 at 262.

<sup>61</sup> Fitzgerald, *supra* note 33 at 114.

<sup>62</sup> Bill S-214, *supra* note 13, s 18.2(1).

<sup>63</sup> EU-Directive on Cosmetics, *supra* note 7, preamble, s (6).

<sup>64</sup> Klein, *supra* note 6 at 256.

<sup>65</sup> *Ibid.*

likelihood of success. The human health (now maybe even framed as life) stake would rise. It is arguably much more important to ensure that the pharmaceutical industry can continue to develop new safe compounds in the search to treat and cure illnesses and diseases. On the other hand, it is much harder to perceive the development of a new lipstick as rising to that level of importance. Further, as argued by Donnellan, cosmetic companies should be able to develop innovative products by using the over eight thousand cosmetic ingredients available to them that do not require animal testing in the EU.<sup>66</sup>

As per *ECAsbestos*, although it is not required, scientific research may be used to justify a regulatory intervention.<sup>67</sup> Many alternatives to animal testing have been developed over the years and assessed.<sup>68</sup> This certainly seems to mitigate the strength of any argument based on effects on human health. Klein comments on the importance of both human health and animal welfare concerns, and suggests that a balancing approach is necessary to assess both against each other under GATT Article XX.<sup>69</sup> The limitations of animal testing are relevant to this discussion, as such tests were found to have “failed to predict the birth defect causing properties [of] PCBs, industrial solvents and many drugs, while cancer tests in rats and mice failed to detect the hazards of asbestos, benzene, cigarette smoke, and many other substances.”<sup>70</sup> In addition to data backing alternative methods to animal testing, there is data suggesting many flaws with the traditional, dated animal testing methods.

The French government as well as the European Federation for Cosmetics Ingredients (EFCI), which represents over 70 cosmetic companies in the EU, challenged the EU-Directive on Cosmetics.<sup>71</sup> One of the grounds was that the directive would likely result in the marketing of products that are unsafe for humans.<sup>72</sup> The Court held that the ban was essential to accomplish the goals of the EU-Directive on Cosmetics, which all relate to animal welfare, and rejected the view that the risks to human

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<sup>66</sup> Donnellan, *supra* note 4 at 268.

<sup>67</sup> *ECAsbestos*, *supra* note 19 (see also *WTO Casebook*, *supra* note 16 at 695).

<sup>68</sup> Hartung, *supra* note 25.

<sup>69</sup> Klein, *supra* note 6 at 271.

<sup>70</sup> *Q&A: Animal Testing*, Humane Society Legislative fund, cited in Klein, *ibid.*

<sup>71</sup> Klein, *supra* note 6 at 265.

<sup>72</sup> *Ibid.*

health outweighed the benefits of the Directive.<sup>73</sup> This decision can largely be attributed to the lengths that the EU-Directive on Cosmetics goes to in minimizing human health risks, such as the dual-purpose ingredient exception. There has been pressure following the EU-Directive on Cosmetics to extend the ban to testing on laboratory animals, however the EU has not backed this.<sup>74</sup> Peter comments on the importance of these tests in improving animal and human health.<sup>75</sup> This illustrates a desire to apply laws like these to a broader context and, in contrast, a significant limitation in the fact that this cannot viably be done without offending WTO trade rules. Further, it could quite possibly result in opening the law up to challenge through other avenues.

When imports are subject to the PPM regulations of another WTO member state, this essentially means that the exporting WTO member state would have to comply by changing its own PPM, or cease the exportation of products to the former WTO member state. This suggests an element of coercion.<sup>76</sup> However, Nielsen points out that there is no obligation in general international law to trade in a non-discriminatory way or to import goods at all.<sup>77</sup> On the other hand, PPMs aside, there is arguably a limit to sovereignty found in trade agreements as contracts, where “in exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO agreement”.<sup>78</sup> This is to say that, by virtue of a WTO member state becoming a WTO member, they are effectively limiting their own sovereignty by agreeing to refrain from imposing barriers to trade. Despite this idea of a potential limit on state sovereignty, Kruse, using the example of an import ban on products produced from slave labour, discusses the idea that a state may be able to indirectly regulate in another jurisdiction

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<sup>73</sup> *Ibid* at 266.

