

The Agreements on International Humane Trapping Standards – Background, Critique and the Texts

Stuart R Harrop¹

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1. Background

Two new agreements, the Agreement on International Humane Trapping Standards between the European Community, Canada and the Russian Federation² and the International Agreement in the form of an Agreed Minute between the European Community and the United States of America on humane trapping standards - Standards for the humane trapping of specified terrestrial and semi-aquatic mammals,³ may be regarded as the first international agreements concerned exclusively with animal welfare. The former agreement, although negotiated with the involvement of the United States, was concluded in December 1996 between the European Community, Canada and the Russian Federation. The latter, in the form of an agreed minute with virtually identical text to the first agreement, was finalised one year later by the EC and the United States of America.

Prior conservation treaties had dealt, in a minor way, with animal welfare issues but such diversions have been either accidental or incidental. The focus of CITES, for instance, is on the conservation of species that are endangered or threatened through the impact of trade but the Convention also has several provisions that regulate the welfare of animals in transport.⁴ Similarly the Convention on the Conservation of European Wildlife and Natural Habitats (Berne Convention) deals primarily with the conservation of threatened species and habitats but its prohibition of indiscriminate capture methods is an animal welfare provision.⁵

The latter provision, set out almost verbatim in the European Community's Habitats Directive,⁶ was part of the higher legislative matrix relied upon as the legal basis for the European Community's Leghold Trap Regulation.⁷ The regulation banned the use of the leghold or *gin* trap (long known to be indiscriminate and long regarded as cruel⁸) throughout

¹ Professor of Wildlife Management Law, Durrell Institute of Conservation and Ecology, University of Kent at Canterbury, UK.

² Official Journal NO. L 042 , 14/02/1998 P. 0043 – 0057 (1998).

³ Official Journal L 219 , 07/08/1998 p. 0026 – 0037 (1998).

⁴ CITES Articles 111.2(c), 4(b), V.2(c), 5(b), 6(b), V.2(b) and VIII.3. See Stuart Harrop, *The Dynamics of Wild Animal Welfare Law* 9(2) J. ENVTL. L. (1997), at 289.

⁵ Berne Convention Article 8. See Harrop, *supra* note 4, at 291.

⁶ Article 15 of the Council Directive on the Conservation of Natural Habitats 92/43/EEC (OJ L 206 22/7/92).

⁷ Council regulation: EEC 3254/91 (OJ EC 1991, L 308/1).

⁸ See the reference to Charles Darwin's views in the mid-19th century in Harrop, *supra* note 4, at 296.

the EC territories.⁹ The regulation also purported to ban the import of furs of 13 species referred to in the regulation (principally species found in North America, Northern Europe and Russia¹⁰) from 1st January 1996 unless, pursuant to Article 3:

- the country of origin had banned the use of the leghold trap; or
- that country's trapping methods complied with internationally agreed humane trapping standards.

The ensuing international dispute concerning this import ban has been discussed extensively elsewhere.¹¹ For present purposes, therefore, the matter is briefly summarised, with special emphasis on the promotion of international standards within the Leghold Trap Regulation.

The Regulation arose out of the fur controversy within Europe about the morality of using fur in clothing. It became law in Europe with a clear mandate from governments and the electorate.¹² However, in the absence of unequivocal international consensus on either the use of the leghold trap or the content of humane trapping standards (upon which the mechanics of the ban depended), the restriction on imports contemplated by the Regulation consisted of a unilateral restriction on international trade. Since the regulation concerned mammals found largely in the northern American and northern Asian Continents, threats of action by the USA and Canada, pursuant to the provisions in the General Agreement on Tariffs and Trade 1947 (now within the portfolio of the World Trade Organisation), soon materialised¹³. When faced with these threats, and with no visible route of escape in the form of internationally agreed standards or in the form of an international instrument which would demonstrate that international consensus existed on the subject, the European Commission sought to avoid the immediate threat of a WTO dispute by postponing the ban on imports.¹⁴

Prior to the promulgation of the Leghold Trap Regulation, the International Standards Organisation (ISO) had begun the process of developing international standards.

