Memorandum

Date	17 December 2024
File No. and case	**3747/2024 1KGO / 1KAL** **Verein zur Erhaltung des Wildes und der Jagd im CIC e.V. wg. Einfuhrverbot für Jagdtrophäen**
Subject	**Legality of an EU Ban on the Import of Hunting Trophies under WTO Law**
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A. Question

In a memorandum dated 14 August 2024, we concluded that the more convincing arguments speak in favour of exclusive European Union ("EU") competence to impose a comprehensive import ban on hunting trophies. This raises the following questions:

- Would a comprehensive EU ban on the import of hunting trophies be permissible under the laws of the World Trade Organization ("WTO")?
- What defense options would be available against such an EU import ban?

B. Findings

- Depending on its specific design, an EU ban on the import of hunting trophies may potentially be justified under WTO law as a measure necessary to protect public morals, provided it is not a disguised restriction on international trade and does not discriminate amongst trading partners (see **C.1.1**).
- In contrast, it would likely not be justified under WTO law as a measure necessary to protect animal life or health or as a measure relating to the conservation of exhaustible natural resources, because the provisions allowing for such measures are likely limited in scope to the territory of the EU (see **C.1.2** and **C.1.3**).
- An action for annulment before the Court of Justice of the European Union ("CJEU") against an EU ban on the import of hunting trophies would have low chances of success if brought by Verein zur Erhaltung des Wildes und der Jagd im CIC e.V. or individual importers, because they would have no standing

before the CJEU. Furthermore, the CJEU would not review the EU legal act against WTO law (see **C.2.1**).

- On the WTO level, WTO Members may bring a violation complaint against the EU, which would result in in a review by the WTO's Dispute Settlement Body against WTO law (see **C.2.2**).

C. Legal Assessment[1]

1. Compliance of an EU Ban on the Import of Hunting Trophies with WTO Law

Art. XI(1) of the General Agreement on Tariffs and Trade ("**GATT**") prohibits quantitative restrictions in the form of prohibitions or restrictions other than duties, taxes or other charges on the importation of any product of the territory of any other contracting party. A ban on the import of hunting trophies would constitute a prohibited quantitative restriction.

Measures inconsistent with Art. XI(1) GATT may, however, be justified under one of the several exceptions to substantive provisions found in GATT. The exceptions formulate various high-level policy objectives, which can take precedence over the WTO's trade liberalization aim.

Three exceptions in GATT may potentially justify an EU import ban on hunting trophies, i.e. the exceptions for measures necessary to protect public morals (see **C.1.1**), measures necessary to protect animal life or health (see **C.1.2**) and measures relating to the conservation of exhaustible natural resources (see **C.1.3**).

1.1 Possible Justification as a Measure Necessary to Protect Public Morals

An EU import ban on hunting trophies may be regarded justified as a measure necessary to protect public morals pursuant to Art. XX(a) GATT.

1.1.1 Public Morals

The notion of "public morals" is understood to denote **standards of right and wrong conduct** maintained by or on behalf of a community or nation. The content of these concepts for WTO Members can vary in time and space,

[1] Please note that since the EU has not proposed an import ban on hunting trophies yet, individual aspects of the following legal assessment may have to be amended on the basis of a concrete proposal.

depending upon a range of factors, including **prevailing social, cultural, ethical and religious values**.[2] Since the content of public morals may vary based on the prevailing social, cultural, ethical and religious values, WTO Members may **define and apply for themselves** the concept of public morals according to their own systems and scales of values.

The justification of an import ban on hunting trophies would require the EU to argue that the practice of killing animals (inter alia or exclusively) with the **aim of acquiring a trophy** contradicts prevailing ethical values within the EU. Such an argument may be supported by the fact that both the EU Member States as well as the EU itself maintain relatively **high standards of animal protection**, which are designed to avoid harm to animals.

However, while there is consensus within the EU that animal suffering should be avoided, there is also a consensus that animal welfare must always be **weighed up against other legitimate interests**. Hunting, including hunting for the purpose, among others, of obtaining a trophy, can serve such legitimate purposes – whether it takes place within the EU or in third countries. An important legitimate purpose that has to be taken into consideration especially as far as hunting in African countries in concerned is the aspect that hunting generates income for the local population. This income is indirectly suitable for reducing the incentive to poach, for establishing and maintaining protected areas for endangered animal species, and thus for ensuring stable and sustainably growing wildlife populations. That other legitimate objectives must be taken into account in animal welfare measures was, for example, established by the General Court (GC) in the case concerning *EC – Seal Products*[3]. In its decision, the GC held that the economic and social interests of Inuit communities that hunt seals for their livelihood demanded an appropriate balance. The import ban on these products thus ultimately only applied to a limited extent. In addition, the CJEU emphasized in the case on the *Flemish Ban on Shechita* that the standard of animal welfare within the EU varies from region to region. In any case, a broad discretion is afforded to Member States when recognizing animal welfare standards. An EU-wide-regulation could therefore at best reflect the common minimum standard.[4] Conversely, it would be

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2 WTO, Panel Report of 10 November 2004, WT/DS285/R (*US – Gambling*), para. 6.465; Appellate Body Report of 7 April 2005, WT/DS285/AB/R (*US – Gambling*), para. 299; Panel Report of 12 August 2009, WT/DS363/R *(China – Publications and Audiovisual Products)*, para. 7.759.