<sup>74</sup> Laurence Peter, “EU rejects bid to ban animal testing in European labs”, BBC News (4 June 2015), online: <[www.bbc.com/news/world-europe-33015460](http://www.bbc.com/news/world-europe-33015460)>.

<sup>75</sup> *Ibid*.

<sup>76</sup> Laura Nielsen, *The WTO, Animals and PPMs* (Leiden, The Netherlands: Koninklijke Brill, 2007) at 263 [Nielsen].

<sup>77</sup> *Ibid* at 264.

<sup>78</sup> WTO, *Report of the Appellate Body Japan – Tax on Alcoholic Beverages* WTO Doc WT/DS11/AB/R, online: <[www.mofa.go.jp/policy/economy/wto/cases/WTDS8ABR.pdf](http://www.mofa.go.jp/policy/economy/wto/cases/WTDS8ABR.pdf)>.

through domestic regulations.<sup>79</sup> A ban of this sort can arguably fall within GATT Article XX(a), related to public morals.<sup>80</sup> Kruse finds that although this regulation would have the effect of indirectly regulating slave labour in the exporting country, this does not necessarily mean that the measure is GATT inconsistent.<sup>81</sup>

Kruse goes on to suggest that the issue in a case like the one mentioned above, becomes one of unilateralism, rather than extra-territoriality.<sup>82</sup> Here, while indirect extra-territoriality (such as creating a measure that affects imports) will not necessarily be GATT inconsistent, an issue of unilateralism may arise at the chapeau stage of the analysis under GATT Article XX. The chapeau of GATT Article XX states:

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures...”<sup>83</sup>

The chapeau makes the substantive sections of GATT Article XX, such as the public morals exception, contingent on satisfying the above requirement. In this respect, a PPM regulation can be consistent with the chapeau, however “the regulation must be sufficiently flexible, taking into account the conditions prevailing in affected countries; and the regulating Member must adopt a continuing, good faith effort to negotiate a bilateral or multilateral solution with those affected.”<sup>84</sup>

The bans on animal testing discussed here do not reach too far. In *US-Shrimp*,<sup>85</sup> a regulation was found to be inconsistent with the chapeau. The regulation in that case would have required other nations to adopt the exact same regulation used by the US. This failed to take into account “different

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<sup>79</sup> Kruse, *supra* note 28 at 389.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> GATT, *supra* note 1, art XX.

<sup>84</sup> *Ibid* at 390.

<sup>85</sup> WTO, *Report of the Appellate Body on Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R (1998), online: <[https://www.wto.org/english/tratop\\_e/dispu\\_e/58abr.pdf](https://www.wto.org/english/tratop_e/dispu_e/58abr.pdf)> (see also Kruse, *supra* note 28).

prevailing conditions in the countries affected by its regulation”, and further, it was without first seeking a good faith multilateral or bilateral solution with those affected countries.<sup>86</sup> In contrast, the animal testing bans do not set out the precise process that a member state must use to test cosmetic products they want to import to the regulating state. Rather, they simply set out that the products cannot be tested on animals and must still meet the requisite level of safety for human use. As we have seen, the EU has been forthcoming to help other nations implement alternative measures, which promotes compliance and continued trade. An example of this is the FTA in place with the EU and Korea that “already includes text in an annex on chemicals that confirms the shared objective of the parties to ‘promot[e] alternative methods for assessment of hazards of substances and reduc[e] animal testing’”.<sup>87</sup> As Nielsen explains, sometimes PPM regulations are necessary, such as in cases where a WTO member state does not wish to remove a product from the market completely.<sup>88</sup> This was the case in *US- Shrimp*, where the US government wished to curb the incidental killing of sea turtles without banning shrimp completely, which would have been more trade restrictive.

