

SYMPOSIUM ARTICLE

Globalization and the Animal Turn: How International Trade Law Contributes to Global Norms of Animal Protection[†]

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Abstract

Many animal and environmental activists think of international trade law as a block to the achievement of their goals and perceive the World Trade Organization (WTO) as a threat to animals. Yet, the first legal decision of an international tribunal to devote careful, sustained attention to animal welfare issues comes from the WTO, in the *EC – Seal Products* decision. This article argues that international trade law is currently an important, although under-acknowledged, locus for the development of global norms concerning the protection of animals, and that animal conservation and animal welfare can be seen as aspects of a single overarching principle of animal protection. International trade law contributes to animal protection in two ways. Firstly, WTO jurisprudence has recognized animal protection as a legitimate basis for invoking exceptions to trade rules (as in *EC – Seal Products*). Secondly, international trade negotiations enhance cooperation on the implementation and enforcement of existing conservation obligations (as in the new Trans-Pacific Partnership’s Environment Chapter).

Keywords International trade law, Animal welfare, International wildlife law, Animal protection, World Trade Organization (WTO), Trans-Pacific Partnership (TPP)

1. INTRODUCTION

Something momentous happened in 2014 in the evolution of global animal law. For the first time, an international tribunal recognized animal welfare as normative matter that has status at the international level, describing it as ‘an ethical responsibility for human beings in general’ and ‘a globally recognized issue’.¹

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¹ *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, Panel Report, WTO Docs WT/DS400/R, WT/DS401/R, WT/DS400/R/Add1, WT/DS401/R/Add1, 25 Nov. 2013 (*EC – Seal Products* (Panel)), paras 7.409, 7.420. These findings were not disturbed by the Appellate Body in its Report in the same dispute: *European Communities – Measures Prohibiting*

It is remarkable enough that these statements were made in international case law, in light of the long-standing relegation of animal welfare to the realm of the local and domestic. However, there is another remarkable aspect to this story, and that is the identity of the tribunal which made the pronouncement. It was a Panel of the Dispute Settlement Body of the World Trade Organization (WTO), adjudicating a trade challenge to the European Union (EU) ban on the importation of seal products (*EC – Seal Products*).

A WTO Panel is hardly the most obvious source to look to for such a pronouncement. Advocates for the better treatment of animals tend to think of international trade law as a block to the achievement of their goals, not as a legal tool that could contribute to their realization. Compassion in World Farming, for example, has described the WTO as ‘the greatest threat facing animal protection today’ and an institution the rules of which ‘have been wrecking progress on animal welfare’.² These statements are fairly representative of the views of many animal welfare advocates on the relationship between international trade law and animal protection. Yet, the decision in *EC – Seal Products* indicates that something more complex and interesting is happening than simply trade law crushing animal protection. It suggests that developments in the trade sphere need not hamper and could actually contribute to the development of norms of animal protection.

The term ‘animal protection’ is used here to refer to two different concepts at the same time: animal *welfare*, and animal (or animal-species) *conservation*. Important differences distinguish these objectives. Animal welfare focuses on the well-being of individual animals; animal conservation is concerned with the survival of species. Animal welfare is predominantly a domestic matter with no more than a tentative presence in international law, whereas animal conservation is an established objective of international environmental law.

While I acknowledge those important differences, I argue that there are also meaningful conceptual connections between animal welfare and animal conservation, and that they share some common ground as expressions of the ways in which human societies value animals.³ In light of those connections, I will use the term ‘animal protection’ to capture the linkages between animal welfare and (animal) species protection. If such a link indeed exists, then we can also explore the connection between the respectful attention paid to animal welfare as a moral concern in *EC – Seal Products* and initiatives to incorporate commitments regarding species conservation – including but not limited to conservation of animal species – into trade deals, notably the new

the Importation and Marketing of Seal Products, Appellate Body Report, WTO Docs WT/DS400/AB/R, WT/DS401/AB/R, 22 May 2014 (*EC – Seal Products* (AB)).

² P. Stevenson, ‘The Greatest Threat Facing Animal Protection Today’, Post-Cancun Briefing, WTO/Compassion in World Farming, Oct. 2003, available at: https://www.ciwf.org.uk/includes/documents/cm_docs/2008/p/post_cancun_mep_briefing.pdf. While I am using Stevenson’s statements as a kind of argumentative foil, it should be noted that I do not disagree with his analysis of WTO law, which is generally accurate and insightful. In later writings he has observed that interpretation by the WTO Dispute Settlement Body has opened the law to a more evolutionary and more pro-animal perspective. I agree with this too.

³ See further discussion in Section 2 below.

Trans-Pacific Partnership (TPP).⁴ Both can be seen as aspects of the incrementally increasing seriousness with which animal protection is taken in international legal discourse, even in the realm of trade lawmaking (which might seem an unexpected place to look for such developments). In this regard, concerns for animal welfare and species conservation are both instructive manifestations of the emergence of global animal law.

I argue that the decision in *EC – Seal Products* and the animal-protective provisions in the TPP are not anomalies or isolated incidents but form part of a broader phenomenon that potentially could grow still further. Notwithstanding its reputation for blocking the development of progressive laws to protect animals, contemporary lawmaking in the international trade system makes a positive contribution to the construction of animal-protective norms, and plays an important role in the evolution of global animal law.⁵

I do not intend to stretch the reader's credulity beyond the breaking point; I am not trying to convince anyone that the WTO has converted itself into an animal protection organization or that trade negotiators see animals as their top priority. The argument is not that animals are highly important to international trade law, but that international trade law has, rather unexpectedly, turned out to be an important context for the formation of global norms regarding animals. Animal protection so far has only a tentative and embryonic presence in international law. Proportionally, the role of international trade law in establishing and developing that presence has been outsized.

There are two aspects to this contribution, which can be summed up as (i) negative, and (ii) positive. The negative category means that trade law does not *prevent* individual states from adopting domestic measures to protect animals (within the usual constraints of not unfairly targeting imported products). This might mean no more than not hindering, or at least not completely obstructing, domestic initiatives on animal protection. However, as the decision in *EC – Seal Products* shows, there is also deeper significance in the affirmation that animal welfare is a legitimate zone of domestic regulatory autonomy and a valid basis for invoking exceptions to trade disciplines. The positive category, meanwhile, refers to the incorporation of commitments to cooperate on animal protection matters into trade agreements, as in the TPP Environment Chapter.⁶ This positive aspect has the potential to materially improve the level of effective legal protection for animals around the world.

⁴ The provisional text of the TPP, agreed on 5 Oct. 2015, can be found at Global Affairs Canada, available at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng>.

⁵ While beyond the scope of this article, both (i) the relationship between EU rules on free movement of goods and divergent levels of animal protection in the domestic law of Member States, and (ii) the relationship between the Dormant Commerce Clause of the United States (US) Constitution and animal-protection initiatives by individual states offer instructive parallels with the international trade/animal protection interface discussed here. On the latter, see *Association des Eleveurs de Canards v. Harris*, 729 F. 3d 937 (9th Cir. 2015) (upholding California's ban on products resulting from force-feeding birds to expand their livers beyond normal size against claims that, inter alia, the ban discriminated against out-of-state goods).

⁶ Ch. 20 'Environment', available at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/20.aspx?lang=eng>.

The customary hostility of many animal welfare advocates to trade liberalization arrangements is in some respects well founded. However, it may turn out that outright hostility is a strategic mistake, and represents an obstacle to realizing the potential for trade lawmaking to enhance global agreement and cooperation on the development of animal-protective norms. Stronger links between trade deals and animal protection could enhance the effectiveness of existing international animal-protective norms and foster the growth of new norms.

2. ANIMAL PROTECTION AS A GLOBAL CONCERN

I use the term ‘animal protection’ to refer to both animal welfare and the conservation of animal species. However, animal protection as used here is not just a shorthand label to describe two different things at the same time. It is also meant to express a connection, and an overlap in conceptual underpinnings, between welfare and conservation, which are often thought of as distinct and even, to some extent, opposed ideas. The term ‘animal protection’ is intended to signify that these two categories of legal norms are actually connected, and share underlying foundations. In turn, the developments in the international trade context on animal welfare and wildlife protection can be understood not as dissociated phenomena but as conceptually linked initiatives building international norms of animal protection. I aim to show that trade law has contributed to the articulation of more holistic norms regarding the protection of animals which connect conservation and welfare, rather than keeping them apart as distinct categories.⁷

These propositions need to be unpacked and substantiated. To what extent are principles concerning species protection and animal welfare reflected in international law, how are they different, and what supports the argument that there is a hybrid or synthesized principle of animal protection?