3 GC, Judgement of 25 April 2013, Case No. T-526/10 (*Inuit Tapiriit Kanatami and Others v Commission*), paras. 35 et seqq.

4 CJEU, Judgment of 17 December 2020, Case No. C-336/19 (*Centraal Israëlitisch Consistorie van België and Others*), paras. 70 et seq.

inadmissible to adopt supranational regulations that significantly exceed the currently existing national standards and justify this with the need to protect public morals.

Another important aspect to consider when banning the import of hunting trophies to protect public morals is that although within the EU there is a consensus to reduce animal suffering, such a consensus is less apparent when it comes to the rejection of killing animals "for the wrong reasons". Hunting as such remains legal within the EU, and we are not aware of any legislation banning hunting activities in connection with the acquisition of trophies within the EU. The absence of such regulation is a clear indication that the killing of animals for obtaining a trophy **does not necessarily violate the moral conviction of the EU Member States and its citizens**. This is supported by the fact that the import of hunting trophies has been **allowed on a limited scale** under Council Regulation (EC) No 338/97 of 9 December 1996. While the EU may argue that the prevailing ethical values in the EU have changed over time and, at the time of the adoption of a ban on the import of hunting trophies, have become incompatible with the practice of killing animals with the aim of acquiring a trophy, the fact that the EU has not banned hunting activities in connection with the acquisition of trophies within the EU and furthermore allowed the import of hunting trophies for a long time sets a rather high bar for such an argument to be convincing.

Regardless of whether a moral conviction that killing animals with the aim of acquiring a trophy is wrong actually exists within the EU, an issue with regard to applying Art. XX(a) GATT to the case at hand is whether **the motivation** behind killing an animal, i.e. obtaining a trophy, may be regarded contrary to public morals at all or whether the scope of Art. XX(a) GATT is limited to justifying trade-restrictive measures against the background of **the ways** in which animals are killed, hunted, sourced etc. The case law on Art. XX(a) GATT does not provide an answer to this question. In the *EC – Seal Products*[5] case, which concerned trade-restrictive measures regarding seal products, the EU successfully argued that the ways in which seals were killed violated the moral conviction of the EU Member States and their citizens.[6] The EU also stressed that hunting measures it intended to ban

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5 See WTO, Panel Reports of 25 November 2013, WT/DS400/R, WT/DS401/R; Appellate Body Reports of 22 May 2014, WT/DS400/AB/R, WT/DS401/AB/R (*EC – Seal Products*).

6 See also Regulation 1007/2009 of the European Parliament and of the Council of 16 September 2009 on Trade in Seal Products, OJ (EU) L 286, 31 October 2009, p. 36 et seqq., recital 4: "The hunting of seals has led to expressions of serious concerns by members of the public and governments sensitive

did "not guarantee the instantaneous death, without suffering".[7] The killing animals with the aim of acquiring a trophy in and of itself does not say anything about how animals are killed and their level of suffering. When carried out professionally, hunting does not result in significant animal suffering. There is much to suggest that hunting with rifles, which regularly results in the animal dying instantaneous, is more "humane" from an animal suffering perspective as, for example, the treatment of live animals in slaughterhouses prior to their killing.

Furthermore, the **motivation for killing animals** in other cases for other purposes than nutrition is not entirely different from the motivation at question in the context of hunting for the purpose of obtaining a trophy. For example, the killing of animals for the production of clothing is motivated by the desire to produce fur, clothing etc. Millions of these products are imported into the EU and placed on the market. There is no reason why the killing of animals for the "production" of a hunting trophy should be treated differently than the killing of animals for the production of, for example, clothing. This being said, if there is in fact a moral conviction within the EU that the killing of animals for trophies is wrong, while, for example, the killing of animals for clothing is acceptable, this may be irrational, but would not automatically exclude such public moral concern to be invoked due to WTO Members' broad discretion in defining and applying the concept of public morals. However, from our point of view, there are considerable doubts as to whether there is a common moral conviction within the EU that animals may not be hunted if the acquisition of a hunting trophy is the central motive – especially if there are also other legitimate objectives that must be weighed against animal protection.

Alternatively, the EU may **limit the import ban on trophies from endangered species**. In this case, it would have to argue that not the hunting of the acquisition of a hunting trophy as such contradicts prevailing ethical values within the EU but only hunting for trophies of endangered species. This approach would not require the EU to argue that the killing of animals "for the wrong reasons" is rejected within the EU, but rather that the killing of "the wrong animals" is not accepted. We would assume the EU could convincingly argue that the majority of the EU Member States and its citizens are opposed to the hunting of endangered animal species. Again,

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to animal welfare considerations due to the pain, distress, fear and other forms of suffering which the killing and skinning of seals, as they are most frequently performed, cause to those animals."

7 Regulation 1007/2009 of the European Parliament and of the Council of 16 September 2009 on Trade in Seal Products, OJ (EU) L 286, 31 October 2009, p. 36 et seqq., recital 1.

while the fact that the import of hunting trophies from endangered species has been **allowed on a limited scale** under Council Regulation (EC) No 338/97 of 9 December 1996 could speak against the existence of such a prevailing ethical value, the EU may argue that the prevailing ethical values in the EU have changed.