There have been recent developments in the WTO case law with respect to animal welfare from a public morals perspective under GATT Article XX(a). The *EC-Seal* challenge confirmed that animal welfare is a public moral concern under that section, deeming the ban “necessary” to protect public morals.<sup>89</sup> However, the AB was not convinced that the EU had “made “comparable efforts” to facilitate the access of the Canadian Inuit to the Indigenous Communities (IC) exception as it did with respect to the Greenlandic Inuit”.<sup>90</sup> The AB stated here, “we recall, in this regard, that a measure may result in arbitrary or unjustifiable discrimination ‘when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in

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<sup>86</sup> *Ibid* (see also Kruse, *supra* note 28 at 390).

<sup>87</sup> Lurié & Kalinina, *supra*, note 48 at 484.

<sup>88</sup> Nielsen, *supra*, note 76 at 273.

<sup>89</sup> WTO, *Report of the Appellate Body on European Communities – Measures prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/AB/R (2014), online: <[https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S006.aspx?Query=%28@Symbol=%20wt/ds400/ab/r\\*%20not%20rw\\*%29&Language=ENGLISH&Context=Fome rScriptedSearch&languageUICchanged=true at 5.3.3.7](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=%28@Symbol=%20wt/ds400/ab/r*%20not%20rw*%29&Language=ENGLISH&Context=Fome rScriptedSearch&languageUICchanged=true at 5.3.3.7)>.

<sup>90</sup> *Ibid* at 5.3.4.4.

those exporting countries.”<sup>91</sup> In this respect, the measure was not justified under the chapeau of GATT Article XX, and the AB recommended that the measure be brought within compliance with the chapeau.

The seal ban was not a total ban and instead attempted to prohibit the commercial sale of seal products, outside of the exceptions.<sup>92</sup> The ban originally contained three exceptions, found under Article 3. Article 3 reads:

1. The placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence. These conditions shall apply at the time or point of import for imported products.
2. By way of derogation from paragraph 1:
  - (a) the import of seal products shall also be allowed where it is of an occasional nature and consists exclusively of goods for the personal use of travellers or their families. The nature and quantity of such goods shall not be such as to indicate that they are being imported for commercial reasons;
  - (b) the placing on the market of seal products shall also be allowed where the seal products result from by-products of hunting that is regulated by national law and conducted for the sole purpose of the sustainable management of marine resources. Such placing on the market shall be allowed only on a non-profit basis. The nature and quantity of the seal products shall not be such as to indicate that they are being placed on the market for commercial reasons.

The application of this paragraph shall not undermine the achievement of the objective of this Regulation. ...<sup>93</sup>

Selheim discusses how the original seal ban measure did not alter the ways in which seals are hunted but rather it limited the commercial sale of seal products. This author points out that “basing the Seal Regime on a moral standard pertaining to animal welfare would have to include the animal welfare clause in all types of seal hunting”.<sup>94</sup> The EU has since made amendments to the seal ban to address the AB’s ruling by fully removing

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<sup>91</sup> *Ibid.*

<sup>92</sup> Nikolas Selheim, “The Legal Question of Morality: Seal Hunting and the European Moral Standard” (2016) 25(2) *Social & Legal Studies* 141 at 143 (Sage).

<sup>93</sup> EC, *Regulation No 1007/2009/EC of 16 September 2009 on trade in seal products*, [2009] OJ L 286, 31.10.2009 at Art 3 Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009R1007>.