2.1. *Conservation*

Conservation, including conservation of animal species, is a well-established objective of international environmental law. Major treaties addressing international wildlife conservation include the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),⁸ the Bonn Convention on the Conservation of Migratory Species of Wild Animals (CMS),⁹ the Convention on Biological Diversity (CBD),¹⁰ and the Bern Convention on the Conservation of European Wildlife and Natural Habitats.¹¹ Numerous additional multilateral and regional treaties deal with

⁷ As discussed in Section 4.1 below.

⁸ Washington, DC (US), 3 Mar. 1973, in force 1 July 1975, available at: <https://www.cites.org/eng/disc/text.php>.

⁹ Bonn (Germany), 23 June 1979, in force 1 Nov. 1983, available at: <http://www.cms.int>.

¹⁰ Rio de Janeiro (Brazil), 5 June 1992, in force 29 Dec. 1993, available at: <https://www.cbd.int>.

¹¹ Bern (Switzerland), 19 Sept. 1979, in force 1 June 1982, available at: <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/104>.

this subject matter.¹² Major international institutions concerned with the conservation of wild animals include the International Union for the Conservation of Nature (IUCN), membership of which includes ‘governments and government agencies alongside scientific, professional and conservation bodies’.¹³

I propose that there are common philosophical underpinnings between conservation and animal welfare. It is therefore necessary to ask what constitutes the philosophical basis for our international laws on species conservation. From there, it is possible to evaluate to what extent the legal protection of animal welfare shares that basis.

The authors of the second edition of *Lyster’s International Wildlife Law* argue that in the underlying philosophical foundations of international wildlife law are found the sources of value that humans accord to nature and wildlife.¹⁴ Value can be *instrumental* (based on the uses to which wildlife can be put, as with species used for food or industry); *inherent* (the value nature has for us by virtue simply of existing – for example, because we value its beauty); and/or *intrinsic* (value ‘which an entity possesses of itself, for itself, regardless of the interests or utility of others’).¹⁵

A further question arises: what is the locus of value? Is value (whether instrumental, inherent or intrinsic) found in individual specimens, in species or communities, or entire ecosystems?¹⁶ The locus of intrinsic value is a particularly complex matter, because the value of a living organism for its own sake (intrinsic value) takes two forms: ‘good-of-its-own’ (the conditions for the individual to flourish and experience well-being, including avoidance of pain for sentient animals¹⁷), and ‘good-of-its-kind’ (conditions for the species, or other relevant group with shared biological characteristics, to thrive).¹⁸

The choices expressed in international instruments reflect the responses of international actors to these questions – what kind of value underlies the protection, and where that value is located – in a particular context.

All three categories of value – instrumental, inherent and intrinsic – are reflected to some extent in international legal instruments relating to wildlife conservation. There has been a shift in emphasis over time. Early treaties were ‘undoubtedly prompted by utilitarian considerations, generally of a narrowly anthropocentric character’.¹⁹ The need for international cooperation arose, to borrow terms Cymie Payne has used in describing whaling conflicts, as a matter of managing property rights for mutual (human) benefit.²⁰

¹² See generally M. Bowman, P. Davies & C. Redgwell, *Lyster’s International Wildlife Law*, 2nd edn (Cambridge University Press, 2011).

¹³ *Ibid.*, p. 9.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, pp. 62–3.

¹⁶ *Ibid.*, pp. 68–73.

¹⁷ For Peter Singer, moral philosopher and author of the groundbreaking *Animal Liberation* (Harper Perennial, 2009; orig. edn 1975), the capacity of sentient animals to experience pain and suffering is the critical factor determining their moral status and human obligations towards them. See further discussion in Section 2.1 below.

¹⁸ Bowman, Davies & Redgwell, n. 12 above, pp. 73–7.

¹⁹ *Ibid.*, p. 64.

²⁰ C. Payne, ‘ICJ Halts Antarctic Whaling – Japan Starts Again’ (2015) 4(1) *Transnational Environmental Law*, pp. 181–94, at 192.

Wild creatures beyond national borders are a free resource owned by none and open to exploitation by all (*res nullius*), but as humans became more effective at exploiting these resources a different kind of management was required to avoid a tragedy of the commons, and legal regimes emerged to manage these resources as something owned in common (*res communis*).²¹

An illustrative example is the Fur Seal Treaty of 1911,²² which has been described as ‘the first international treaty to address the issue of wildlife conservation’.²³ The economically valuable and once abundant fur seal herds of the Northern Pacific Ocean were facing the threat of being hunted to extinction. Hunting on the open ocean was outside the jurisdiction of any of the interested states to regulate. This rendered domestic conservation regulation essentially ineffective, since limits and protection would be lost as soon as the seals were out in the ocean. In a classic tragedy of the commons,²⁴ the incentive for each nation was to keep increasing its take as there was nothing to stop others doing the same.

Under the Treaty, the four parties – the United States (US), Great Britain (also representing Canada), Russia, and Japan – agreed to stop all pelagic seal hunting, with an exemption for traditional indigenous hunting. Each state regulated onshore hunting within its own jurisdiction. As compensation for giving up the pelagic hunt, the parties were entitled to be paid percentages of each other’s take, in skins or cash. In effect, since most land hunting took place in breeding grounds on US territory, the US agreed to share the proceeds of its land-based hunt in return for the promise of the other parties to stop pelagic hunting. This fairly simple arrangement was successful in restoring the northern fur seal herds.²⁵

The Fur Seal Treaty reflects instrumental, utilitarian and narrowly anthropocentric values almost exclusively.²⁶ During negotiations, the US at least paid lip service to a broader range of values, supporting its position with rhetoric about ‘seeking to preserve “the noble race” of fur seals and mitigating cruelty to animals’, but (as Mitrovitskaya and co-authors observe) ‘it is difficult to fault the Canadians for seeing these sentiments as a thinly veiled attempt to preserve the monopoly’ of American sealing companies.²⁷

²¹ Ibid.

²² Convention between the United States, Great Britain, Russia and Japan for the Preservation and Protection of Fur Seals, Washington, DC (US), 7 July 1911, in force 14 Dec. 1911, available at: http://pribilof.noaa.gov/documents/THE_FUR_SEAL_TREATY_OF_1911.pdf.

²³ US National Oceanic and Atmospheric Administration, ‘Northern Pacific Fur Seal Treaty of 1911’, available at: <http://celebrating200years.noaa.gov/events/fursealtreaty/welcome.html#treaty>. An earlier Convention for the Preservation of Wild Animals, Birds and Fish in Africa, adopted by the colonial powers in 1900, never entered into force: see Bowman, Davies & Redgwell, n. 12 above, p. 5.

²⁴ The tragedy of the commons describes a situation where the rational pursuit of self-interest (utility) by each member of the group results in harm to the whole group. Garrett Hardin, in a 1968 article in *Science*, illustrated the tragedy with the example of a pasture open to all, where ‘the only sensible course’ for each individual herdsman is to keep adding more animals to his herd and the inevitable result is ‘ruin to all’: G. Hardin, ‘The Tragedy of the Commons’ (1968) 162(3859) *Science*, pp. 1243–8.

²⁵ N.S. Mitrovitskaya, M. Clark & R.G. Purver, ‘North Pacific Fur Seals: Regime Formation as a Means of Resolving Conflict’, in O. Young & G. Osherenko (eds), *Polar Politics: Creating International Environmental Regimes* (Cornell University Press, 1993), pp. 22–55, at 35.

²⁶ Ibid., p. 40.

²⁷ Ibid.

Wildlife conservation instruments of more recent vintage evidence a shift in emphasis from (or in addition to) economic value to a range of instrumental, inherent and intrinsic values, including the beauty of wildlife, its role in maintaining healthy ecosystems, and the importance of preserving it for the benefit of future (human) generations. The Preamble to CITES recognizes wild fauna and flora ‘in their many beautiful and varied forms’ as ‘an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come’, and refers to the value of wild fauna and flora from ‘aesthetic, scientific, cultural [and] recreational’, as well as economic, points of view.²⁸ The Preamble to the CBD speaks of consciousness of the ‘intrinsic’ value of biological diversity and its components in ecological, genetic, social, scientific, educational, cultural, recreational and aesthetic terms, in addition to economic value.²⁹ The World Charter for Nature,³⁰ which is not a treaty but a resolution of the United Nations General Assembly (UNGA), calls for non-wasteful use of natural resources and observes that humanity benefits from healthy ecological processes and biological diversity. It also states that every form of life warrants respect ‘regardless of its worth to man’, and that according such respect requires us to be ‘guided by a moral code of action’.³¹

The reference in the World Charter for Nature to being guided by a moral code in our interactions with other forms of life gestures towards value related to the good-of-itself of an animal, because it is the recognition of the intrinsic value of good-of-itself that ‘renders each organism morally considerable in its own right’ and implies that ‘any acceptable normative code must ... pay due regard to the protection of individuals for their own sake’.³² Although international conservation law is concerned predominantly with the conservation of species,³³ the protection of individuals for their own sake – from unnecessary cruelty, or even outright protection from being killed – is reflected quite extensively in various treaties and other international instruments.³⁴

The discussion above shows why conservation in international law is usually seen as something distinct and separate from animal welfare. International conservation law still reflects the legacy of its utilitarian and ‘narrowly anthropocentric’³⁵ early prototypes, although modern instruments recognize a full range of values, including the inherent and intrinsic value of the natural world. It is exclusively concerned with wild animals; there are no international instruments relating to conservation of domesticated animals, which are (by human design) abundant, even excessively so.³⁶

²⁸ CITES, n. 8 above, Preamble.