1.1.2 Measure Designed to Protect Public Morals

In order to be justifiable under Art. XX(a) GATT, measures aimed at protecting public morals must be necessary "to protect" public morals.

This does not imply the necessity to identify the existence of a risk to EU public moral concerns by defining a precise standard of animal protection in the EU and assessing the hunting and killing of (endangered) animals with the aim of obtaining a trophy against that standard.[8] Instead, it solely follows from the wording "to protect" that the measure must be "**designed**" to protect public morals. This is the case if there is a relationship between the measure and the protection of public morals, which must be examined on the basis of the concrete measure, including its content, structure, and expected operation. The relevant test is the general capability of the measure, i.e. the measure must **not be incapable of protecting public morals**.

Generally, the examination of the "design" of a concrete measure is not a particularly demanding step of the Art. XX(a) analysis, i.e. the threshold for demonstrating that the measure is not incapable of protecting public morals is relatively low.[9] The "design test" is solely a preliminary step aimed at assisting and informing the further analysis of whether a measure is provisionally justified Art. XX(a) GATT.[10]

Taking into account the relatively low standard as explained above, an EU import ban on hunting trophies may be regarded as not being incapable of protecting public morals and therefore as being "designed" to protect public morals – provided, of course, that there is such a moral conviction in the first place.

Whereas one could argue that a prohibition on imports of hunting trophies is incapable of contributing to the prevention of hunting and killing animals

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8 WTO, Appellate Body Reports of 22 May 2014, WT/DS400/AB/R, WT/DS401/AB/R (*EC – Seal Products*), para. 5.196.

9 WTO, Appellate Body Report of 7 June 2016, WT/DS461/AB/R (*Colombia – Textiles*), paras. 5.68 et seqq.; see also: Panel Report of 15 September 2020, WT/DS543/R (*US – Tariff Measures*), para. 7.125.

10 WTO, Panel Report of 15 September 2020, WT/DS543/R (*US – Tariff Measures*), para. 7.150.

for sporting purposes because such a ban would solely eliminate the import of trophies, which necessarily requires the hunting to be already completed, the import ban would likely **render sport hunting in third countries unattractive** for persons, who want to import their trophies into the EU. It is plausible that such reduced attractiveness of sport hunting would result in a reduction of such hunting activity in the concerned third countries and consequently mirror the societal rejection in the EU of hunting and killing animals with the aim of obtaining a trophy.

Furthermore, it is understood in the literature that the purpose of Art. XX(a) GATT is to enable WTO Members to **prevent goods from being offered for purchase** on their market that were produced in a manner the public deems immoral.[11] A ban on the import of hunting trophies would prevent hunting trophies from being offered for purchase on the EU single market.

1.1.3 Necessity to Protect Public Morals

A further requirement of Art. XX(a) GATT is the necessity of the measure to protect public morals. Whether a measure is "necessary" to protect public morals is examined based on a comprehensive weighting and balancing of several factors.[12]

Firstly, **the more vital or important the interests or values that are reflected in the objective of the import ban**, the easier it is to accept a measure as necessary. Generally, the protection of public morals is regarded to rank amongst the most important values or interests pursued by WTO Members as a matter of public policy. This is confirmed by the fact that public morals exception is the first exception identified in the subparagraphs of Art. XX GATT.[13] With regard to animal protection in particular, it shall be noted that the EU already stated in the WTO context that it regards moral concerns with regard to the protection of animals as a value of high importance in the EU. This was not challenged at the time and the panel accepted that

> *"the protection of such public moral concerns is indeed an important value or interest".*[14]

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[11] *Blattner*, Protecting Animals Within and Across Borders (2019), p. 126.
[12] See WTO, Appellate Body Report of 7 June 2016, WT/DS461/AB/R (*Colombia – Textiles*), paras. 5.71 et seqq.
[13] WTO, Panel Report of 12 August 2009, WT/DS363/R *(China – Publications and Audiovisual Products)*, para. 7.187.
[14] WTO, Panel Reports of 25 November 2013, WT/DS400/R, WT/DS401/R (*EC – Seal Products*), para. 7.632.

The bar for accepting an import ban on hunting trophies as "necessary" against the importance of moral concerns with regard to animal protection must therefore be regarded as rather low.

Secondly, **the greater the contribution to the pursued policy objective**, the more easily a measure might be considered to be necessary. An assessment of the extent of the measure's contribution to the end pursued requires a concrete qualitative or quantitative assessment. It is not possible to assess the potential contributions of an EU ban on the import of hunting trophies to the protection of animals since **reliable facts are missing** insofar. Generally, it is an open question whether an EU ban on the import of hunting trophies would lead to a decline in sport hunting in third countries.