<sup>94</sup> Selheim, *supra*, note 86 at 148.

the exception for Maritime Resource Management (MRM) hunts and by amending the IC exception.<sup>95</sup>

Although the exceptions limit the protection of seals in some ways, the AB ruling in *EC-Seal* is a great victory for animal welfare. Even though the measure was found to violate WTO rules under a substantive part of the GATT agreement, there is now case law to directly fit animal welfare under a GATT XX exception as a legitimate objective. Interestingly, the ban was actually tightened following the recommendations of the AB, with the removal of the MRM exception and the addition of more regulations on animal welfare within the IC exception. This is to say that the violation of the chapeau in GATT Article XX was not due to an issue with the extra-territorial nature of the measure in the sense that the AB found that it was too far reaching.

It is certain that there will be a desire to apply the AB's ruling in *EC-Seal* broadly. Lurié and Kalinina extend the concept of animal welfare as a public moral to animals outside wildlife, since people generally have moral concerns for other animals as well.<sup>96</sup> Selheim discusses public opinion in the context of morality and law, stating that although the Dispute Settlement Body of the WTO found that consideration for animal welfare can be a moral standard, this is hindered to the extent of the perceived need of society.<sup>97</sup> This is seen in the IC exception, where "seals are not considered as needed for human consumption, unless they are hunted by indigenous peoples,"<sup>98</sup> and the ban reflects this "need perception" accordingly. It is these types of factors that necessarily limit animal welfare measures, much like the derogation clauses in the EU-Directive on Cosmetics. Conconi and Voon explain that, "in order to take advantage of the general exceptions under GATT Article XX, the EU did not need to establish that the seal regime was solely motivated by public morals."<sup>99</sup> It was sufficient that they demonstrate that it was the "principle" motivation. This is a crucial finding – without

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<sup>95</sup> EC, *Regulation No 2015/1850/EC of 13 October 2015 on trade in seal products*, [2015] OJ L 271, 16.10.2015 (see also *ibid* & EU Submissions, update of 26 October 2015 online: [http://trade.ec.europa.eu/wtodispute/show.cfm?id=475&code=2#\\_eu-submissions](http://trade.ec.europa.eu/wtodispute/show.cfm?id=475&code=2#_eu-submissions)).

<sup>96</sup> Lurié & Kalinina, *supra*, note 48 at 451.

<sup>97</sup> Selheim, *supra* note 92 at 153.

<sup>98</sup> *Ibid*.

<sup>99</sup> Paola Conconi & Tania Voon, "EC-Seal Products: The Tension Between Public Morals and International Trade Agreements" (2016) 15:2 *World Trade Rev* 211 at 221.

the exceptions present in these measures, through derogation or otherwise, the measure risks failing through other streams. For example, a total seal ban with no exception for the Inuit and other indigenous groups would likely result in constitutional challenges. Similarly, a total ban on animal testing that fails to allow for medical research, for example, could result in challenges based on human health or life concerns. By allowing other considerations, albeit that arguably take away from the underlying public moral principle, the success of the measure is actually strengthened.

### C. Technical Barriers to Trade Agreement (TBTA) 2.1 and 2.2

The Technical Barriers to Trade Agreement (TBTA) is intended to promote the objectives of the GATT by trying to create a balance between the benefits and risks for international trade that are inherent in the use of technical regulations or voluntary standards, thereby drawing a line between protectionism and legitimate protection.<sup>100</sup> The TBTA applies to technical regulations and standards.<sup>101</sup> Technical regulations are defined as a “[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which *compliance is mandatory*”.<sup>102</sup> Three criteria were mentioned in EC-Asbestos as set out previously in EC-Sardines and are as follows:

- i. Document must apply to an identifiable product or group of products (note the identifiable product or group need not be expressly identified in the document).
- ii. Document must lay down one or more characteristic of the product (intrinsic or related to the product and imposed in either a positive or negative form).
- iii. Compliance with the product characteristics must be mandatory.<sup>103</sup>

In our case, the laws or regulations clearly identify that cosmetic products are the target and the circumstances in which there will be exemptions. They state restrictions on what products can be sold in the respective jurisdictions based on the process used to create the products.

