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Global Animal Law and International Trade Law
After EC – Seal Products: An Interactional Analysis

by

Katie Sykes

Submitted in partial fulfilment of the requirements
for the degree of Doctor of Philosophy

at

Dalhousie University
Halifax, Nova Scotia
November 2019

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Abstract

This thesis is a case study of the formation of new norms in international law. The norms are those that concern animal protection. The thesis argues that international trade law is playing a part in the development of international legal norms for animal protection. The theoretical model applied is interactional international law, the theory of the constructivist international legal scholars Jutta Brunnée and Stephen Toope. Interactional theory posits that legitimate, binding international law arises from norms based on shared understandings, exhibits specifically legal characteristics that correspond to Lon Fuller's criteria of legality, and is created, maintained and supported through interaction of a practice of legality. The thesis argues that the international trade regime gives rise to practices of legality that enable the development of animal protection norms as contemplated by interactional theory. Two main practices of legality within international trade governance are reviewed. One is adjudication in the WTO dispute settlement system. The most important case here is the WTO's 2014 decision on the EU ban on trade in seal products, which was justified as a response to public moral concerns about animal welfare and cruelty in the seal hunt. The second practice of legality considered is law formation and implementation under new preferential trade agreements outside the WTO system. The thesis analyzes affirmative obligations under environmental side agreements, especially the Environment Chapter of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. The thesis argues that, despite the long-standing hostility of animal advocates to economic globalization, the legal structures of global economic governance provide important opportunities to drive the development of robust and effective animal protection norms.

List Of Abbreviations

AIDCP	Agreement on the International Dolphin Conservation Program
CAFTA-DR	Dominican Republic-Central America Free Trade Agreement
CEC	North American Commission for Environmental Cooperation
CETA	Comprehensive Economic and Trade Agreement
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CMS	Convention on the Conservation of Migratory Species of Wild Animals
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CTE	Committee on Trade and Environment
CUSMA	Canada-United States-Mexico Agreement
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding)
EC	European Communities
EEC	European Economic Community
EFSA	European Food Safety Authority
ETP	Eastern Tropical Pacific
EU	European Union
FTA	Free Trade Agreement
GAL	Global Animal Law
GATT	General Agreement on Trade and Tariffs
HIS	Humane Society International
IATTC	Inter-American Tropical Tuna Commission
ICJ	International Court of Justice
IDCPA	International Dolphin Conservation Program Act
IFAW	International Fund for Animal Welfare
ISDS	Investor-State Dispute Settlement
ITO	International Trade Organization
MEA	Multilateral Environmental Agreement

MFN	Most-Favoured Nation
MRTA	Mega-Regional Trade Agreement
NAAEC	North American Agreement on Environmental Cooperation
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organization
NT	National Treatment
OIE	World Organization for Animal Health
PPM	Process and Production Method
PTA	Preferential Trade Agreement
RCEP	Regional Comprehensive Economic Partnership
RSPCA	Royal Society for the Prevention of Cruelty to Animals
RTA	Regional Trade Agreement
SPS Agreement	Agreement on Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TED	Turtle Excluder Device
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
WTO	World Trade Organization
UDAR	Universal Declaration on Animal Rights
UDAW	Universal Declaration on Animal Welfare
UK	United Kingdom
UN	United Nations
US	United States

Acknowledgments

Sincere thanks to my supervisor, David VanderZwaag, and to Vaughan Black and Jodi Lazare for their encouragement and wise advice. I am grateful to Nicolas Lamp for generously agreeing to be my external examiner. This work was supported by a Joseph-Armand Bombardier Canada Graduate Scholarship from the Social Sciences and Humanities Research Council of Canada, a President's Award from Dalhousie University, and a John Peters Humphrey Student Fellowship from the Canadian Council on International Law. I appreciate their support.

Chapter 1 Introduction

This thesis is a case study of the formation of new norms in international law. The norms are those that concern animal protection. I argue that international trade law is playing a part in the development of those norms, and contributing to the process by which they are potentially taking shape in the international legal system as global animal law.