⁹ The Regulation, as implemented by further Commission regulations such as EEC 1771/94, (OJ EC 1994 L 184/3) banned the use of leghold traps in the European Community countries from 1st January 1995 (Article 2).

¹⁰ The species listed in the Annex to the regulation are: beaver, wolf, otter, coyote, lynx, bobcat, racoon, sable, musk rat, fisher, badger, martin and ermine.

¹¹ See Stuart Harrop & David Bowles, *Wildlife Management, The Multilateral Trade Regime, Morals and the Welfare of Animals*, 1(1) J. INT'L WILDLIFE L. & POL'Y 64-94 (1998); Andre Nollkaemper, *The Legality of Moral Crusades Disguised in Trade Laws: An Analysis of the EC "Ban" on Furs From Animals Taken By Leghold Traps*, 8(2) J. ENVTL. L. 237-256 (1996); *Trapped by Furs? The Legality of the European Community's Fur Import Ban in EC and International Law*, Rotterdam Centre for International Law (Andre Nollkaemper, ed. 1997); Harrop, *supra* note 2, at 287-302; House of Lords Session 1995-96, 8th Report, Select Committee on the European Communities *Leghold Traps* HMSO (HL Paper 73)

¹² ANIMAL WELFARE IN EUROPE- EUROPEAN LEGISLATION AND CONCERNS (Wilkins, ed. 1997).

¹³ The Russian Federation was unable to make such threats because it was not a member of the WTO. *See generally* Harrop & Bowles, *supra* note 11.

¹⁴ The postponement was put into effect by Commission Regulation (EC) No 1771/94 on the basis of the *sufficient progress* made in major fur exporting countries in developing humane trapping methods and because of the delay in developing the international standards. *See* preamble to the regulation and House of Lords, *supra* note 11.

The European Commission had hoped that international standards would come out of this effort, as a result of this work, to permit derogation from the general trade restriction in the Regulation. Had such standards been in place, thereby diluting, if not eliminating, the unilateral nature of the ban, the vulnerability of the regulation to a WTO-based attack may have been much reduced. The WTO portfolio expressly deals with this issue in its *Technical Barriers to Trade Agreement*. This agreement makes it clear that the WTO, rather than accepting the upholding of technical regulations through the unilateral route, prefers to base such technical regulations on international standards that derive from an international, consensus based negotiation mechanism.¹⁵

The ISO process of standard development proceeded for almost ten years before it became clear that standards capable of being used as foundations for derogation from the European ban would not be forthcoming. The work of that committee effectively ended, at the London meeting of ISO TC191 in 1997, when it was finally agreed that the committee would issue trap testing methodology standards rather than humane trapping standards.

Even before the London meeting of ISO TC191, faced with an embarrassing WTO challenge, the European Commission instigated an alternative standards development process, through the work of a group of participants appointed by the European Community, the USA, Canada, and ultimately Russia. Sir Leon Brittan, the vice president of the European Commission, defined the function of the group as being “to explore the technical aspect of humane trapping standards” and amplified the purpose of its creation in a written European parliamentary answer issued in June 1995:

The International Standards Organisation process to adopt internationally agreed humane trapping standards has been delayed mainly because of the controversy over the definition of the term humane in that context. The Commission is therefore exploring ways for a more rapid adoption of standards by direct negotiation with the most important fur exporting countries, i.e. USA and Canada. Talks on this are in an initial phase. As far as the World Trade Organisation’s challenge of the regulation is concerned, the Commission would not expect such action to be initiated as long as the issue is being discussed with the third countries concerned.

However, the group was criticised from some quarters as not having an appropriately wide and relevant representation in its membership. The UK’s House of Lords investigated the

¹⁵ It is not entirely certain that the TBT agreement would support technical regulations concerned with animal welfare. Article 2.2 requires that “technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective and that such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.”