Thirdly, **the lower the measure's impact on international trade**, the easier it is accepted as a necessary measure. It is necessary to assess the qualitative or quantitative degree of a measure's trade-restrictiveness in concrete terms. Given that there is no large market for hunting trophies, the EU's quotas imposed on imports of hunting trophies are already relatively low and the ban would mainly affect non-commercial activities, the impact of an EU ban on the import of hunting trophies could be regarded as having a rather low impact on international trade. On the other hand, between 2014 and 2018, the EU accounted for a large share of imports of hunting trophies from CITES-listed wildlife species, second only to the United States.[15]

Although there is some debate on whether **alternative measures** may remove the necessity of a concrete measure, the Appellate Body seems to take the view that measures may not be regarded necessary if alternative measures are **reasonably available**, which are less trade restrictive while making an equivalent contribution to the relevant objective.[16] An alternative measure may be found not to be "reasonably available" where it is merely theoretical in nature, for instance, where the responding party is not capable of taking it, or where the measure imposes an undue burden on that WTO Member. Moreover, a "reasonably available" alternative measure must be a measure that would preserve the responding party's right to achieve its desired level of protection with respect to the objective pursued under Art. XX GATT.

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[15] European Parliament Resolution of 5 October 2022 on the EU Strategic Objectives for the 19th Meeting of the Conference of the Parties to the CITES, OJ (EU) C 132, 14 April 2023, p. 41.

[16] See WTO, Appellate Body Report of 21 December 2009, WT/DS363/AB/R (*China – Publications and Audiovisual Products*), paras. 239 et seqq.

While it may generally be argued that, for example, **high duties** on imports of hunting trophies may also render hunting in third countries unattractive, an outright import ban would eliminate the possibility that individual persons are willing to pay high duties on the import of hunting trophies and therefore provide a higher level of protection.

However, taking into account the purpose of Art. XX(a) GATT, it is in our view possible that a **ban on trade with hunting trophies within the EU could be regarded as an alternative, less trade-restrictive measure**, in comparison to a ban on the import of hunting trophies, in particular when taking into account that the purpose of Art. XX(a) GATT is to enable WTO Members to **prevent goods from being offered for purchase** on their market that were produced in a manner the public deems immoral. A ban on trading with of hunting trophies within the EU would likewise achieve the objective of preventing hunting trophies from being offered for purchase on the EU market. From a foreign trade perspective, such a measure may be less trade-restrictive, since it would not directly touch upon the flow of goods between WTO Members, but merely eliminate trade in hunting trophies within the EU single market. In comparison to an import ban, a ban on trading in hunting trophies within the EU single market would not affect private parties, who import hunting trophies for personal use rather than as a commercial good intended for distribution within the EU.

If the EU were to **limit an import ban on hunting trophies to trophies of certain endangered species**, the strengthening of **international cooperation** with regard to the conservation of animals, for example in the framework of **CITES**, could also be a "reasonably available" alternative measure, because in this case the EU would pursue a public moral objective aimed at the prevention of extinction of animal species. By imposing a unilateral import ban instead of cooperating within a multinational framework aimed at protecting endangered species, the EU would also risk undermining its own objective. In this context, it is important to emphasize that CITES already lays down restrictions to limit trade in endangered species in order to ensure their preservation. Endangered species and parts of endangered species, including trophies, may only be exported with a valid CITES export certificate. An export certificate for specimens of endangered species may be granted by the country of export only if the taking of the specimens in question is not detrimental to the maintenance of the species.

CITES has three Appendices to reflect the different degrees of threat to species and the associated trade restrictions required: Appendix I lists the most endangered animals and plants for which CITES stipulates a general

ban on international trade; only in exceptional circumstances, primarily for research purposes, may CITES Member States issue import and export certificates (Art. II(1) and III CITES). Appendix II lists species that are not immanently threatened with extinction but that may become so unless trade is closely controlled. International trade in specimens of Appendix II-species may be authorized by the granting of an export permit certificate if the competent national authorities are satisfied that certain conditions are met, above all that trade will not be detrimental to the survival of the species in the wild (Art. II(2) and IV CITES). Under CITES import permit certificates are not required for these Appendix II-species but several countries, including the EU and its Member States, have taken stricter measures than CITES requires and also demand an import certificate. Through this, the authorities of the EU Member States reserve the right to carry out an additional sustainability check. Appendix III is a list of species included at the request of a CITES Member State that already regulates trade in the species and that needs the cooperation of other countries to prevent unsustainable or illegal exploitation (Art. II(3) and V CITES).

The CITES rules therefore already ensure that only those trophies of endangered species may be exported from the hunting country, for which the competent national authority of the exporting country confirms the sustainability of the hunt. The EU and its Member States have even taken additional measures to ensure sustainability by requiring a CITES import permit certificate in addition to the mandatory CITES export permit certificate for Appendix II species. If animals are killed in a non-cruel manner and international regulations for the protection of endangered species are observed, it is difficult to justify the idea that Western moral standards take precedence over fundamental economic interests of the local population in developing countries – especially since the ban on importing hunting trophies can ultimately lead to the loss of protected reserves and to poaching, and thus to the very thing that an import ban on hunting trophies purports to avoid in the interest of public morals: animal suffering due to poaching and the extinction of species due to the loss of natural habitats.

Rather than banning the import of hunting trophies from endangered animal species, the EU could subject such imports to an even closer scrutiny than the one already in place and require additional proof that the individual animal has been hunted in accordance with recognized standards to minimize animal suffering and in a sustainable matter. This would clearly be a less trade-restrictive measure, which would arguably provide an equally strong protection of endangered species.