The most important contribution of international trade law so far is the WTO *EC – Seal Products* case.¹ In its ruling on this dispute over the European Union’s ban on importing and selling seal products – legislation that the EU adopted to target animal cruelty in seal hunting – the WTO recognized animal welfare as a serious policy objective and confirmed that it can be a justification for relying on exceptions to otherwise applicable international trade law obligations. The WTO arbitration panel that decided the case in the first instance went further, expressing the importance of animal welfare as an international concern. The panel stated that animal welfare is “an ethical responsibility for human beings in general” and “a globally recognized issue.”²

International law has only recently begun to pay attention to the welfare of individual animals, an ethical concern that arises from the intrinsic value of animals as

¹ *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products* (Complaints by Canada and Norway) (2013), WTO Docs WT/DS400/R, WT/DS401/R, WT/DS400/R/Add1, WT/DS401/R/Add1 [*EC – Seal Products* Panel Report]. The panel’s decision was reversed in part by the WTO Appellate Body: *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products (Complaints by Canada and Norway)* (2014) WT/DS401/AB/R. The part of the panel decision that these quotations come from was not disturbed, and the Appellate Body’s decision is consistent with the panel’s serious, thoughtful approach to animal welfare. I refer to this case, consisting of both the panel and Appellate Body reports, as *EC – Seal Products*. Chapter Seven is a detailed discussion of the case.

² *EC – Seal Products* Panel Report, *ibid* at paras 7.409, 7.420.

sentient beings who experience pleasure and pain and pursue their own ends.³ By contrast, the protection of wild animal species under international environmental law, generally for use by humans as resources or to ensure that future generations can enjoy their presence, is more established. Conservation and welfare have long been bifurcated in international law.⁴ I use the term “animal protection” here to bring the two concepts together. Although the split between them is ingrained into the way international lawyers and legal scholars generally approach questions concerning animals, it is neither inevitable nor immutable. After all, animals are both individuals and members of species, and from their point of view, presumably, their survival and their freedom from unnecessary suffering are not categorically distinct problems. WTO jurisprudence has made some contribution to reintegrating animal conservation and welfare as components of a more general norm of animal protection.⁵

An international network of scholars who identify with the project of global animal law are advocating for recognition of holistic, ethically grounded and non-

³ The authors of the second edition of *Lyster's International Wildlife Law* identify the “intrinsic value” of an entity as “that which an entity possesses of itself, for itself, regardless of the interests and utility of others,” and equate it to “moral value, indicating that all entities which exhibit such value can be said to have a good of their own, and therefore to fall within the scope of moral considerability” (Michael Bowman, Peter Davies & Catherine Redgwell, *Lyster's International Wildlife Law*, 2d ed (Cambridge: Cambridge University Press, 2010) at 63). The intrinsic value of entities in the natural world, in particular of “autopoietic entities” or individual beings that function towards the realization of their own ends, is included in the values recognized in international environmental law (along with the instrumental and inherent value of the natural world and its components) (*ibid* at 69).

⁴ Laura Nielsen, *The WTO, Animals and PPMs* (Boston: Brill, 2007) at 44 (noting that the “general assumption is that protection of animals as natural resources in environmental law is *species protection*, i.e. not protection of the individual specimen” (emphasis in the original)) and 83-106 (delineating animal welfare as a separate concern based on the moral concept that it is wrong to subject animals to suffering and stress); Katie Sykes, “Globalization and the Animal Turn: How International Trade Law Contributes to Global Norms of Animal Protection” (2016) 5:1 *Transnational Env'tl L* 55 at 58-62; Werner Scholtz, “Injecting Compassion into International Wildlife Law: From Conservation to Protection?” (2017) 6:2 *Transnational Env'tl L* 463 (arguing that international wildlife law focuses on conservation and has a blind spot concerning the pain and suffering of individual animals).