In the context of standards concerned with the trapping of wild mammals, the relevant legitimate objectives are “the protection of animal life or health or the environment.” The latter reference to the environment could be relevant to the current issue in that some potentially non-selective traps, such as the basic legtrap, can be set indiscriminately¹⁵ and thus catch endangered species that are non-targets. However, the process of developing humane trapping standards is concerned not primarily with conservation (although selectivity is a factor dealt with in all recent trapping standards initiatives) but animal welfare, and there has been no definite ruling on whether the term animal life or health is a mere phytosanitary description or can also embrace welfare. See Harrop & Bowles, *supra* note 11, at 89-91 and the WTO’s Agreement on the Application of Sanitary and Phytosanitary Measures.

matter through a select committee and the findings of that committee included the following statement:

We are concerned at the Group's apparently unrepresentative composition and the secretive nature of its proceedings. The exclusion of campaigning organisations is perhaps understandable but the under representation of professional experts in animal welfare and behaviour is less easily defended. It is not clear what status its eventual recommendation should have when around three-quarters of its members are closely associated with the fur trapping trade in the major fur exporting countries.¹⁶

Nevertheless, the work of this group created the foundations for the two international agreements on trapping standard. These agreements provided the practical international consensus to enable all parties to side-step the effect of the ban in the Leghold Trap Regulation, thereby ending the conflicts surrounding the regulation

2. Critique of the Agreements

As has been stated earlier, two agreements with almost identical standards were concluded. Although the US participated in the negotiations of the *Agreement on International Humane Trapping Standards*, it was not able to accept the final text. However, the European Commission persisted with its desire to conclude an agreement with the US on terms equivalent¹⁷ to those of the principal agreement. The result was an alternate bilateral agreement with the United States. The main differences between the bilateral and trilateral agreements concern the manner in which traps that do not comply with the standards are to be phased out.¹⁸ Further, the agreement with the US does not contain the detailed further research programmes contained in the trilateral agreement.

References hereinafter to the Agreement refer to the trilateral Agreement unless otherwise stated.

2.1 Comments on the text of the Agreement

2.1.1

Bearing in mind the criticism, by the UK's House of Lords Select Committee of the composition of the working group that laid the foundations for the Agreement; it is not surprising that the key purpose of the standards within the Agreement is expressed, in the

¹⁶ House of Lords, *supra* note 9, at 58.

¹⁷ Council Decision 98/487/EC concerning the conclusion of an International Agreement in the form of an Agreed Minute between the European Community and the United States of America on humane trapping standards (OJ L 219, 13/07/1998 p. 24-25,) which approves that agreement, refers back to the Council's decision of 22 July 1997 which approved the principal agreement and notes that it "called upon the Commission to intensify its efforts to reach an Agreement with the [USA] that is equivalent to the Agreement with Canada and the Russian Federation."

¹⁸ See paragraph 4.2-*Implementation Schedule* of Annex 1 in respect of the Agreement and the Annex in respect of the Agreed Minute.

preamble and elsewhere, to be the facilitation of trade rather than the promotion of animal welfare. The preamble states that

the primary purpose of any international technological standard is to, *inter alia*, improve communication and facilitate trade.

This principle is reiterated and emphasised in the objectives set out in Article 2 and, therefore, the effect of the standards must be predicted and analysed in the context of these overriding principles.

2.1.2

Recalling that the main purpose of the establishment of the working group was to avoid a formal WTO dispute, Article 4 ensures that the agreement does not affect the rights or obligations of parties to the WTO.

2.1.3

Article 5 states that

A party may continue to prohibit the use, in its territory, of traps that had been prohibited for use at the date of entry into force of this agreement.

Standards or other internal mechanisms forming the basis of regulatory measures, which provide greater welfare to trapped animals than the standards in the Agreement, may continue if such measures were in force prior to the Agreement. Bearing in mind the overriding objective to facilitate trade, presumably from a basis of equality, this concession, which permits a rupture in the level playing field, may have drastic implications for the further development of wild animal welfare regulation. The implication of this part of the text is that *future* national developments, which go beyond the international standards' requirements, could no longer be implemented without breach of the terms of the Agreement. Thus, if the development of standards pursuant to the Agreement falters or slows down to the pace of the ISO TC191 negotiations, the internal development of relevant animal welfare measures could also be denuded.