²⁹ CBD, n. 10 above, Preamble.

³⁰ Annex to UNGA Resolution 37/7, UN GAOR, 28 Oct. 1982, Supp. No. 51, UN Doc. A/37/7 (1982).

³¹ *Ibid.*

³² Bowman, Davies & Redgwell, n. 12 above, p. 76.

³³ *Ibid.*, p. 74.

³⁴ See further discussion in Section 2.3 below.

³⁵ Bowman, Davies & Redgwell, n. 12 above, p. 64.

³⁶ However, many breeds of agricultural animals have become extinct or face extinction, often because they are supplanted by more productive breeds, resulting in a loss of genetic diversity, described as agrobiodiversity: Consultative Group on International Agricultural Research, ‘Rare Breeds of Farm

It is concerned mainly with the survival of kinds or species of animals rather than the well-being of individual animals. The concept of the intrinsic moral significance of each individual animal is arguably reflected also, but in a limited way (for example, in the reference in the World Charter for Nature³⁷ to being ‘guided by a moral code of action’ in according recognition to other forms of life).³⁸ Another important difference is the fact that the value of animal-species conservation takes into account all animal species, whereas the value of animal welfare invites questions and line drawing regarding which animals matter: which animals can meaningfully be seen as *having* welfare that warrants protection.³⁹

The differences between conservation and welfare are clear. Nevertheless, there is at least a *prima facie* connection in the very basic sense that both conservation (insofar as it applies to animal species) and animal welfare incorporate norms governing human behaviour towards non-human animals. It is worth looking into whether this connection goes deeper. Can animal conservation and animal welfare be regarded as aspects of a single overarching principle of animal protection? This question is explored below in Section 2.3.

2.2. Animal Welfare

Many – perhaps most – *domestic* legal systems around the world in one way or another reflect the idea that animal welfare should be protected.⁴⁰ Generally speaking, this means prohibiting the subjection of animals to excessive or unnecessary suffering. The idea is that animals will be used and exploited for human purposes and they may suffer, but there is a limit to the permissible extent of that suffering. Gratuitous cruelty, or harm to animals that is grossly disproportionate to the benefit to humans, are prohibited.

In contrast to the conservation of wild animals, animal welfare has so far had relatively little presence in international law. Laura Nielsen’s *The WTO, Animals and PPMs*⁴¹ is the first book to set out an extended analysis of the relationship between WTO law and animal protection. It states categorically that animal welfare rules are not part of international law ‘because animal welfare primarily is regulated domestically with domestically defined norms’.⁴²

Animals Face Extinction’, *ScienceDaily*, 4 Sept. 2007, available at: <http://www.sciencedaily.com/releases/2007/09/070903094320.htm>.

³⁷ N. 30 above.

³⁸ Bowman, Davies & Redgwell, n. 12 above, Ch. 20 ‘Wildlife and Welfare’, pp. 672–99, sets out an extensive discussion of welfare provisions in international wildlife law.

³⁹ For Singer, the morally relevant boundary is sentience – the capacity for suffering and/or enjoyment or happiness: Singer, n. 17 above, pp. 7–9. Others who have considered the question have drawn the line on different bases; for example, Tom Regan distinguishes animals who are ‘subjects-of-a-life’ – meaning that they are aware of their existence in the world and that what happens to them matters to them – as being entitled to rights just as human beings are: T. Regan, *Empty Cages* (Rowman & Littlefield, 2004), pp. 50–61.

⁴⁰ See generally B.A. Wagman & M. Liebman, *A Worldview of Animal Law* (Carolina Academic Press, 2011), p. 28.

⁴¹ L. Nielsen, *The WTO, Animals and PPMs* (Martinus Nijhoff, 2006).

⁴² *Ibid.*, p. 7.

That statement is not incorrect, although today, some eight years after the publication of Nielsen's book, it needs some qualification. During the intervening period, the tentative beginnings of animal welfare as an international concern have taken firmer root and the issue has made additional progress towards its recognition in international law and policy. Certainly, animal welfare is still not exactly prominent in international lawmaking, but neither is it completely absent from the international agenda.

One important initiative is the draft Universal Declaration of Animal Welfare (UDAW), which is intended to be presented for adoption by the UNGA as a non-binding resolution.⁴³ This initiative was launched in 2000 by the World Society for the Protection of Animals, since renamed World Animal Protection (WAP). The draft UDAW recognizes that '[a]nimals are sentient beings and their welfare should be respected',⁴⁴ and calls on states to take all appropriate steps to 'prevent cruelty to animals and to reduce their suffering'.⁴⁵

Some international governance bodies have taken steps to enhance animal welfare globally. The World Organisation for Animal Health (known as the OIE, the acronym for the original French name of the body – Office International des Epizooties), which began with international efforts to prevent the spread of disease in farmed animals, has made animal welfare part of its mandate.⁴⁶ The OIE promulgates codes on both terrestrial and aquatic animals, both of which now include general principles and specific recommendations on animal welfare.⁴⁷ In 2004, OIE Director-General Bernard Vallat committed the OIE to the mission of 'convinc[ing] all the decision-makers in its member countries of the need to take into account the human-animal relationship in favour of a greater respect for animals'.⁴⁸

Similarly, the UN Food and Agriculture Organization (FAO) has incorporated animal welfare into its work, recognizing links with food safety and security, alleviation of poverty, and international development. The FAO hosts a 'Gateway to Farm Animal Welfare' website for the exchange of knowledge among multiple stakeholders on animal welfare, noting that '[i]n recent years animal welfare has become an issue of increasing concern in a number of countries, including several developing ones', and

⁴³ The text of the 2011 version of the draft UDAW, which is apparently the most recent version, is available from the Global Animal Law database at: <https://www.globalanimallaw.org/database/universal.html>. See also M. Gibson, 'The Universal Declaration of Animal Welfare' (2011) 16(2) *Deakin Law Review*, pp. 539–67, which appends an earlier (2007) draft. Although animal organizations such as WAP and the International Fund for Animal Welfare have active campaigns to gather signatures in support of UDAW, they do not provide the actual text for which they are seeking support.

⁴⁴ Draft UDAW, *ibid.*, Art. 1.

⁴⁵ *Ibid.*, Art. 4.

⁴⁶ A.C.D. Bayvel, 'The International Animal Welfare Role of the Office International des Epizooties: The World Organisation for Animal Health', in J. Turner & J. D'Silva (eds), *Animals, Ethics and Trade: The Challenge of Animal Sentience* (Earthscan, 2006), pp. 248–60.

⁴⁷ OIE, Terrestrial Animal Health Code (2015), Section 7 'Animal Welfare', available at: <http://www.oie.int/en/international-standard-setting/terrestrial-code/access-online>; OIE, Aquatic Animal Health Code (2015), Section 7 'Welfare of Farmed Fish', available at: <http://www.oie.int/en/international-standard-setting/aquatic-code/access-online>.