1.1.4 No Disguised Restriction on International Trade

The Chapeau of Art. XX GATT requires any measure taken under the exception to not be a disguised restriction on international trade.

While an EU ban on the import of hunting trophies would clearly restrict international trade in hunting trophies, this alone would not suffice to regard it inconsistent with the chapeau of Art. XX GATT. By the very nature of measures formally justified under Art. XX GATT, they restrict international trade contrary to the Art. XI(1) GATT. If this alone would suffice to render the exceptions in Art. XX GATT inapplicable under the chapeau of Art. XX GATT, the exceptions would simply be obsolete. The aim and object of the chapeau of Art. XX GATT is to avoid **abuse or illegitimate use of the exceptions** to substantive rules available in Art. XX GATT.[17]

The question whether an EU ban on the import of hunting trophies may be regarded an abusive or illegitimate use of Art. XX GATT would depend on the concrete contents of the EU's legal act.

The GATT's objective is to facilitate the free flow of goods among WTO Members, i.e. free trade in goods. This means that abusive or illegitimate uses of exceptions to substantive provisions come into questions in particular where the WTO Member taking a measure **pursues protectionist objectives**, e.g. shielding its own economy from foreign competition, but formally justifies the measure with an exception in order to "legalize" it under the GATT.

In the case of trade in hunting trophies, there is no reason to believe that the EU could try to shield its own economy from foreign competition. In particular, many animal species hunted in Africa do not exist in the EU.

However, if the EU were to impose an import ban that is not limited to trophies of certain species, and the public morals concern under Art. XX(a) GATT were therefore related to the killing of animals for the purposes of obtaining a trophy, a ban on imports of hunting trophies could be incompatible with the chapeau of Art. XX(a) GATT, if the EU did not also prohibit hunting activities in connection with the acquisition of trophies within the EU.

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[17] WTO, Appellate Body Report of 29 April 1996, WT/DS2/AB/R (*US – Gasoline*), p. 25.

1.1.5 Most-Favoured-Nation Principle

If the EU were to impose an import ban on all hunting trophies, it would be barred from limiting such a ban to certain countries, e.g. Botswana. WTO law requires WTO Members, including the EU, to refrain from discriminating between their trading partners under the so-called most-favoured-nation principle. In the context of quantitative import restrictions, including prohibitions on imports of certain goods, Art. XIII(1) GATT provides:

> *"No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party […], unless the importation of the like product of all third countries […] is similarly prohibited or restricted."*

If the EU were to limit an import ban on trophies of certain species, the prohibition on discrimination amongst trading partners would likewise apply. However, the mere fact that certain species only live in certain countries would not constitute a violation of the most-favoured-nation principle.

1.1.6 Conclusion on the Possible Justification as a Measure Necessary to Protect Public Morals

In conclusion, the EU may potentially be able to justify an import ban on hunting trophies, which does not discriminate amongst trading partners, on the ground that the practice of hunting and killing animals with the aim of obtaining a trophy contradicts prevailing values within the EU. Provided the EU can establish the existence of such a social or ethical value, an import ban on hunting trophies would likely be regarded capable of protecting such values since it would prevent the placing of hunting trophies on the EU market.

However, regardless of whether the ban would concern all hunting trophies or only hunting trophies from certain (endangered) species, there are good **arguments that would speak against the necessity of the measure**. With regard to a ban on all imports of hunting trophies, it can be argued that an import ban would not be necessary, because a **ban on trading in hunting trophies** within the EU market may be an alternative, less trade-restrictive measure, which would equally prevent hunting trophies from being placed on the EU market. An import ban limited to endangered species may also be unnecessary because the EU may safeguard the survival of endangered species **thorough import controls** with regard to the

sustainability of the concrete hunt as well as through **international cooperation**, e.g. in the context of CITES.

Furthermore, justification of an import ban on hunting trophies would require that the measure is not a disguised restriction on international trade. Therefore, if the EU were to impose an import ban on all hunting trophies, it would also have to prohibit hunting activities in connection with the acquisition of trophies within the EU.

1.2 No Justification as a Measure Necessary to Protect Animal Life or Health

Pursuant to Art. XX(b) GATT, WTO Members are free to adopt measures necessary to protect animal life or health.

An EU import ban on hunting trophies would essentially aim at protecting animal life in third countries. The question of whether Art. XX(b) GATT allows WTO Members to take measures necessary to protect animal life or health **outside their own territory or jurisdiction** or whether the provision's objective is solely to allow for measures that would protect domestic animal life from dangerous imports remains unsolved.

It could be argued that while the chapeau of Art. XX GATT sets out requirements for the measures taken, the nature and scope of the policy area mentioned in subparagraph (b), the protection of animal life, is **not limited in the wording** of Art. XX(b) GATT, in particular with respect to the location of the animals to be protected.