⁵ Sykes, *ibid*.

anthropocentric norms of animal protection in international law.⁶ The material of global animal law is a collection of treaty provisions, interstate practices and guidelines, scholarship, and advocacy initiatives that together aim to ensure that the interests of animals are represented in international law.⁷

Global animal law is at the early stages of establishing itself in international law, and it has a long way to go. This thesis analyzes how far global animal law has progressed in the process of evolving as part of international law, what is missing, and how international trade law both has contributed to supplying some of the deficiencies, and may continue to contribute in the future.

For this analysis I apply a methodology called interactional international law, which was developed and articulated by the constructivist international legal scholars Jutta Brunnée and Stephen Toope – most importantly in their 2010 book *Legitimacy and Legality in International Law*.⁸ Brunnée and Toope’s interactional theory describes how international legal law is created and maintained based on three propositions. First, legal norms arise from social norms based on consensus or “shared understandings.” Second, legal norms are not the same as social norms, because they possess distinctive characteristics, associated with the idea of the rule of law, which are essential to the ability of legal norms to command adherence and compliance. Third, legal norms are

⁶ See, e.g., the work of scholars including Anne Peters, Charlotte Blattner, Sabine Brels and Werner Scholtz, and the Global Animal Law Project web site at <https://www.globalanimallaw.org/>. A more detailed discussion (with references to specific works) is set out in Section 4.2.

⁷ For an extended discussion of global animal law, see Chapter Four.

⁸ Jutta Brunnée & Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010). See Chapter Three, which sets out the methodological approach in detail.

created, maintained and can become obsolete through a specific type of interaction that exhibits the characteristics of legality, which they call “the practice of legality.”⁹

I apply the interactional framework to assess the emergence of animal-protective norms in international law. I propose that international trade law is the site of “practices of legality” that are helping to form, specify and maintain these norms. WTO jurisprudence under the dispute settlement body created in 1995 (referred to here as the DSB) is the practice of legality that has had the most impact, and it is the focus of most of the analysis in this thesis.¹⁰ More modern WTO trade agreements outside the WTO system (preferential trade agreements or PTAs), contribute something more: they commonly link membership in trade blocs to positive obligations on matters including the environment, and animal protection norms can be embedded in these provisions. Interaction in the context of PTAs is another practice of legality that is leading to some important work in the development of international legal norms for animal protection.¹¹

The idea that international trade law is contributing to the formation of global animal law may seem surprising. The central purpose of trade law is trade liberalization and increased (human) economic welfare.¹² Animal protection has little place in WTO law except in the interstices, as an exception that WTO members¹³ can invoke to trade-law obligations that would otherwise apply. The WTO is not an animal protection

⁹ *Ibid* at 15.

¹⁰ The analysis of WTO law is set out mainly in Chapters Five, Six and Seven.

¹¹ For a detailed discussion, see Chapter Eight.

¹² Nielsen, *supra* note 4 at 11 (noting that the goal of liberalizing trade “is the most important goal” for the WTO).

¹³ I follow the terminology of the WTO treaties, and generally of WTO-related scholarship and policy documents, by referring to nation states that are part of the WTO system as “members.”

agency.¹⁴ Its core objective is to increase the free of flow global trade, including, increasingly, trade in animals and animal products. Trade in animal-derived foods, animal fur and skins, live animals, and other products made from or made using animals has increased exponentially since the 1970s as demand has grown, production methods have become more intensive, and transport and refrigeration technology has advanced.¹⁵ Therefore, other things being equal, as the international trade regime advances its project of facilitating and increasing world trade, it can be expected that animal suffering and animal deaths will proportionally increase.

Yet the WTO's dispute settlement body is the only international adjudication body so far to have paid serious attention to animal welfare as an ethical concern and a global value. To date, there has been no other statement affirming the importance of animals in the international legal arena that emanates from such an authoritative source. This WTO case is one of the most significant developments in the evolution of global animal law, which is why the *EC – Seal Products* case is the principal focus of this thesis.