⁴⁸ B. Vallat, 'Foreword', in *Proceedings of the Global Conference on Animal Welfare: An OIE Initiative*, Paris (France), 23–25 Feb. 2004 (European Communities/OIE, 2004), available at: http://www.oie.int/fileadmin/Home/eng/Conferences_Events/docs/pdf/proceedings.pdf.

that '[t]he massive increase in animal production of the last decades has raised a wide range of ethical issues, including concern for animal welfare, which has to be considered alongside with environmental sustainability and secure access to food'.⁴⁹

These initiatives are concerned primarily with domestic and farmed animals. However, they are not narrowly focused on agricultural practices; rather, they integrate farmed animal welfare into a more far-reaching vision of the human relationship with the non-human inhabitants of our world. In this way, they are conceptually linked to a second important category of animal welfare provisions in international law: namely, provisions of international wildlife law relating to the welfare of individual animals. Although animal welfare is a secondary concern of international wildlife law, and one that is frequently overlooked, there is in fact a 'surprisingly wide range of treaty commitments' concerning welfare issues that affect wildlife.⁵⁰ Many of these provisions concern the welfare of wild animals at the point of, or after, removal from the wild, when human actions have taken the animals out of their natural state so that humans have direct control over (and therefore responsibility for) their welfare.⁵¹ Reflecting increasing scholarly attention to the place the well-being of individual animals occupies in international wildlife law, George Washington University Law School held a workshop in November 2013 entitled 'International Law and Wildlife Wellbeing: From Theory to Action', in which panels discussed welfare issues implicated in the capture and taking of animals from the wild, holding wild animals in captivity, and international trade in wild animals.⁵²

Some of the most extensive and detailed welfare provisions in international wildlife law are found in CITES. The treaty includes numerous requirements for the transportation and care of animals in order to minimize the risk of injury, damage to health or cruel treatment.⁵³ Michael Bowman has described CITES as being 'replete with provisions relating to the welfare of individual living specimens'.⁵⁴ He demonstrates that welfare is an additional and under-discussed policy dimension of

⁴⁹ FAO, 'Gateway to Farm Animal Welfare', available at: <http://www.fao.org/ag/againfo/themes/animal-welfare/aw-abthegat/aw-whaistgate/en>.

⁵⁰ Bowman, Davies & Redgwell, n. 12 above, p. 682. The second edition includes an entire chapter on wildlife and welfare (n. 38 above).

⁵¹ See examples discussed in Bowman, Davies & Redgwell, *ibid.*, pp. 682–97, including hunting and killing of marine and terrestrial animals, humane trapping standards, management of captive wildlife (as in zoos) and transportation of live animals.

⁵² For a summary of the workshop, see American Society of International Law, 'Report from International Law and Wildlife Well-being Workshop', George Washington Law School, Washington, DC (US), 13–14 Nov. 2013, available at: <https://www.asil.org/community/report-international-law-and-wildlife-well-being-workshop>.

⁵³ N. 8 above, Arts 3(2)(c) (export of Appendix I species); 3(4)(b) (re-export of Appendix I species); 4(2)(c) (export of Appendix II species); 4(5)(b) (re-export of Appendix II species); 4(6)(b) (introduction from the sea of Appendix II species); and 5(2)(b) (export of Appendix III species). In addition, although Art. 7 CITES provides for discretionary waivers from the normal documentation requirements for the transport of certain specimens as part of a zoo, circus, menagerie, plant exhibition or travelling exhibition, such a waiver may be granted only if the relevant authority 'is satisfied that any living specimen will be so transported and cared for as to minimize the risk of injury, damage to health or cruel treatment' (Art. 7(7)(c)).

⁵⁴ M. Bowman, 'Conflict or Compatibility? The Trade, Conservation and Animal Welfare Dimensions of CITES' (1998) 1(1) *Journal of International Wildlife Law & Policy*, pp. 9–63, at 10.

CITES (in addition to the trade and conservation dimensions), and observes that minimizing risks of cruelty and injury to specimens taken from the wild is distinct from the conservation of species as it cannot matter to the health of the species whether an individual animal, once taken, is harmed or made to suffer. While the death of a single specimen during transportation could affect species survival, cruel treatment, as distinct from injury or damage to health, ordinarily would not.

The latest, but not the least important development in international law on animal welfare is the WTO Report on *EC – Seal Products*. This case concerned the EU legislation which prohibited the marketing and sale of seal skins and other seal products, adopted in response to moral objections concerning animal suffering in the seal hunt.⁵⁵ Canada and Norway challenged the ban as a breach of various obligations under the WTO treaties. The decisions by both the Panel which initially considered the matter and the WTO Appellate Body are similar in substance (although there are some technical differences in the legal bases for their respective findings). The Appellate Body⁵⁶ upheld the Panel's finding that the EU ban on imports of seal products was justifiable as a matter of 'public morals' under the policy exception in Article XX(a) of the General Agreement on Tariffs and Trade (GATT).⁵⁷ The Panel also determined that addressing the moral concerns of the European public regarding seals was within the scope of legitimate objectives under Article 2.2 of the WTO Agreement on Technical Barriers to Trade (TBT).⁵⁸ Although the TBT has no express exception for public morals, as Article XX GATT does, the Panel was of the view that public morals does fall within the open-ended list of legitimate objectives under Article 2.2 TBT.⁵⁹

The non-discrimination requirements of WTO law meant that the design of the prohibition had to be adjusted to ensure that those provisions were applied in an even-handed way, in particular the provisions exempting traditional indigenous hunters.⁶⁰ However, the principle that animal welfare is a legitimate basis for regulation in the context of WTO law was affirmed.

Furthermore, the *EC – Seal Products* Reports, especially that of the Panel, offer important insights into the relationship between animal welfare as a matter of public morals within a particular society on the one hand, and international law and norms on the other. Whether a legislative objective fits within the rubric of public morals is a domestic question that reflects standards of right and wrong within the community relying on the exception.⁶¹ At the same time, the Panel considered evidence of measures to protect animal welfare adopted by other WTO members and internationally and, based on that evidence, expressed its view that 'animal welfare

⁵⁵ Regulation (EC) No. 1007/2009 on Trade in Seal Products [2009] OJ L 286/36.

⁵⁶ *EC – Seal Products* (AB), n. 1 above, para. 5.290.

⁵⁷ Marrakesh (Morocco), 15 Apr. 1994, in force 1 Jan. 1995, available at: http://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm.

⁵⁸ Marrakesh (Morocco), 15 Apr. 1994, in force 1 Jan. 1995, available at: https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm.

⁵⁹ *EC – Seal Products* (Panel), n. 1 above, para. 7.418.

⁶⁰ *EC – Seal Products* (AB), n. 1 above, paras. 5.316–5.339.

⁶¹ *EC – Seal Products* (Panel), n. 1 above, para. 7.419.

is a globally recognized issue'.⁶² This determination was not a necessary condition for the Panel's conclusion that addressing public moral concerns on seal welfare was a legitimate objective, but it did add 'further support' to that conclusion.⁶³ This analysis suggests that, although the status of animal welfare as a matter of public morals in this context remains primarily a domestic and local question, the growing profile of this issue at the international level is a factor that strengthens the case for animal welfare as a legitimate justification for legislation.

The Appellate Body reversed the Panel's conclusion that the seal products ban constitutes a technical measure subject to the TBT.⁶⁴ The Panel's findings on this point are therefore, strictly speaking, moot and of no legal effect.⁶⁵ Yet, the Appellate Body did not expressly disturb or question the Panel's findings on animal welfare and public morals, which are generally consistent with the Appellate Body's analysis under Article XX(a) GATT.

The foregoing examples challenge the conventional view that animal welfare is solely a domestic matter with no place in international law. Animal welfare does have a place in international legal discourse – in the draft UDAW, in the work of the OIE, in some provisions of international wildlife law, in the reasoning of the *EC – Seal Products* Panel – because it has become a matter of importance to the international community. As Bowman, Davies and Redgwell observe, 'the welfare of individual animals (whether wild or domesticated) is emerging as a significant and pervasive concern of the international community, albeit one which has not yet attracted the level of attention or consistency of response achieved by the issue of species conservation'.⁶⁶

2.3. Animal Protection: The Overarching Principle

In July 2015, the news that Cecil, a male Southwest African lion with a distinctive black-tinged mane, had been killed by an American trophy hunter provoked international outrage of a pervasiveness and intensity usually associated with human rights abuses (or celebrity misdeeds).⁶⁷ The public reaction to the lion's death was marked by concerns about the imperilled status of lions as a species (reportedly, lions 'are now extinct in 26 African nations where they once roamed'⁶⁸) mixed with reactions to the loss of this particular, individual lion. Cecil, who had been fitted with a GPS collar and was tracked by a wildlife conservation team based at Oxford University, was described as 'beloved',⁶⁹ 'glorious',⁷⁰ a 'star attraction',⁷¹

⁶² *Ibid.*, para. 7.420.

⁶³ *Ibid.*

⁶⁴ *EC – Seal Products* (AB), n. 1 above, para. 5.70.

⁶⁵ *Ibid.*

⁶⁶ N. 12 above, p. 698.

⁶⁷ Editorial, 'The Death of Cecil the Lion', *The New York Times*, 31 July 2015, p. A24, available at: http://www.nytimes.com/2015/07/31/opinion/the-death-of-cecil-the-lion.html?_r=0.