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<sup>100</sup> Erich Vranes, “The WTO and Regulatory Freedom: WTO Disciplines on Market Access, Non-Discrimination and Domestic Regulation Relating to Trade in Goods and Services” (2009) 12:4 J Intl Economic L 953 at 962.

<sup>101</sup> *WTO Casebook*, *supra* note 16 at 264.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid* at 265.

Lastly, they set out that products that do not comply with the bans cannot be manufactured or sold within the respective jurisdictions. Thus, it would follow that, at face value, the laws in question would be considered technical regulations for the purpose of a TBTA analysis. The following discussion is premised on this assumption.

According to Article 2.1 and 2.2 of the TBTA, a technical regulation must be both applied in an National Treatment (NT) consistent manner with like products and be *necessary* to achieve a legitimate objective.<sup>104</sup> Protection of both human health or safety and animal life or health are legitimate objectives listed under Article 2.2 TBTA.<sup>105</sup> Recall that, as Klein discusses, the exceptions in the EU-Directive on Cosmetics to animal testing in certain circumstances (such as dual-purpose ingredients used in testing chemicals for pharmaceuticals) could undermine its general purpose of furthering animal welfare.<sup>106</sup> However, it could also be argued that the separation between cosmetics and pharmaceutical animal testing narrows the scope of the purpose to avoid such challenge. Thus, there is a separation between the pharmaceutical industry and the cosmetic industry through the exception, and the purpose of the ban is to protect animal welfare as it relates to testing cosmetic products on animals.

The most likely argument related to the measures at issue in this paper not meeting their objectives and therefore not satisfying the Article 2.2 of the TBTA is the derogation clauses. This clause implies that, in some instances, testing on animals is justified if no alternatives exist. Here the purpose appears to be moving away from the objective of furthering animal welfare, implying that the development of cosmetics can trump the animal welfare concern when no alternatives to testing exist.<sup>107</sup> It is not in the name of medicine or curing disease, but instead the cosmetic industry. It should be noted that the derogation clause in the EU-Directive on Cosmetics is only available in exceptional circumstances and requires many steps before the clause can be used.<sup>108</sup> The ingredient must be in wide use and not capable of being replaced, and the human health problem must be

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<sup>104</sup> *Supra* note 2, arts 2.1–2.2 (see also *WTO Casebook*, *supra* note 16 at 270).

<sup>105</sup> *Ibid*, art 2.2.

<sup>106</sup> Klein, *supra* note 6 at 262.

<sup>107</sup> *Ibid*.

<sup>108</sup> *EU-Directive on Cosmetics*, *supra* note 7 art 18.2.

substantiated and a research protocol proposed.<sup>109</sup> Canada's Bill S-214 contains a derogation clause with very similar language to that in the EU-Directive on Cosmetics but leaves decision making authority with the Minister.<sup>110</sup> In this sense the objective of animal welfare has some level of protection here as it relates to the derogation clauses.

## D. Technical Barriers to Trade Agreement (TBTA) 12.3

Klein raises the concern that, in many countries, "the use of non-animal alternative testing methods might be too expensive or not feasible."<sup>111</sup> The disparities between WTO member states appears to have been contemplated through Article 12.3 of the TBTA.

Article 12.3 of the TBTA states that:

Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, *take account of the special development, financial and trade needs of developing country Members*, with a view to ensuring that such technical regulations, standards and conformity assessment procedures *do not create unnecessary obstacles* to exports from developing country Members.<sup>112</sup>

As per the determination in *US-Clove Cigarettes*, the TBTA's stipulation that regulations do not "create unnecessary obstacles to exports" should be read in the context of the words "to take account of". Accordingly, it differs from that of the obligation under Article 2.2 of the TBTA, which mandates that technical regulations not impose unnecessary obstacles to international trade.<sup>113</sup> In order to assess what obligation is placed on the state imposing the regulation, one must ask what it means "to take account of". The Panel in *EC-Approval and Marketing of Biotech Products* addressed this question in the context of a similar provision under Article 10.1 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS).<sup>114</sup> The Panel used the

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<sup>109</sup> *Ibid.*

<sup>110</sup> *Bill S-214, supra* note 13, s 18.2(1).