In the discussion that follows, I argue that the analytical tools of interactional theory can assist in diagnosing what is holding global animal law back from generating fully articulated legal norms that command fidelity. The same tools also help to pinpoint

¹⁴ Compare the statement on the WTO website (intentionally echoed here) concerning WTO competency and the environment: “The WTO is not an environmental agency. Its members do not want it to intervene in national or international environmental policies or to set environmental standards. Other agencies that specialize in environmental issues are better qualified to undertake those tasks.” WTO, “The Environment: A Specific Concern,” online: <https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm>.

¹⁵ Clive JC Phillips, *The Animal Trade: Evolution, Ethics and Implications* (Wallingford and Boston: CABI, 2015) at x-xiii.

how the institutions of international trade law – both the WTO and PTAs – can make up for some of those deficiencies.

Interactional legal theory posits that international legal norms can only inspire adherence if they are consensual. One of the most difficult problems for achieving consensus on animal protection is conflicts over cultural values. Legal initiatives to protect animals, especially in the international context, often run up against traditional animal-use practices that are deeply rooted in distinct cultures. These conflicts are especially difficult when they involve the traditional practices of Indigenous peoples, whose rights have their own protections under international law. The *EC – Seal Products* case thrust this conflict into the international trade dispute settlement arena, because the EU’s ban on trade in seal products had an exemption for products that came from traditional Indigenous hunts.¹⁶

The attempt to bypass the difficulty through this type of exemption is an example of what animal rights scholars Will Kymlicka and Sue Donaldson call a “strategy of avoidance” of the conflict between animal rights and Indigenous rights.¹⁷ Part of my argument in this thesis is that the strategy of avoidance does not work. As embodied in the EU’s seal products ban, it did not stand up to scrutiny in the WTO DSB. Although the WTO confirmed that the EU could legally ban seal products, it found the exception for traditional Indigenous hunts to be incoherent and unfair in its application.

¹⁶ See Chapter Seven.

¹⁷ Will Kymlicka & Sue Donaldson, “Animal Rights and Aboriginal Rights” in Peter Sankoff, Vaughan Black & Katie Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin, 2015) 159. See also discussion in Chapter Seven.

EC – Seal Products therefore reminds global animal law scholars of the imperative to engage in a deeper discussion over these matters than the strategy of avoidance allows, so as to work out consensual principles on animal protection. This is another way (in addition to recognizing animal welfare as a serious ethical responsibility for humanity) in which the WTO *EC – Seal Products* case has contributed to the possibility of generating international animal protection norms grounded in an overlapping ethical consensus. Cultural differences in the weight accorded to animal interests, and the specific ways that those interests are balanced with other values, are real. Interactional theory teaches that genuinely legal international norms need a foundation in the place where different cultural perspectives overlap. The imposition of one perspective on another (regardless of their relative moral worth) cannot ground robust international law. Nor can solutions that try to bypass conflicts by simply exempting or carving out cultural practices and avoiding engagement on how tradition and animal protection can coexist.

This thesis proceeds as follows. In Chapter Two, I set out an overview of discussion in scholarship and advocacy discourse on the relationship between animal protection and international trade. I argue that there has been a significant shift in this discussion, with *EC – Seal Products* marking a turning point.¹⁸ Critics of international trade law used to consider it one of the greatest threats to progress on the protection of animals, in both domestic and international law. Some still do, but the predominant opinion has shifted towards seeing the WTO as less of a threat to animals than was once

¹⁸ As I argue below, that shift can be seen in some of the scholarship summarized in Sections 2.3 and 2.4.

feared. Some scholars have even drawn attention to the potential for environmental provisions in PTAs to work as a basis for international cooperation for animal protection.

Chapter Three sets out the methodological approach, international interactional law, in detail.