⁶⁸ J. Truesdell & C. Butan, 'Remembering Cecil: The Killing of a Lion King' (2015) 84(7) *People*, pp. 65–6.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ 'The Death of Cecil the Lion', n. 67 above.

a ‘beautiful beast’,⁷² and ‘no ordinary cat’.⁷³ Cecil was reportedly shot and wounded, then tracked for 40 hours before finally being shot dead with a gun (as substantiated by information transmitted by the GPS tracking device). The *New York Times* described the way in which he was killed as ‘cruel’.⁷⁴

The public reaction to Cecil’s killing betrays elements of conservation-focused concerns, welfare concerns, and something that does not quite fit into either category: the value of the life of a charismatic individual animal. The story of Cecil thus indicates that we do not – or, at least, do not always – think of conservation and animal welfare as separate and unrelated matters, and that they are morally and normatively intertwined, at least some of the time. The worldwide public response to the death of this particular lion cannot be strictly separated under conservation and welfare headings.

Examples like this suggest that the traditional separation between conservation and animal welfare in international law may distort our understanding of the normative bases of these legal phenomena and of their ongoing development. Conservation relates to wild animals; welfare is concerned more (but not exclusively) with domestic animals. Conservation is well established in international law; welfare is mainly, although not exclusively, a matter of domestic regulation. These distinctions are not absolute, and they are less solid than they used to be.

It may be more helpful to think of both conservation and welfare as manifestations of the same overarching principle in different contexts. As Bruce Wagman and Matthew Liebman put it, ‘[o]ur relationships with the nonhuman sentient beings with whom we share the planet have undergone major revisions’.⁷⁵ There is an evolving ethical orientation in human relationships with animals, which recognizes the latter as sentient beings of intrinsic moral significance. This is the overarching principle that I describe as animal protection. It is reflected in different ways in international law, in keeping with differences in context. In the realm of conservation, certainly, animal protection is an aspect of the protection and conservation of ecosystems and of the natural world more generally. However sentient animals are a unique component of ecosystems and the natural world in that they have a special moral status: ‘amongst the many different types of entities within the ecosystem, some beings have a subjective existence that calls for distinctive moral responses’.⁷⁶

The traditional conservation/welfare dichotomy is important in the international trade law context because of the way in which domestic regulatory space is carved out in trade treaties. In WTO law, Member States commit to broad obligations of non-discrimination, with a safe harbour for rules that fit within recognized exceptions. The key treaty provision regarding such exceptions is Article XX GATT, which lists, inter alia, measures ‘relating to the conservation of exhaustible

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Wagman & Liebman, n. 40 above, p. 3.

⁷⁶ S. Donaldson & W. Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford University Press, 2011), p. 158.

natural resources⁷⁷ and measures ‘necessary to protect human, animal or plant life or health’.⁷⁸ It is well established that conservation measures fall under both of these heads, and some of the most significant WTO rulings concern the relationship between trade and wildlife conservation. For example, the *US – Shrimp*⁷⁹ case concerned the regulation of shrimp imports adopted by the US to reduce bycatch of endangered sea turtles. The long series of disputes culminating most recently in *US – Tuna II (Mexico)*⁸⁰ arose from embargoes on tuna caught using methods that kill a high number of dolphins. The place of animal welfare in the exceptions was much less clear before *EC – Seal Products*, but now it has been confirmed that animal welfare can fall within the exception for measures ‘necessary to protect public morals’.⁸¹

Laura Nielsen’s study of WTO law and animals takes as axiomatic ‘the difference between animal welfare and environmental protection’.⁸² I argue that at this point in the evolution of international law, and in particular in international trade law, it is important to bring the strands together and consider them as components of an overarching principle of animal protection. From this standpoint, we can analyze what has already been accomplished in the trade law context and reflect on what might develop in the future by way of articulating norms of animal protection in the full sense. In particular, this way of looking at the question highlights the possibilities for more robust development of the still relatively unrealized animal welfare aspect of animal protection.

Notably, with the successful negotiation of the TPP Environment Chapter,⁸³ a new trade regime includes commitments by the parties to cooperate on the implementation and enforcement of *positive* legal obligations of conservation and animal protection, based on pre-existing obligations under multilateral environmental agreements (MEAs). Animal welfare still appears confined mainly to the realm of *negative* space, in the exceptions to trade obligations. Seeing the two as linked parts of a whole may shift this perspective and eventually lead to further and more progressive linkages between trade law. It may also foster the development of positive obligations of animal protection in the full sense, including a stronger emphasis on welfare.

3. TRADE AND ANIMALS: THE GREATEST THREAT?

It might be objected that the argument is getting ahead of itself. Is there any realistic basis for imagining that trade law could be a tool for constructing positive international obligations of animal protection, when it has been called the greatest threat facing animal protection today? To address this question, it is necessary first to

⁷⁷ Art. XX(g) GATT.

⁷⁸ Art. XX(b) GATT.

⁷⁹ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, WTO Doc. WT/DS58/AB/R, 12 Oct. 1998 (*US – Shrimp*).

⁸⁰ *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Appellate Body Report, WTO Doc. WT/DS381/AB/R, 16 May 2012 (*US – Tuna II (Mexico)*).

⁸¹ Art. XX(a) GATT.

⁸² Nielsen, n. 41 above, p. 6; see also pp. 44, 83.

⁸³ N. 6 above.

review why many observers see a clash between animal protection and trade law, and then proceed to examine the prospects for reconciliation and productive collaboration.

Why and how is international trade law a threat to animal protection? The reasons can be grouped into two categories: (i) ideological/political, and (ii) legal/doctrinal.

3.1. *The Ideological/Political Opposition*

Advocates for animal protection generally tend to be identified with the progressive or left end of the political spectrum. From the perspective of some on the left, the advance of trade liberalization is often regarded with hostility, as part of the agenda of the right, associated with neoliberal ideology in the service of powerful corporations. The alliance of progressive politics with opposition to trade liberalization dates back to the Seattle protests of 1999 and, even further back, to the mobilization of social justice movements in opposition to the US-Canada Free Trade Agreement of 1989.⁸⁴ More recently, anti-capitalist activists such as Naomi Klein and the Occupy movement have opposed trade liberalization.⁸⁵

I argue that international trade law is not a vehicle for neoliberal or pro-capitalist ideology. To see it as such is both to misunderstand its core tenet of respect for sovereignty and regulatory pluralism, and to concede too much territory to a particular ideological camp.⁸⁶ However, in some material and practical respects the criticism hits home. It is true that the reduction of barriers to trade coincides with the interests of various international businesses and that open trade is conducive to a greater volume of trade (indeed, increasing the volume of trade is the whole point). Animals come to the attention of international trade law because animals and animal products are traded. In this context, they are commodities.

One of the side effects of economic globalization and increasing global wealth has been an increase in demand for animal food and products, and a rising global middle class with disposable income to spend.⁸⁷ Thus, other things being equal, more trade liberalization is likely to result in more animal suffering, because it is likely to lead to more production and transportation of animals and animal products. As human economic activity grows, so too grows the pressure on the natural environment and

⁸⁴ One of the most comprehensive and detailed accounts of the mobilization of worldwide social justice movements against free trade, and the complex relationships between these two discursive frameworks, is in A. Lang, *World Trade Law after Neoliberalism: Re-imagining the Global Economic Order* (Oxford University Press, 2011), pp. 61–103. During the period on which Lang focuses (beginning in the run-up to the US-Canada Free Trade Agreement in the 1980s, and coming to a head with the Seattle protests in 1999), animal protection was not yet a significant theme for the social justice movement, the principal agenda items of which were labour, the environment, and human rights.

⁸⁵ E.g., N. Klein, *This Changes Everything: Capitalism vs. the Climate* (Simon & Schuster, 2014).

⁸⁶ R. Howse, J. Langille & K. Sykes, 'Pluralism in Practice: Moral Legislation and the Law of the WTO after *Seal Products*' (2015) 48(1) *George Washington International Law Review*, pp. 81–150 (pointing out that WTO law does not aim to create a shared community of values and norms in the thick sense or to instantiate a neoliberal normative vision for world order).

⁸⁷ P. Sans & P. Combris, 'World Meat Consumption Patterns: An Overview of the Last Fifty Years (1961–2011)' (2015) 109 *Meat Science*, pp. 106–11 (observing that consumption of animal-based protein worldwide has increased dramatically in the last 50 years and 'emerging countries have experienced a livestock revolution characterized by a surge in meat consumption': *ibid.*, p. 106).

animal habitats resulting from anthropogenic effects.⁸⁸ It is not inevitable that the net result will be more harm to animals, as it is possible for these effects to be offset by other moves to improve animal protection, but in the absence of such offsets (or sufficient offsets), increased trade and economic activity would be, overall, detrimental to animals.