<sup>111</sup> Klein, *supra* note 6 at 270.

<sup>112</sup> *Supra* note 2, art 12.3 [emphasis added].

<sup>113</sup> WTO, *Report of the Appellate Body on Measures Affecting the Production and Sale of Clove Cigarettes*, GATT Doc WT/DS406/AB/R (2012) online: <[https://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/tbt\\_02\\_e.htm#article12](https://www.wto.org/english/res_e/booksp_e/analytic_index_e/tbt_02_e.htm#article12)> (see also WTO website).

<sup>114</sup> WTO, *Report of the Panel on Measures Affecting the Approval and Marketing of Biotech Products*, GATT Doc WT/DS291/R, WT/DS292/R, WT/DS293/R (2006) online:

dictionary definition, wherein “to take account of” is to “consider along with other factors before reaching a decision.”<sup>115</sup> They found this was consistent with the Article at issue as it did not require a specific result, nor “that the importing Member must invariably accord special and differential treatment in a case where a measure has led, or may lead, to a decrease, or a slower increase, in developing country exports.”<sup>116</sup> Further, they found that the burden was on the member making the challenge.<sup>117</sup> It is unclear how Article 12.3 would protect developing nations from domestic regulations with trade effects, since there is no positive duty placed on developed nations to provide special treatment to developing nations. Other possible issues pertaining to Article 12.3 are beyond the scope of this paper.

As more and more WTO member states increase regulations on products, those WTO member states that cannot afford to rise to such standards will inevitably be left behind. Although “for poor and developing countries, regulatory approximation may improve its standing vis-a-vis the EU generally, and more particularly improve trade relations and technical and intellectual exchanges with the EU,”<sup>118</sup> this may not be an option due to the increased costs associated with the compliance. Although seemingly unfair, what is the alternative? Should WTO member states be expected to refrain from improving standards and progressing as values change because the progression may have adverse effects on developing nations? As pointed out by Heyvaert, “the globalization of regulation benefits stronger states and industries much more than the weaker ones, making this a game with relative winners and losers.”<sup>119</sup>

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<[https://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/tbt\\_02\\_e.htm#fnt175](https://www.wto.org/english/res_e/booksp_e/analytic_index_e/tbt_02_e.htm#fnt175)> (see also WTO website).

<sup>115</sup> *Ibid*, para 7.1620.

<sup>116</sup> *TBTA*, *supra*, note 2.

<sup>117</sup> *Ibid*.

<sup>118</sup> Veerle Heyvaert, “Globalizing Regulation: Beyond the Borders of Chemical Safety” (2009) 36:1 *J L & Society* 110 at 117.

<sup>119</sup> *Ibid* at 118.

#### IV. SECTION THREE: EFFECTS AND OPTIONS

The ability of domestic regulations to create change beyond borders is best characterized as passive. A WTO member state cannot directly create regulations in another jurisdiction and any change must stem from the effect that the former's own domestic regulation has on the latter's ability to trade within the former's jurisdiction. As seen in section two, a domestic regulation can only reach so far in its application, since member states should not offend WTO rules in the process of creating their own domestic regulations. In our case, owing to the human health concerns that these animal tests address, the ability to further the objective of animal welfare is hindered significantly. Many tests on animals will remain legal insofar as they are in the name of human health, such as testing ingredients used in drugs in the pharmaceutical industry or in some cases cosmetics, where validated alternatives do not exist.