Chapter Four examines the phenomenon of global animal law. This chapter explains why many animal law scholars and advocates see a need for a transnational approach to animal protection, and where animal protection norms are beginning to emerge in international law. I discuss some of the key legal materials, scholarly work and advocacy on protection of the environment, animal welfare and animal rights. I apply the interactional framework to assess how global animal law is faring as animal advocates work for its establishment as part of international law. The chapter also identifies specific problems that interactional theory points to and that practices of legality under international trade law could help to resolve.

Chapter Five is an overview of international trade law, focusing on the WTO and its antecedents. The chapter explains the origins and development of the international trade regime, from the classical liberal economic theories that provided an ideational justification for free trade, through the creation of a multilateral trade law framework after the Second World War, to the creation and evolution of the WTO. This chapter also sets out a summary of the key legal principles under WTO law that are relevant to the trade-animal protection relationship.

Chapter Six examines some prominent controversies over animal protection and trade law that arose before the Seal Products case. This chapter looks at trade fights over

animal mortality due to fishing bycatch; fur; farmed animal welfare; and cosmetic testing on animals.

Chapter Seven is an extended analysis of the WTO *EC – Seal Products* decision. This chapter describes the background to the EU seal ban and the two WTO decisions (at the panel and the Appellate Body) in detail. I also explore how the problems with the exemption for traditional Indigenous hunting in the EU legislation exemplify both the attractiveness and, ultimately, the unsustainability of the “strategy of avoidance.”

Chapter Eight shifts focus from the WTO to preferential trade agreements, with a particular focus on the new Comprehensive and Progressive Trans-Pacific Partnership¹⁹ and its Environment Chapter. This chapter explains the emergence and significance of modern PTAs, especially the relatively new category of large super-regional agreements with ambitious governance provisions that have been labeled “mega-regional trade agreements” or MRTAs, of which the CPTPP is an example. The chapter describes international collaboration efforts for animal protection under PTAs and the potential for more significant and extensive work on this front under the CPTPP. I also look at the EU’s efforts to include specific animal welfare obligations in its PTAs. Finally, I analyze these initiatives using the tools of interactional theory, identifying how practice under PTAs can potentially help to address some of the deficiencies that global animal law faces – especially with respect to compliance mechanisms and enforcement.

¹⁹*Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, 8 March 2018, [2018] ATS 23 (entered into force on 30 December 2018 for Canada, Australia, Japan, Mexico, New Zealand, and Singapore, and entered into force 14 January 2019 for Vietnam), referred to here as both the CPTPP and the TPP. For more, see Chapter Eight.

Chapter Nine is the conclusion.

The emergence of animal protection as a global concern (a “globally recognized issue,” in the words of the *EC – Seal Products* panel) is linked to and shaped by debates and legal reform initiatives at the domestic level in many countries. As one recent article considering the definition of animals as (mere) property in US law, put it, “[s]ociety is in a period of accelerated evolution regarding how we view the status of animals.”²⁰ This statement is also true of international society. As the world grows increasingly interconnected and interdependent, such developments and their implications are unlikely to be limited to a particular country or part of the world.

Eyal Benvenisti has described the changing nature of sovereignty using an insightful metaphor: whereas sovereignty used to be understood as “akin to owning a large estate separated from other properties by rivers or deserts,” today it is “more analogous to owning a small apartment in one densely packed high-rise that is home to two hundred separate families.”²¹ In this global high-rise, the policy choices and regulatory actions of each small apartment are unlikely to work effectively unless there is cooperation and coordination with the other residents. This is as true of measures to enhance the protection of animals as it is in other areas. As Anne Peters has argued, “[i]n times of globalization, regulation at the domestic level is insufficient to address animal welfare and, to be effective, needs to be complemented by international rules.”²²

20 Richard L Cupp, Jr, “Animals as More than ‘Mere Things,’ But Still Property: A Call for Continuing Evolution of the Animal Welfare Paradigm” (2016) 84 U Cinn L Rev 1023 at 1033.