3.2. *The Legal/Doctrinal Constraint*

Like all international legal obligations, commitments under international trade law impose some limits on the freedom of sovereign nations to regulate as they choose in the area of animal protection, as in other areas. As a practical matter, international trade obligations seem especially powerful because of the trade regime's relatively effective enforcement mechanism. In the WTO, adjudication of disputes is mandatory, decisions of the Dispute Settlement Body are binding, and non-compliance can be met with the imposition of trade sanctions.⁸⁹

Other trade agreements – including the TPP – incorporate similar dispute settlement and enforcement provisions. The agreed text of the TPP (subject to final review) was released to the public by several of the participating governments on 5 November 2015. I will refer here to the text released by Global Affairs Canada.⁹⁰ The Dispute Settlement Chapter of the TPP (Chapter 28)⁹¹ provides for referral of disputes to arbitral panels.⁹² If the panel finds a party to be non-conforming and the responding party fails to eliminate the non-conformity, compensation and/or retaliatory trade measures may be imposed by way of remedy.⁹³ In these respects, the dispute settlement process is similar to the WTO system, on which it was modelled, according to the technical summary of the TPP issued by the (then) Canadian Department of Foreign Affairs, Trade and Development.⁹⁴

Such mechanisms for ensuring compliance, and the possibility of real consequences in a relatively short time frame where obligations are breached, distinguish trade law as having a higher degree of power to bring about compliance than is typical in

⁸⁸ D.P. Vincent, 'The Trans-Pacific Partnership: Environmental Savior or Regulatory Carte Blanche' (2014) 23(1) *Minnesota Journal of International Law*, pp. 1–36, at 31 (noting that free trade agreements 'usually result in the increase of exports, which requires increases in production and transportation' and have been found in many studies to correlate positively with increased greenhouse gas emissions). See also D. Bodansky & J.C. Lawrence, 'Trade and Environment', in D. Bethlehem et al. (eds), *The Oxford Handbook of International Trade Law* (Oxford University Press, 2009), pp. 505–38, at 511.

⁸⁹ J.H.H. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats' (2001) 35(2) *Journal of World Trade*, pp. 191–207, at 192.

⁹⁰ Global Affairs Canada, Trans-Pacific Partnership Consolidated Text, available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/final_agreement-accord_finale.aspx?lang=eng.

⁹¹ Ch. 28 'Dispute Settlement', available at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/28.aspx?lang=eng>.

⁹² *Ibid.*, Art. 28.7.

⁹³ *Ibid.*, Art. 28.19.

⁹⁴ Available at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/understanding-comprendre/index.aspx?lang=eng>. This department's name changed to Global Affairs Canada when the new Canadian government took power in Nov. 2015.

international law. It is reasonable to see the natural outcome of trade law constraints on domestic regulation (in animal protection as in other areas, such as environmental protection and labour standards) as a pull towards deregulation, or a race to the bottom.⁹⁵

Assume, for example, that State A has stricter rules on the welfare of egg-laying hens than State B, and imports eggs from State B. State A has two options. One is to subject the imported eggs to the same standards – that is, ban imports unless satisfied that the eggs were produced in conditions as good as those required in State A. The other is to permit unrestricted imports from State B even though the eggs were produced under weaker welfare rules and are (presumably) cheaper. The first option would put State A at risk of a complaint from State B under international trade law. Whether State A would win is another question, but the risk itself may make this option less attractive. The second option makes it difficult or impossible for egg producers in State A to compete with the cheaper, imported eggs. Faced with these alternatives, State A might be expected to opt for a lower standard of regulation, no stricter than that of State B: a race to the bottom.

As Peter Stevenson states:

The conventional view is that, while a WTO member country may prohibit the use of cruel farming practices in its own jurisdiction, it cannot restrict the import of products derived from these practices in other countries. In effect this makes it difficult for any country to prohibit an inhumane system as it runs the risk that its own farmers will be undermined by lower welfare, and hence cheaper, imports.⁹⁶

This deregulatory influence of trade law drives much of the opposition to trade agreements in the progressive and animal advocacy communities. The chilling effect that comes from the apprehension of risk of violating WTO rules and concern about competition from lower welfare imports has been blamed for the EU's adoption of watered-down rules on welfare standards for farm animals,⁹⁷ on animal-tested cosmetics,⁹⁸ and on imports of fur from countries that use

⁹⁵ See generally R.L. Revesz, 'Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation' (1992) 67(6) *New York University Law Review*, pp. 1210–54, at 1210 (defining the 'race to the bottom' – in the context of regulatory differences between US states – as 'a race from the desirable levels of environmental quality that states would pursue if they did not face competition for industry to the increasingly undesirable levels that they choose in the face of such competition'). See also D.C. Esty & D. Gerardin, 'Environmental Protection and International Competitiveness: A Conceptual Framework' (1998) 32(3) *Journal of World Trade*, pp. 5–46, at 6 (discussing claims that different levels of protection in environmental regulation trigger a race to the bottom), and V. Heyvaert, 'Regulatory Competition: Accounting for the Transnational Dimension of Environmental Regulation' (2012) 25(1) *Journal of Environmental Law*, pp. 1–31, at 3–9 (providing an overview of the literature on regulatory competition and the idea of the 'race to the bottom').

⁹⁶ P. Stevenson, 'European and International Legislation: A Way Forward for the Protection of Farm Animals?', in P. Sankoff & S. White (eds), *Animal Law in Australasia* (Federation Press, 2009), pp. 307–32, at 308.

⁹⁷ *Ibid.*, p. 313.

⁹⁸ P. Stevenson, 'The World Trade Organisation Rules: A Legal Analysis of Their Adverse Impact on Animal Welfare' (2002) 8 *Animal Law*, pp. 107–41, at 108–9, 138. EU legislation, adopted in 2003, prohibited the testing of cosmetics on animals in the EU and the marketing of cosmetic ingredients if tested on animals (even if outside the EU). The weakness here was that there was no ban on marketing

leg-hold traps.⁹⁹ The dispute that led to the decision in *US – Shrimp* and the series of disputes over dolphin-safe tuna have been blamed for undermining US efforts to protect endangered sea turtles and reduce harm to dolphins from tuna fishing.¹⁰⁰

These criticisms of the effect of WTO law on animal protection are certainly not without foundation. However, WTO law has evolved and continues to evolve; over time it has become clear that the framework of international trade law can accommodate recognition and even enhancement of animal-protective norms. The very cases cited by the anti-trade camp are examples of how debate and dialogue have produced a richer discourse about trade law and pushed the interpretation of WTO treaties in a more environmentally conscious and animal-friendly direction. Debates in the international community about the relationship between trade rules and non-economic values, including environmental and animal protection, have shaped understandings of how trade rules should be interpreted and applied, and this evolution is reflected in the case law. As Stevenson notes, ‘recent cases indicate that [the WTO is] beginning to develop a more balanced relationship between the GATT free trade rules and other legitimate public policy considerations. It follows that there are many strong arguments that can be made in defence of animal protection initiatives’.¹⁰¹

I agree with the view that a solid foundation exists in WTO law for the defence of animal protection – what I have called the negative aspect of trade law’s contribution to animal-protective norms. Of potentially even greater significance is the positive aspect, namely, the use of trade law not just to defend domestic animal protection initiatives but to develop and strengthen those of an international nature.

4. TRADE LAW’S CONTRIBUTION TO INTERNATIONAL NORMS OF ANIMAL PROTECTION

It might seem unconventional or even eccentric to argue that trade law, so often seen as a threat to animal protection, is actually a significant contributor to the development of international animal-protection norms. It is one thing to observe, as

finished cosmetic products tested on animals, so imported animal-tested cosmetics could still be sold. The European Commission had held back from adopting a marketing ban because of the need to ‘take account of the constraints arising from compliance with international trade rules, in particular those of the [WTO]’: European Commission, ‘Proposal for a Directive of the European Parliament and of the Council amending for the seventh time Council Directive 76/768/EEC of 27 July 1976 on the Approximation of the Laws of Member States relating to Cosmetic Products’, COM(2000) 189 final, 5 Apr. 2000. However, the EU has since (in 2013) adopted a prohibition on the marketing of finished cosmetic products which have been tested on animals.

⁹⁹ Stevenson, *ibid.*

¹⁰⁰ *Ibid.*, p. 108. With respect to the *US – Shrimp* dispute, following the original finding of a GATT violation, the US amended its guidelines for implementation of the contested measure to comply with the WTO ruling. The modified US position was upheld in compliance proceedings (*US – Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, WTO Doc. WT/DS58/AB/RW, 22 Oct. 2001. Stevenson’s argument that the WTO’s initial ruling contributed to ‘an immensely damaging impact on animal protection laws’ (Stevenson, n. 98 above) arguably overstates the case, given the ultimate endorsement by the WTO of the modified position of the US.

¹⁰¹ Stevenson, n. 96 above, p. 332.