As a result of the AB's findings in *EC-Seal*, animal welfare can now readily be considered a valid objective under the public morals exception in GATT Article XX(a). This is a large step forward, since many laws protecting animal welfare are with respect to PPMs, which are not adequately recognized in the substantive part of GATT Article III:4. The fact that animal welfare need not be the only objective in a measure under the public moral exception leaves room for necessary exceptions to be made within these measures. Although this can be argued to limit the measure's main objective, much like the line between cosmetics and pharmaceuticals, these types of limits are necessary for the measure's survival. If the WTO had required that animal welfare be the sole purpose, this would result in total bans which may not stand up when challenged.

The nature of the WTO dispute system strengthens the ability of domestic regulation to impose change beyond borders, due to its constraints and limitations. Krikorian mentions two: its procedure, where there is potential for a party to delay matters and increase the overall time it may take for a challenge, and the remedies available to a party in cases of a successful challenge.<sup>120</sup> Focusing on remedies, Krikorian states that "successful litigants do not have the legal authority to unilaterally impose sanctions or retaliate in other ways for a trade violation" and "the WTO

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<sup>120</sup> Jacqueline Krikorian, *International Trade Law and Domestic Policy* (Vancouver: University of British Columbia Press, 2012) at 210.

does not have authority to award damages or specific performance to winning litigants”.<sup>121</sup> So even when a member state brings a successful challenge under a WTO agreement, the dispute ruling does not enjoy direct effect in the offending WTO member state’s jurisdiction.<sup>122</sup> This is to say that it cannot be forced upon a member to change the regulation even when their domestic regulation is found inconsistent with the GATT or TBTA. It follows that a state may still need to conform to the regulations of the offending WTO member state if they wish to trade in that WTO member state’s jurisdiction. What is left to the successful challenger of a regulation is the ability to impose retaliatory sanctions against the offending WTO member state, such as increased tariffs.<sup>123</sup> This is not to say that the WTO system has no teeth. Ville discusses how the Registration, Evaluation and Authorization of Chemicals (REACH) was considerably watered down by the time it became policy, being the subject of many WTO dispute threats along the way.<sup>124</sup> This suggests that the WTO dispute system does create an incentive for member states to ensure that their regulations comply with WTO rules. In turn, it limits the extent of the regulations’ application and hence, the ability to impose change beyond borders to some extent, albeit necessarily.

On the other hand, Heyvaert discusses REACH and argues that the importation of foreign regulatory norms and procedures can put pressure on local regulatory priorities, cultures and practices.<sup>125</sup> There is a large incentive to rise to the standards set by those nations that dominate a particular industry, even if only for fear of being left behind. Heyvaert discusses this phenomenon as a race to the top of countries’ increasing standards to match stricter foreign countries in the environmental and health context.<sup>126</sup> This can be said about any shift in values unique to the new world. For a race to the top to occur, “the country upholding the more stringent standards must be able to close its borders to products that do not

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<sup>121</sup> *Ibid* at 211.

<sup>122</sup> Ferdi De Ville, “European Union Regulatory Politics in the Shadow of the WTO: WTO Rules as Frame of Reference and Rhetorical Device” (2012) 19:5 *Journal of European Public Policy* 700 at 702.

<sup>123</sup> *Ibid* at 703.

<sup>124</sup> *Ibid* at 708.

<sup>125</sup> Heyvaert, *supra* note 118 at 111.

<sup>126</sup> *Ibid* at 118.

meet its regulatory prescriptions... [and] the country with the toughest regulation must constitute a desirable export market".<sup>127</sup> The EU is home to the largest cosmetic industry in the world. In this sense, the risk posed to the EU by increasing regulations and shutting out those who do not comply is low. On the other hand, the incentive for a nation to increase their regulations so they can remain in the EU market is high.