21 Eyal Benvenisti, “Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders” (2013) 107:2 AJIL 295 at 295.

22 Anne Peters, “Global Animal Law: What It Is and Why We Need It” (2016) 5:1 Transnat’l Env’t L 9 at 11-13.

Animals need legal norms for their protection at the global level. Whether such legal norms will truly crystallize, and be effective, is not yet clear. But some seeds have been planted. The view that the human-animal relationship has global or universal implications and transcends national boundaries is gaining traction, and there is increasing evidence of animal protection establishing a foothold in international law. Trade law has already played a part in articulating and applying international legal norms that protect animals. It has the potential to continue to do so, and to do more in building positive collaboration and capacity-building in international animal protection.

Perhaps the most important message of this thesis is a practical one. Animal advocates have good reasons to be skeptical about globalization and international trade law, but at the same time they should not overlook the potential of international trade law as a tool that, at least potentially, can be put to work in furthering their objectives at the international level.

Chapter 2 The Sea Change of Seal Products

2.1 Introduction

This chapter situates the analysis presented in this thesis in the context of recent scholarship and intellectual debate about the relationship between trade and animal protection, beginning around the creation of the WTO in 1995. I divide the scholarship into three stages. The stages are roughly, but not strictly, temporal and sequential. Ideas that can be identified with each of the stages coexist in the research throughout the period being discussed, but there has been a discernible shift over time towards a somewhat more positive assessment of how international trade law affects animal protection, with *EC – Seal Products* marking a significant pivot point. The “stages” are used here not exactly to present a picture of a teleological progression, but more as a convenient taxonomy for organizing the scholarship and identifying trends and emerging currents in it.

Stage one, beginning with the leadup to creation of the WTO and the debates over conflict between trade and progressive policies that have played such a prominent part in the WTO’s history, is characterized by deep skepticism, even hostility, on the part of animal advocates towards international trade and trade law. Stage two is where we are now: a period of transition from the skepticism of stage one, or perhaps a partial tempering of that skepticism, with thoughts that WTO law, at least, may not be as much of an impediment to animal-protective policies as we used to fear. Stage three is about what may be emerging: the potential for trade law not just to stand in the way of the

development of animal protection norms, but also to make a positive contribution to that development.

2.2 Stage One: “A Malign Influence”

In 1994, just before the creation of the WTO, Daniel Esty published an influential analysis of the relationship between trade and the environment, *Greening the GATT*.¹ Esty’s starting point was the conflict between the world views of “environmentalists” and “free traders.” Environmentalists generally regarded the trade regime with trepidation: “[t]rade liberalization viewed through the environmentalists’ lens seems to invite increased pollution, lost regulatory sovereignty, an anti-environmental counterforce driven by the desire for jobs and profits, and policymaking by obscure, unaccountable, business-oriented international bureaucrats.”²

The tension between animal protection and trade is analogous to the tension between trade and the environment. These two areas also overlap, because environmental protection encompasses aspects of biodiversity and the conservation of animal species. From the point of view of animal advocates, trade liberalization appears to bring with it the risk that domestic rules intended to protect animals will be found inconsistent with international trade obligations, a threat that domestic and regional lawmakers will be discouraged from moving forward on animal protection out of fear that

¹ Daniel C Esty, *Greening the GATT: Trade, Environment and the Future* (Washington: Institute for International Economics, 1994).

² *Ibid* at 2.

such initiatives could violate trade rules, and an anti-animal counterforce that elevates profit and economic development over ethical concern for animals.