Stevenson does, that the threat posed by the WTO is not quite as bad now as it used to be. It is quite another to propose that trade law could help to further the objectives of animal welfare advocates. Yet, the evidence is worth considering. From a pragmatic perspective, it may be a more promising strategy for animal welfare advocates to recognize and capitalize on the potential of international trade law – one of the most active and productive areas of international lawmaking today – to support their goals than to categorize it as inherently and irredeemably anti-animal.

4.1. *The Negative Aspect: Animal Protection as a Legitimate Aspect of Regulatory Pluralism*

The negative aspect of the contribution of international trade law to animal protection could be thought of less as a contribution than as a limitation to the damage that trade law would otherwise cause to domestic animal-protection initiatives. It means recognition in the trade law realm that animal protection is a valid area of domestic regulation that can be the basis for invoking exceptions to otherwise applicable trade law obligations, for example, under Article XX GATT. This has come about as a matter of interpretation. There is no express exception in the GATT or other WTO treaties for animal welfare or animal protection. However, both the conservation of endangered animals and animal welfare have been recognized in WTO case law as fitting into the enumerated exceptions in Article XX GATT and more open-ended exceptions, such as in Article 2.2 TBT.¹⁰²

The negative aspect, in my view, is more than merely negative. In fact, in working out the questions that have come before it concerning animal protection, the WTO Dispute Settlement Body has made important contributions to the global discourse on the value of animals, the moral imperatives to reduce animal suffering and wasted animal life, and the status of these principles in international law and policy. The interpretation of exceptions in this way adds to the development and promulgation of animal-protective norms at the global level.

The decision in *EC – Seal Products* is the most important example, to date, of the contribution of international trade law to the development of animal-protective norms in this negative sense. The decision confirms that moral concerns about animal welfare can be a legitimate basis for domestic regulation and for invoking the exception in Article XX(a) GATT for measures necessary to protect public morals.

The *EC – Seal Products* Panel did not need to decide whether animal welfare is a global value or has any global status for the purpose of deciding the question before it. As the Panel noted, '[w]e do not need to determine ... the existence of a global social norm (a "universal value" according to the European Union) on animal welfare in general or seal welfare in particular'.¹⁰³ The decision is an affirmation of the principle of regulatory pluralism, confirming that WTO members have wide latitude to determine for themselves the objectives of moral legislation, including in the case of

¹⁰² N. 58 above; Art. 2.2 provides that technical regulations 'shall not be more restrictive than necessary to fulfil a legitimate objective', and sets out a non-exhaustive list of legitimate objectives.

¹⁰³ *EC – Seal Products* (Panel), n. 1 above, para. 7.420

non-instrumental moral goals (laws that express a society's moral opprobrium regarding products linked to animal cruelty, rather than, or in addition to, aiming to reduce animal suffering).¹⁰⁴ In that context, it was not necessary for the EU to show general global agreement on the importance of animal welfare for the moral exception to apply. The EU did not even need to show that any other members of the WTO or the international community agreed with its moral choices – although international endorsement of a moral value probably does add some weight in the balance of competing considerations.

The Panel's remarks on the global status of animal welfare are therefore *obiter dicta*. In terms of their contribution to the development of global animal law, however, they are very important *obiter dicta*. No other international tribunal, to date, has expressly addressed the question of whether animal welfare is a global value. The Panel's careful reasoning concerning the globally recognized status of animal welfare refutes the idea that this is merely a European or Western foible.¹⁰⁵

EC – Seal Products is the first WTO case to address animal welfare as an aspect of the public morals exception. In earlier decisions on the interface of trade and environmental protection, the WTO has endorsed a robust and holistic concept of the protection of animals, drawing in part on international legal and quasi-legal instruments to inform its understanding of how these issues stand with the international community.

In the *US – Shrimp* case,¹⁰⁶ a key interpretive issue was whether the exception for measures 'relating to the conservation of exhaustible natural resources' in Article XX(g) GATT could be relied on to justify US measures aimed at protecting endangered sea turtles. The parties challenging the measure argued that the language referred to non-living natural resources, such as minerals.¹⁰⁷ The Appellate Body rejected these arguments, noting that the treaty text 'must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment'.¹⁰⁸ Adopting an 'evolutionary'¹⁰⁹ approach to interpretation – informed by international environmental instruments including the UN Convention on the Law of the Sea (UNCLOS),¹¹⁰ CITES,¹¹¹ the CBD,¹¹² and Agenda 21¹¹³ – the Appellate Body confirmed that living things were included in the term 'natural resources', that endangered species were 'exhaustible', and that protection of sea turtles was therefore covered by Article XX(g) GATT.¹¹⁴

¹⁰⁴ Howse, Langille & Sykes, n. 86 above.

¹⁰⁵ See discussion of the Panel's analysis on this point in Section 2.2 above.

¹⁰⁶ N. 79 above.

¹⁰⁷ *Ibid.*, para. 127.

¹⁰⁸ *Ibid.*, para. 129.

¹⁰⁹ *Ibid.*, para. 130.

¹¹⁰ Montego Bay (Jamaica), 10 Dec. 1982, in force 16 Nov. 1994, available at: http://www.un.org/depts/los/convention_agreements/convention_agreements.htm.

¹¹¹ N. 8 above.

¹¹² N. 10 above.

¹¹³ Adopted by the UN Conference on Environment and Development, Rio de Janeiro (Brazil), 14 June 1992, UN Doc. A/CONF. 151/26/Rev.1.

¹¹⁴ *US – Shrimp*, n. 79 above, paras 131–4.

In *US – Shrimp*, the Appellate Body did not merely reflect what environmental instruments already said about the protection of animals in international law. It also confirmed the relevance and effectiveness of the principles expressed by those environmental instruments in another field of international law. The WTO added its contribution to the development and refinement of those principles as part of a global conversation about animal protection.

The WTO Appellate Body had also suggested earlier, before *EC – Seal Products* recognized animal welfare as part of the public morals exception under Article XX(a) GATT, that the well-being of individual animals – both physical and, arguably, psychological – is an aspect of ‘animal life or health’, expressly identified as a legitimate regulatory objective in Article 2.2 TBT.¹¹⁵ In finding that US dolphin-safe labelling requirements for tuna were ‘not more trade-restrictive than necessary to fulfil a legitimate objective’ for the purpose of Article 2.2 TBT, the Appellate Body endorsed the Panel’s factual findings that fishing methods harmful to dolphins cause adverse effects ‘beyond observed mortalities’, including acute stress and cow-calf separation.¹¹⁶ The Panel considered evidence concerning the potential for these stress factors to contribute to compromised health and mortality in dolphins; its analysis underscores that US legislation was concerned not only with the taking and killing of dolphins, but also with various types of ‘observed and unobserved adverse impacts on dolphins’¹¹⁷ – not just life, but also health in a broad sense.

The US legislative scheme aimed to inform consumers so that they could avoid buying tuna that involved adverse impact on dolphins.¹¹⁸ Consumers may want to avoid buying tuna caught by fishing methods which cause reduced populations of dolphins *and* cause pain and suffering to dolphins. The protection of dolphin life and health spans both the preservation of dolphin life (protecting the survival of their species) and the protection of dolphins as sentient beings from injury, stress, suffering and other ‘adverse impacts’.

In their application of the exception for measures to protect animal life or health, then, both the Panel and the Appellate Body implicitly blended concerns about protecting dolphin populations from wasteful destruction (good-of-its-kind) with concerns about pain, suffering, stress, and family destruction (good-of-itself). The example of dolphin bycatch in tuna fishing effectively illustrates that, in some contexts, these concerns cannot really be disentangled from one another; they are, or can be, aspects of a holistic concept of the protection of animals as sentient beings.

The emergent status of animal protection as a matter of weight in the context of international trade law both reflects and adds to a nascent consensus that a global conception of justice must include some notion of justice regarding animals, and that this idea can no longer be dismissed out of hand as eccentric or trivial.

¹¹⁵ N. 58 above. Art. XX(b) GATT is an exception for measures necessary to protect human, animal or plant life or health. Presumably the same analysis would carry over into this context.

¹¹⁶ *US – Tuna II (Mexico)*, n. 80 above, para. 330 and n. 663.

¹¹⁷ *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Panel Report, WTO Doc. WT/DS381/R, 15 Sept. 2011, para. 7.505

¹¹⁸ *Ibid.*

On the contrary, it is (as the *Seal Products* Panel observed) ‘a globally recognized issue’¹¹⁹ and a serious challenge for international lawmaking.