Furthermore, one may argue that **international agreements** such as GATT by their very nature deal with matters in the **international sphere** and, therefore, the recognized methods of interpretation under international law do not prevent the interpretation of Art. XX(b) GATT to the effect that the animals to be protected may be located outside the territory of the WTO Member taking the measure.[18]

However, the more convincing arguments speak in favour of limiting the scope of Art. XX(b) GATT to measures necessary to protect animal life within the territory and jurisdiction of the WTO Member taking the measure. This is confirmed by the only report on this question so far, i.e. a panel report from 1991, which concluded that the scope of Art. XX(b) GATT is limited to

[18] GATT, Panel Report of 16 June 1994, DS29/R (*United States – Restrictions on Imports of Tuna (EEC)*), paras. 3.16 et seq.

measures aimed at protecting animal life or health within the own territory or jurisdiction of the state taking the measure.[19]

The Panel argued that the drafting history of the Draft Charter of the International Trade Organization ("**ITO**") and the New York Draft of the ITO Charter, including discussions amongst delegates in the ITO Charter negotiations, may be understood to indicate that the concerns of the drafters of Art. XX(b) GATT focused on the use of **sanitary measures** to safeguard life or health of humans, animals or plants within the jurisdiction of the importing country itself.

Furthermore, if Art. XX(b) GATT allowed WTO Members to take measures aimed at protecting animal health or life in other jurisdictions, WTO Members could **unilaterally determine the life or health protection policies** from which other contracting parties could not deviate without jeopardizing their rights under the GATT. The GATT would then no longer constitute a multilateral framework for trade among all WTO Members but would provide legal security only in respect of trade between a limited number of WTO Members with identical internal regulations. If one took the view that Art. XX(b) GATT was not limited in its scope to animals in the territory of the EU (*quod non)* and regarding the further requirements of Art. XX(b) GATT, reference is made to the deliberations under **C.1.1.2** – **C.1.1.5.**, which would apply accordingly in the context of Art. XX(b) GATT.

1.3 No Justification as a Measure Relating to the Conservation of Exhaustible Natural Resources

Pursuant to Art. XX(g) GATT, WTO Members may adopt measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

1.3.1 Jurisdictional Limitations

It is not settled whether Art. XX(g) GATT has jurisdictional limitations, i.e. whether the provision allows for measures that are related to the conservation of exhaustible natural resources in other territories or other jurisdictions than that of the WTO Member taking the measure.

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[19] GATT, Panel Report of 3 September 1991, DS21/R – 39S/115 (*United States – Restrictions on Imports of Tuna (Mexico)*), paras. 3.33 et seqq.

We see no reason why the arguments put forward in the context of Art. XX(b) GATT (see **C.1.2** above) should not apply in the context of Art. XX(g) GATT. Applying our analysis under **C.1.2** above to Art. XX(g) GATT, the more convincing arguments speak in favour of limiting the scope of Art. XX(g) GATT to exhaustible natural resources within the territory or jurisdiction of the WTO Member taking the measure in question. This means that the EU could **likely not justify** a ban on the import of hunting trophies from third countries under Art. XX(g) GATT.

The following analysis (**C.1.3.2** and **C.1.3.3** below) would therefore only be relevant if one took the view that Art. XX(g) GATT were not limited in its territorial and jurisdictional scope.

1.3.2 Relating to the Conservation of Exhaustible Natural Resources

Although animals may be considered "renewable" due to their capability of reproduction, the notions of "exhaustible" and "renewable" are not mutually exclusive, because animals are in certain circumstances susceptible of depletion, exhaustion and extinction. The notion of "exhaustible natural resources" within the meaning of Art. XX(g) GATT therefore refers to **animals**, too.[20]

The notion of "conservation" is interpreted widely. It means the preservation of natural resources. The precise meaning of the word "conservation" can only be understood in the context of the exhaustible natural resource at issue. In the context of animals, "conservation" encompasses e.g. **halting activities creating a danger of extinction**.[21]

The word "relating to" means "**primarily aimed at**". For a measure to "relate to" conservation of natural resources, there must be a close and genuine relationship of ends and means between that measure and the conservation objective. Measures that are merely incidentally or inadvertently aimed at a conservation objective do not satisfy the "relating to" requirement.

Invoking Art. XX(g) GATT in order to justify a ban on the import of hunting trophies would require that the species to be conserved is endangered or

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[20] WTO, Appellate Body Report of 12 October 1998, WT/DS58/AB/R (*US – Shrimp*), paras. 128 et seqq.

[21] WTO, Appellate Body Reports of 7 August 2014, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (*China – Rare Earths*), para. 5.89.

threatened by extinction because of hunting.[22] This is already questionable in the case at hand, since only hunting trophies that have been acquired and exported in compliance with CITES may be imported into the EU.

1.3.3 Made in Conjunction with Restrictions on Domestic Consumption or Production

A measure may only be justified under Art. XX(g) if it is "made in conjunction with restrictions on domestic consumption or production". This notion establishes a requirement of **even-handedness** in the imposition of restrictions.[23]

The trade restriction in question, here an EU import ban on hunting trophies, must not necessarily be aimed at ensuring the effectiveness of domestic restrictions. Instead, Art. XX(g) GATT permits trade measures relating to the conservation of exhaustible natural resources if such trade measures **work together** with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource.[24]

In the context of an EU import ban on hunting trophies, it appears that even-handedness would require the EU to impose a ban on hunting within the EU or at least a ban on hunting, which is also aimed at acquiring trophies.