An analysis of the WTO rules that is representative of this point of view is Peter Stevenson's article on the WTO published in *Animal Law Review* in 2002, quite early in the WTO's history.³ Stevenson is an English lawyer and the Chief Policy Advisor of Compassion in World Farming.⁴ Stevenson's article expresses the apprehension, widely shared by animal advocates when the WTO replaced the GATT, that the new and strengthened multilateral trade regime would have severe negative consequences for animal protection. There were good reasons for such pessimism. Before the WTO was created, the dispute settlement system under the GATT had taken an interpretive approach that constrained the ability of GATT parties to protect animals if by doing so they affected trade, especially in its rulings against the US concerning its ban on imported non-dolphin-safe tuna.⁵ The GATT tuna/dolphin decisions were problematic for animal protection, but the GATT dispute settlement system was relatively weak, and the US had the option of rejecting the rulings – which it did.

By contrast, when the WTO was created in 1995, it had a new, strong, mandatory dispute settlement system whose rulings WTO members were legally obligated to adhere to: the DSB.⁶ The stronger WTO enforcement mechanism, combined with treaty rules extending trade disciplines into new areas, raised concern that WTO members' right to

³ Peter Stevenson, "The World Trade Organisation Rules: A Legal Analysis of Their Adverse Impact on Animal Welfare" (2002) 8 *Animal Law* 107.

⁴ Compassion in World Farming, "Peter Stevenson - Chief Policy Advisor," online: <<https://www.ciwf.org.uk/about-us/our-staff/peter-stevenson/>>.

⁵ These GATT rulings, and the rest of the history of the dolphin / tuna dispute, are discussed in Chapter Six.

⁶ See Section 5.4.2.

regulate for the protection of animals would be seriously constrained by the new multilateral trade regime. A trade regime with teeth, coupled with the interpretive approach established under GATT that paid little deference to nontrade policy objectives, looked like a deadly combination for animals.

Stevenson's assessment of the effect of trade rules on animal protection was disconcerting. He argued that GATT rules had "already had an immensely damaging impact on animal protection rules," both in application (as in the tuna/dolphin rulings) and also simply by putting lawmakers off taking action to protect animals, because of their worry that such initiatives might be found to violate trade disciplines.⁷ Two pieces of proposed legislation in the EU, a ban on marketing cosmetics tested on animals and a ban on imports of fur from countries that permit the use of leghold traps, had been "severely diluted" because of fear that they might violate GATT.⁸ EU rules phasing out battery cages for egg-laying hens provided for a review in 2005, prior to the rules coming into force, for compliance with WTO rules (among other factors).⁹ Thus it appeared that unless WTO rules were reformed "to enable the E.U. to prevent its farmers from being undermined by cheap battery egg imports, it may decide not to go ahead with its own ban on the cage."¹⁰

Stevenson argued that unless the trade rules were reformed (or their interpretation changed) "they are likely to continue to exercise a malign influence on future attempts to secure improved standards of animal welfare."¹¹ He did, however, see reason for

⁷ Stevenson, *supra* note 3 at 108-109.

⁸ *Ibid* at 109.

⁹ *Ibid* at 134.

¹⁰ *Ibid*.

¹¹ *Ibid* at 140.

“cautious optimism” in some recent developments, including signs of a more flexible approach to interpretation by the WTO Appellate Body.¹²

Other legal scholars interested in animal protection shared Stevenson’s skepticism about the effect of WTO rules on progress for animals. In 1998, not long after the WTO and its strengthened compliance process came into existence, Stuart Harrop (a professor of wildlife management law) and David Bowles (an international specialist with the UK RSPCA) wrote that “environmental and animal welfare constituencies are likely to regard the long-term consequences of the new WTO regime as threatening existing or future legislation.”¹³ Harrop and Bowles find “sufficient evidence to show that the WTO regime presents a barrier to the development of international animal welfare legislation, and may hinder the development of internal legislation.”¹⁴ They point out that the decisions of the WTO’s DSB are now binding, and can no longer be “set aside” as the US did in the past with the GATT tuna-dolphin rulings.¹⁵

Harrop and Bowles note the contrast between animal welfare and the environment in the WTO system. The WTO responded to growing pressure to work on clarifying the relationship between trade and environment by creating the Committee on Trade and Environment.¹⁶ Animal welfare, however, at that point simply was not being addressed at the WTO; it “has not been mentioned at any of the CTE discussions and is not on the

¹² *Ibid.*

¹³ Stuart Harrop & David Bowles, “Wildlife Management, the Multilateral Trade Regime, Morals and the Welfare of Animals” (1998) 1:1 *J Int’l Wildlife L & Pol’y* 64 at 66.