2.1.4

Article 7 summarises each party's obligations and they include requirements to:

- ensure that trapping methods carried out in each country accord with the standards and to
- prohibit traps that do not accord with the standards

If the Agreement's standards became, in effect, mere lowest common denominators, these obligations coupled with the possible predicted effect of Article 5, could conceivably have the effect of slowly eroding rather than improving the standard of welfare extended to trapped mammals.

2.1.5 The Standards

The standards are contained in Annex 1 to the principal Agreement and in the Annex to the Minute. Their aim, as expressed in paragraph 1.1, is explicitly concerned with the improvement of wild animal welfare.

It is also expressly assumed within the standards that traps should be selective and efficient (see paragraphs 1.2.3 and 5.6.1). These provisions go beyond the bounds of the protection of wild animal welfare and are relevant to the conservation of endangered and non-endangered species. However, the standards do not prescribe comprehensive methods for quantifying these two criteria. The standards assess the welfare of animals by measuring the extent of ease or difficulty in their coping with the environment and the extent of failure to cope with their environment (paragraph 1.3.1).

The Agreement also acknowledges that a range of measures should be used in assessing the welfare of animals since animals vary in the methods that they use to try to cope with their environment (paragraph 1.3.1).

Beyond this, moral judgements are employed to determine whether a trap may be classified as “humane.” The target to be achieved is described as the point at which the welfare of a trapped mammal is maintained at a “sufficient level” (paragraph 1.3.1). Defining what is “sufficient” is necessarily difficult and the standards note that:

in certain situations with killing traps there will be a short period of time during which the level of welfare may be poor.

A mixture of objectivity and judgement determines the level of sufficiency. The objectivity derives from defined indicators to measure the welfare of animals caught in restraining and killing traps and the act of judgement comes in applying the appropriate thresholds.

Restraining Traps

For restraining traps two behavioural indicators are recognised; self-mutilation and unresponsiveness (paragraph 2.3.1). In addition, a number of injuries or physiological symptoms are recognised as indicators of poor welfare (paragraph 2.3.2). A restraining trap will only be deemed humane if 80% of the animals tested show none of the behavioural and physiological injuries indicators (paragraph 2.4).

This standard has been criticised because some of the specified indicators fell below the levels that had been accepted by the European Community’s scientists in the working group that led to the development of the Agreement. Further, the indicators are notably lacking in comprehensive behavioural and more subtle physiological indicators (such as, in the latter case, indicators linked to base heart rates and specific hormone and enzyme levels.)¹⁹

Killing Traps

The indicator for killing traps is the time for unconsciousness and insensibility to be reached (measured, in most cases, by loss of corneal and palpebral reflexes) (paragraph 3.2.). The thresholds require that 80% of the animals tested reach this state within prescribed time limits (paragraph 3.4).

Bearing in mind the level of physiological and behavioural sophistication of the mammals concerned, the principal criticism of the killing trap standards is that the time to

¹⁹ See the European Brief on the Principal Agreement issued by the Public Affairs Department of the Royal Society for the Prevention of Cruelty to Animals. (RSPCA, Causeway, Horsham, West Sussex, RH12 1HG, United Kingdom.)

loss of consciousness is far too long.²⁰ A wolf, by example, could take five minutes to die as a result of the triggering of a trap accepted, by these standards, as humane.

Further Research

The killing trap standards expressly recognise a need to review some of the time limits. For example, the 300-second time limit for most of the larger mammals is to be evaluated following a three-year period with a view to it being halved thereafter. However, there is no guarantee that this will take place.

The Agreement (although not the version signed by the United States) deals quite extensively in Part IV of Annex 1 with further research needs. This research will focus on the establishment of new thresholds and new indicators for the purpose of the restraining trap standards. In particular, the parties are obliged to promote research, to be completed within three years, into the welfare of one species of mammal each (paragraph 6.2). However, there are no further practical obligations to evidence the parties' momentum to develop the standards beyond their current status.

If the standards as currently set forth form only lowest common denominator requirements, then even national-internal development may be retarded, or even halted, by this multilateral commitment.

²⁰ *Id.*