1.4 Conclusion on Compliance of an EU Ban on the Import of Hunting Trophies with WTO Law

In our view, an EU import ban on hunting trophies is unlikely to be justified under Art. XX(b) GATT or Art. XX(g) GATT, because neither provision allows WTO Members to take measures aimed at protecting animals outside their own territory or jurisdiction.

While we cannot rule out with certainty that an EU import ban on **all hunting trophies** may be justified as a measure necessary to protect public morals pursuant to Art. XX(a) GATT, two factors in particular would speak against this. First, given that the killing of animals for the production of various consumer goods (e.g., clothing) is accepted within the EU, it would appear rather implausible that the killing of animals for obtaining trophies contradicts prevailing values of the EU Member States and its citizens.

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22 *Blattner*, Protecting Animals Within and Across Borders (2019), p. 111.
23 WTO, Appellate Body Report of 29 April 1996, WT/DS2/AB/R (*US – Gasoline*), p. 20.
24 WTO, Appellate Body Reports of 30 January 2012, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (*China – Raw Materials*), para. 360.

Second, an EU import ban on hunting trophies would arguably not be necessary to protect public morals since a ban on trading in hunting trophies within the EU would likewise prevent the placing of hunting trophies on the EU market while being less trade-restrictive.

An import ban limited to **trophies from certain** species may also be justified under Art. XX(a) GATT. However, an argument could be made that such a ban would not be necessary, because the EU may safeguard the survival of endangered species through thorough import controls with regard to the sustainability of the concrete hunt as well as through international cooperation, e.g. in the context of CITES.

If Art. XX(a) GATT applied despite of the above, justification under the provision would require that the EU does not discriminate amongst trading partners (most-favoured-nation principle). Furthermore, in case of an import ban on all hunting trophies, the EU would likely have to ban hunting activities in connection with the acquisition of trophies within the EU, since, otherwise, an import ban on hunting trophies may be regarded a disguised restriction on international trade.

2. Legal Protection

If the EU were to impose an import ban on hunting trophies, there would be two possibilities for legal protection, both of which would require that a state seek legal protection. First, an EU Member State may bring an action for annulment against the EU legal act before the CJEU (see **2.1**). Second, a WTO Member may bring a complaint before the WTO Dispute Settlement Body (see **2.2**).

2.1 Action for Annulment (Art. 263 TFEU)

Art. 263 TFEU enables the CJEU to review the legality of EU legal acts. However, an action for annulment against an EU import ban on hunting trophies would have low chances of success.

Firstly, proceedings under Art. 263 TFEU may, amongst others, be instituted by any natural or legal person against an EU legal act which is **of direct and individual concern** to them within two months of its publication or of its notification to the applicant, or, in the absence thereof, of the day on which it came to the knowledge of the applicant.

The Verein zur Erhaltung des Wildes und der Jagd im CIC e. V. would have no standing before the CJEU since it does not import hunting trophies into

the EU and therefore an EU ban on the import of hunting trophies would not concern itself.

In contrast, an individual importer may apply for annulment under Art. 263 TFEU. However, it is unlikely that an EU ban on the import of hunting trophies would be regarded as "individually concerning" an importer of hunting trophies. The requirement of "individual concern" is interpreted narrowly. In its landmark *Plaumann* ruling, the CJEU developed the so-called ***Plaumann* test**, which is has since consistently applied:[25]

> *"Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed."*

An importer seeking to challenge an EU ban on the import of hunting trophies would be affected by the import ban by reasons of activity, which may **at any time be practiced by any person**. The activity is not therefore such as to distinguish the applicant in relation to the contested decision as in the case of an addressee.

A possible alternative is that an EU Member State brings an action for annulment against an EU import ban on hunting trophies. EU Member States are privileged applicants under Art. 263 TFEU, i.e. EU Member States have standing before the CJEU irrespective of the requirements of the *Plaumann* test.

Secondly, even if the applicant had standing before the CJEU, the CJEU would not review whether the EU ban on the import of hunting trophies may breech WTO law, including the GATT, but solely possible infringements of EU primary law.

Generally, the CJEU may review EU legal acts against **international law** integrated into the EU's legal order. However, the review of an EU act against the standard of an international treaty presupposes, amongst other things, that its **provisions are such that the individual can invoke them directly in court**. The **CJEU has consistently denied** to review EU legal acts against the provisions of the **GATT and the other WTO**

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[25] CJEU, Judgment of 15 July 1963, Case No. 25/62 (*Plaumann & Co/Commission*).

agreements.[26] The main rationale behind this practice is to avoid stripping the EU of the possibility to negotiate settlements on the WTO level with other WTO Members. Only in exceptional cases do the EU courts review EU legal acts against WTO law, namely if the challenged EU legal act either **expressly refers to WTO law** or if the EU legal act was **aimed at fulfilling obligations under WTO law**.[27]

2.2 Violation Complaint under the WTO Dispute Settlement System

2.2.1 Possibility to Bring a Complaint before the WTO's Dispute Settlement Body

The WTO maintains a dispute settlement system under the so-called Dispute Settlement Understanding ("**DSU**").

Private parties cannot bring cases before the WTO Dispute Settlement Body. This right is **reserved to WTO Members**. In principle, any WTO Member may bring a so-called violation complaint before the WTO Dispute Settlement Body.