The viable options left to WTO member states wishing to continue trading with the member state imposing the regulation is almost non-existent. This creates a high stake for WTO member states, especially when the WTO member state imposing the regulation is one with immense trading power in a particular industry. With respect to the EU-Directive on Cosmetics, as is noted by Klein, trade barriers are imposed because "the importation ban necessarily requires foreign companies to either comply with EU law or to forego selling their products in the EU."<sup>128</sup> When WTO rules are not offended, what can a nation do? Klein proposes three responses when challenging a ban is unsuccessful: 1) making separate product lines; 2) Raising prices to account for the losses; 3) Seek out new markets to sell the products in.<sup>129</sup>

Making separate products lines to carry out different testing methods would mean having two sets of standards. This does not change the fact that the state would still need to conform to the higher standards, albeit in part. Further, it may be desirable to "avoid the dual or multiple burdens of dealing with different regulatory regimes internally and externally, which causes great inefficiencies in industrial production and management."<sup>130</sup>

Although one may be able to offset costs by only producing some of the products in cruelty-free ways, this would not offset the implementation costs for such processes. Raising prices could account for this difference, however there is still a concern of remaining competitive in the market and so a price increase may be limited by what would be reasonable in the particular market. Further, this option also still requires the member state to comply with the heightened regulation. Heyvaert posits that "the global competitive disadvantage of bearing a high regulatory cost is gradually diluted as competing industries in more and more regions are subjected to equivalent

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<sup>127</sup> *Ibid.*

<sup>128</sup> Klein, *supra* note 6 at 258.

<sup>129</sup> *Ibid.*

<sup>130</sup> Heyvaert, *supra* note 118 at 118.

burdens, is matched by the pressure exerted by industries located in non-EU countries to ratchet up local standards to the EU level.”<sup>131</sup> While this is discussed in the context of REACH, it is arguably comparable to any law with trade effects that would cause increased costs to a nation who wishes to conform.

The ability to seek out new markets is not a viable option for two main reasons. First, this would mean that the state would be shutting themselves out of many major markets, such as the EU, which is the largest market for cosmetics in the world. Further, since many nations appear to be following suit, the options for alternative markets is becoming quite limited.

As Hon. Elizabeth (Beth) Marshall stated:

With the sales ban in force in 28 countries across the EU, along with the other countries to recently impose bans or partial bans on animal-tested products, some Canadian cosmetic companies have significant barriers in accessing international markets. The markets of Europe, Norway, Israel and India cater to over 1.7 billion consumers worldwide in total on just cosmetics. Should the United States pass a sales ban proposed under their "Humane Cosmetics Act," Canadian companies will face even tougher obstacles.<sup>132</sup>

It would follow that, the costs of compliance with a heightened standard imposed by a WTO member state who leads that particular industry, is outweighed by the losses of being shut out of that market place. The better option is to conform to the heightened measure.

## V. CONCLUSION

The ability to create change beyond borders through domestic regulation is passive rather than active, in the sense that a WTO member state cannot directly regulate in another WTO member states' jurisdiction. However, the effect is arguably quite strong, given the limited number of viable options available to WTO member states in cases where a WTO challenge is unsuccessful. Although one should not offend WTO rules in creating domestic regulations, due to the limitations of the WTO dispute system, the remedies in cases where one does are limited. Despite that it appears that the WTO system has helped water down regulations so they do not reach as far in their application, this paper suggests that domestic

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<sup>131</sup> *Ibid.*

<sup>132</sup> *Debates of the Senate*, 42nd Parl, 1st Sess, 150 No 12 (4 February 2016) at 277 (Hon. Elizabeth (Beth) Marshall).

regulations may still have effects on other jurisdictions while not offending WTO rules. The limited options available to WTO member states confronted with such a regulation creates a high stake, especially when the state imposing the regulation is one with immense trading power in a particular industry and compliance with the heightened regulation becomes the best option. It is this passive effect that can be used to promote progressive regulations around the globe that reflect shifting values. Since the WTO system necessarily places limits on this effect, so as to not allow direct encroachment on other WTO member states' sovereignty, while also promoting consultations with and consideration of other WTO member states, this passive effect can be viewed as a positive consequence of the international trading system.