4.2. *The Positive Aspect: New Forms of International Cooperation to Protect Animals*

Agreement of the TPP was announced in October 2015, and the text of the agreement (subject to final legal editing) was released the following month. The TPP is a trade partnership with an even more ambitious agenda than that of the WTO. It is a ‘twenty-first century’ agreement, addressing ‘a much broader range of linked trading issues’¹²⁰ than was the case for the trade deals of the last century.

The particular linked issue that is of interest for present purposes is environmental protection. The WTO agreements say little about the environment, except by way of exceptions and in preambular, non-operative language that refers to ‘optimal use of the world’s resources in accordance with the object of sustainable development, seeking ... to protect and preserve the environment’.¹²¹ By contrast, the TPP contains the Environment Chapter: an entire chapter of positive obligations regarding environmental protection to which the parties have agreed as one of the conditions of membership in this powerful new preferential trading bloc.¹²² This new step places wildlife protection in (or at least close to) the mainstream of trade lawmaking.

The origin of the TPP Environment Chapter can be traced back, arguably, to certain features of US international trade policy. In order to satisfy the constitutional framework for approval and ratification of international treaties in US law, trade agreements are generally negotiated and signed pursuant to a pre-authorized mandate provided periodically to the executive branch by Congress, known as the ‘fast-track’ or Trade Promotion Authority.¹²³ Deals negotiated pursuant to this authority are then voted on in Congress on an up or down basis without further amendment¹²⁴ – obviously a practical necessity for the conclusion of a complex agreement with multiple other parties.

Since 2000, Congress has specified that the US must meet certain environmental objectives when negotiating trade agreements. The Bipartisan Congressional Trade Priorities and Accountability Act currently working its way through Congress¹²⁵ provides that one of the US trade negotiating objectives is to ensure that ‘trade and environmental policies are mutually supportive and to seek to protect and preserve

¹¹⁹ See discussion accompanying n. 62 above.

¹²⁰ C.L. Lim, D.K. Elms & P. Low, ‘What is “High-Quality, Twenty-First Century” Anyway?’, in C.L. Lim, D.K. Elms & P. Low (eds), *The Trans-Pacific Partnership: A Quest for a Twenty-First Century Trade Agreement* (Cambridge University Press, 2012), pp. 3–17, at 8.

¹²¹ Agreement establishing the World Trade Organization, Marrakesh (Morocco), 15 Apr. 1994, in force 1 Jan. 1995, Preamble, para. 1, available at: https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm.

¹²² N. 6 above.

¹²³ See discussion in A. Lurie & M. Kalinina, ‘Protecting Animals in International Trade: A Study of Recent Successes and the WTO and in Free Trade Agreements’ (2015) 30(3) *American University International Law Review*, pp. 431–87, at 452.

¹²⁴ *Ibid.*

¹²⁵ Bill S. 995, available at: <https://www.govtrack.us/congress/bills/114/s995>.

the environment and enhance the international means of doing so',¹²⁶ and that parties to trade agreements with the US adopt and maintain measures to implement their obligations under MEAs.¹²⁷ Another objective is 'to strengthen the capacity of United States trading partners to protect the environment through the promotion of sustainable development'.¹²⁸ Earlier authorizing legislation included the same objectives.

Under the TPP Environment Chapter, the parties affirm their commitment to implement MEAs to which they are parties.¹²⁹ The parties recognize the importance of conservation and sustainable use of biological diversity,¹³⁰ and agree to promote and encourage the conservation and sustainable use of biological diversity.¹³¹ Article 20.17 ('Conservation and Trade') specifically addresses the illegal taking of and illegal trade in wild flora and fauna. This Article provides that the parties 'shall adopt, maintain and implement laws, regulations and any other measures' to fulfil their obligations under CITES.¹³² The parties also commit to take appropriate measures to protect and conserve wild fauna and flora that are at risk within their respective territories, to maintain or strengthen government capacity and institutional frameworks to promote conservation, and to strengthen consultation and cooperation with interested non-governmental organizations in this respect.¹³³ In addition, they agree to endeavour to identify opportunities to enhance law enforcement cooperation and information sharing with other TPP parties to combat wildlife trafficking.¹³⁴

Commitments under the Environment Chapter are subject to dispute settlement under the Dispute Settlement Chapter, provided that parties first go through the special consultation and dispute resolution processes of the Environment Chapter.¹³⁵ Accordingly, the failure of a TPP party to implement MEA commitments, including commitments under CITES, in a manner which affects trade or investment¹³⁶ could ultimately be subject to trade retaliation sanctions or compensation imposed through the dispute settlement system. One of the perennial shortcomings of international law concerning conservation and wildlife protection is its lack of strong enforcement capability in the form of the mandatory dispute settlement provisions and penalties for non-compliance found in trade agreements. The TPP harnesses the power of trade enforcement to the substance of MEA commitments.

¹²⁶ *Ibid.*, s. 2(a)(5).

¹²⁷ *Ibid.*, s. 2(b)(10)(A)(i).

¹²⁸ *Ibid.*, s. 2(b)(10)(D).

¹²⁹ TPP Environment Chapter, n. 6 above, Art. 20.4(1).

¹³⁰ *Ibid.*, Art. 20.13(1).

¹³¹ *Ibid.*, Art. 20.13(2).

¹³² *Ibid.*, Art. 20.17(2).

¹³³ *Ibid.*, Art. 20.17(4)(a)–(c).

¹³⁴ *Ibid.*, Art. 20.17(7).

¹³⁵ *Ibid.*, Art. 20.23(1).

¹³⁶ Establishing a violation of Art. 20.17 requires the complaining party to demonstrate that the other party has failed to adopt, maintain or implement laws, regulations or other measures to fulfil its obligations under CITES 'in a manner affecting trade or investment between the Parties' (Art. 20.17(2) n. 23).

These are still very early days for the TPP. It remains to be seen how effective its Environment Chapter will be in practice in enhancing protection for animals and combating trafficking in wildlife and wildlife products. When Wikileaks leaked a negotiation draft of the Environment Chapter in 2014, Julian Assange issued a press release dismissing it as nothing but a ‘toothless public relations exercise’.¹³⁷ Certainly, the importance of trade-linked animal protection provisions should not be overstated; the TPP or any other trade agreement will not bring in anything resembling a comprehensive worldwide regime for animal protection. It must also be borne in mind that all these efforts take place in a context in which animals and products created through animal exploitation are articles of commerce; this is the basic reason why any link at all exists between trade and the treatment of animals. However, the TPP provisions dealing with environmental protection, including the protection of endangered species, are certainly no *more* toothless than the MEAs they incorporate by reference, and there is a reasonable prospect that they will, in fact, enhance compliance with and effective implementation of those MEAs.

The inclusion of environmental objectives in new trade deals is in significant part a product of the environmental community’s efforts to bring public attention to the relationship between trade and environmental protection. Those efforts began with strong criticisms (as in Seattle (US) in 1999, and in earlier anti-trade activism) and have evolved to encompass an element of dialogue and collaboration, as exemplified in the TPP Environment Chapter. This story is suggestive for animal welfare advocates. It is possible to imagine trade-linked agreements joining the enforcement mechanisms of trade law with minimum standards on animal protection and animal welfare. Indirectly, this may have already happened with the TPP: CITES includes extensive animal welfare provisions, and one party’s failure to implement and enforce those provisions could be the basis for a complaint pursued through the dispute resolution mechanism if this failure affects trade or investment between itself and another party.

An even more ambitious marriage of animal protection and trade could, for example, take the form of a future trade agreement which includes a chapter expressly focused on animal welfare, perhaps committing the parties to minimum standards of farmed animal welfare. Such standards could be based on the work of the OIE and the FAO or on the animal welfare standards pioneered by the EU. If something like this were to happen in future trade negotiations, trade could drive a race upwards in animal protection, rather than a race to the bottom.

5. CONCLUSION

A relatively short time ago it was received wisdom that the protection of individual animals was not the concern of international law, and attempts to treat it as such could credibly be dismissed as mere sentimentality or cultural imperialism. This is no longer the case. The animal turn – the phenomenon in the natural and social sciences,

¹³⁷ Wikileaks, ‘Secret Trans-Pacific Partnership Agreement (TPP) Environment Chapter’, press release, 15 Jan. 2014, available at: <https://wikileaks.org/tpp-enviro/pressrelease.html>.

philosophy, and other disciplines which has focused intellectual attention on the status of animals and on human relationships with them – has made its way into international law.

Why and how this development is taking place are complicated questions with multifaceted answers; the formation of international law always is the outcome of a complex mix of interactions between international actors, the unfolding of relationships of power, the emergence and spread of ideas about justice, and other factors. In that mix of factors, the international trade lawmaking project has played a significant and under-recognized part. With the advent of the new TPP Environment Chapter, we may indeed be at the start of a new phase ripe with possibilities, in the relationship between international trade law and animal protection.