The WTO Dispute Settlement Body, acting through a panel, would review the **compatibility of an EU ban on the import of hunting trophies with WTO law**, including the GATT, i.e. the **justification** of an EU ban on the import of hunting trophies under **Art. XX GATT** (see **C.1.** above). Furthermore, it would be required that the ban on the import of hunting trophies directly or indirectly results in **nullification or impairment of a benefit** accruing to the complainant under WTO law. Nullification or impairment is presumed to exist if a violation has been established by way of a reversal of the burden of proof. Since the reversal of burden of proof does not eliminate the possibility that the EU as the respondent proofs lack

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[26] See, e.g., CJEU, Judgement of 12 December 1972, Case No. 21–24/72 (*International Fruit*), paras. 19 et seqq.; Judgement of 24 October 1973, Case No. 9/73 (*Schlüter*), paras. 27 et seqq.; Judgment of 16 March 1983, Case No. 266/81 (*Società Italiana per l'Oleodotto Transalpino*), para. 28; Judgment of 12 December 1995, Case No. C-469/93 (*Chiquita Italia*) para. 29; Judgment of 23 November 1999, Case No. C-149/96 (*Portugal/Council*), para. 47; Judgement of 14 December 2000, Case No. C-300, 392/98 (*Dior et al.*), para. 44; Order of 2 May 2001, Case No. C-307/99 (*OGT Fruchthandelsgesellschaft*) para. 26; Judgment of 9 October 2001, Case No. C-377/98 (*Netherlands/Parliament and Council*), para. 52; Judgement of 10 December 2002, Case No. C-491/01, (*BAT (Investments) et al.*), para. 154; Judgment of 16 November 2004, Case No. C-245/02 (*Anheuser Busch*) para. 54; Judgment of 14 December 2005, Case No. T-383/00 (*Beamglow/Parliament et al.*) paras. 127 et seqq.; Judgment of 24 September 2008, Case No. T-45/06 (*Reliance Industries/Council and Commission*), para. 88; Judgment of 11 May 2019, Case No. T-237/08 (*Abadia Retuerta/HABM*), paras. 66 et seq.

[27] See, e.g., CJEU, Judgment of 23 November 1999, Case No. C-149/96 (*Portugal/Council*), para. 49; Judgment of 24 September 2008, Case No. T-45/06 (*Reliance Industries/Council and Commission*), para. 89.

thereof, the chances of success of a violation complaint would be higher if the complainant is a WTO Member with high international hunting activities involving trophies on its territory.

2.2.2 Practical Issues with Regard to WTO Dispute Settlement

The WTO dispute settlement system has various disadvantages, particularly from the perspective of private entities or organizations, who cannot be a party to the dispute themselves.

Firstly, WTO dispute settlement contains significant **elements of diplomacy**. The system is structured in a way that facilitates mutual agreements between the parties to a dispute in order to avoid panel reports. It is possible at any stage of the proceedings that the complainant reaches a mutually agreed solution of any form with the EU and **withdraws the complaint**, even if that solution does not lead to the removal of EU import bans on hunting trophies. Private parties, who have an interest in the success of the complaint, have no possibility of forcing the complainant to uphold the complaint.

Secondly, the WTO is currently experiencing a **blockade** that can prevent the resolution of disputes altogether. Panel reports, which are judgments of the first instance, may be appealed and brought before the Appellate Body. The Appellate Body as the second instance would then issue the final judgment on the dispute. The United States has been blocking the selection process for Appellate Body members for several years now, which has made the **Appellate Body inoperable and unable to rule on appeals**. This means that a party to the dispute can appeal a panel ruling "into the void". The dispute would then remain unsettled until new members of the Appellate Body are appointed.

In order to overcome the Appellate Body's blockade, some WTO Members have entered into the Multi-Party Interim Appeal Arbitration Agreement ("**MPIA**"), under which arbitral tribunals replace the Appellate Body. However, no African country, including Botswana, is a party to the MPIA.[28]

[28] The current parties to the MPIA include: Australia, Benin, Brazil, Canada, China, Chile, Colombia, Costa Rica, Ecuador, The European Union, Guatemala, Hong Kong (China), Iceland, Japan, Macao (China), Mexico, Montenegro, New Zealand, Nicaragua, Norway, Pakistan, Peru, Philippines, Singapore, Switzerland, Ukraine, Uruguay.

D. Recommendation on How to Proceed

Since any realistic chances for legal protection before the CJEU or the WTO dispute settlement mechanism would require a state (an EU Member State in an action for annulment before the CJEU; a WTO Member in WTO dispute settlement) to challenge an EU import ban on hunting trophies, it is essential that Verein zur Erhaltung des Wildes und der Jagd im CIC e. V. aligns with EU Member States and/or WTO Members potentially willing to challenge such a measure and supports them in preparing legal action even before the EU passes the import ban.

Given that the CJEU generally does not review EU legal acts against WTO law, a violation complaint before the WTO Dispute Settlement Body would have greater chances of success compared to an action for annulment before the CJEU. The likelihood of success of a violation complaint will depend on the concrete design and contents of the EU's legal act imposing an import ban on hunting trophies.

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