¹⁴ *Ibid* at 67.

¹⁵ *Ibid* at 68.

¹⁶ *Ibid* at 69-70.

agenda of the WTO in any of its official [fora].”¹⁷ Harrop and Bowles’s prognosis for the future of animal welfare in the international trade regime is not optimistic:

What is clear, in the midst of the uncertainty over the relationship between the multilateral trade regime and animal welfare (and other moral issues of international concern), is that the gulf between the two will only continue to grow as measures continue to be inhibited either by the decisions of dispute panels or through regulators downgrading legislation enacted in response to overwhelming public support.¹⁸

Laura Nielsen’s *The WTO, Animals and PPMs*,¹⁹ published in 2007, is the most extensive analysis so far of the relationship between WTO law and animal protection. Nielsen’s take is similar to Stevenson’s, in that she sees WTO law as fundamentally inimical to animal protection and especially to progress on animal welfare. Nielsen notes that “the WTO has interfered with the ability for the members to enact trade measures to protect the environment or animal welfare, because these measures are most likely inconsistent with the substantive obligation under the GATT,” and can only be justified under the policy exceptions in WTO law.²⁰

Like Harrop and Bowles, Nielsen sees the different footings of animal welfare and the environment in the WTO system as significant. For her, this distinction is appropriate, because these two matters have with different textual foundations in the WTO treaties and different philosophical bases. Protection of the environment, Nielsen argues, is based in the anthropocentric principle that preserving biological diversity benefits humans, whereas protection of animal welfare is based on moral

¹⁷ *Ibid* at 70.

¹⁸ *Ibid* at 94.

¹⁹ Laura Nielsen, *The WTO, Animals and PPMs* (Boston: Brill, 2007).

²⁰ *Ibid* at 8. See further discussion of the balance between *prima facie* obligations and policy exceptions under WTO law in Chapter Five.

considerations.²¹ Nielsen observes that protection of the environment has a much more solid footing in international law generally as well as in WTO law.²² Nielsen also sees a threat to non-trade priorities (including animal welfare) in the strength of the WTO's governance structure, which she describes as amounting to a "global governance monopoly," with "apparently little concern for the environment and even lesser for social issues."²³

Edward Thomas's 2007 article on the potential WTO implications of the EU's regulation requiring higher welfare standards for broiler chickens is subtly more optimistic about the compatibility of international trade law and animal welfare.²⁴ Thomas acknowledges that animal welfare advocates generally see free trade agreements as holding back progress.²⁵ But he argues that import restrictions on broiler chickens produced at lower welfare standards, if carefully drafted to meet the requirements of WTO law, could survive scrutiny and could "open the door to more national import restrictions aimed at improving animal welfare."²⁶ Thomas notes that decisions emerging from dispute settlement at the WTO are fairly flexible, allowing more room for the

²¹ *Ibid* at 6, 14-15 (observing that animal welfare and environmental protection belong under different provisions in the WTO policy exceptions, and contending that too much overlap between the textual policy exceptions that apply to these different objectives is contrary to the principle of treaty interpretation that all parts of a treaty should be interpreted as being effective, not redundant), 87, 106 (arguing that the key difference between animal welfare and the protection of animals as part of the environment is that the former is based on moral concerns).

²² *Ibid* at 7 (animal welfare is "not ... considered part of [international law]" but "primarily is regulated domestically with domestically defined norms," by contrast with the body of international treaty law on environmental protection), 91 (animal welfare "is addressed primarily in the agriculture area, where it is called 'non-trade concerns'").

²³ Nielsen, *supra* note 19 at 11.

²⁴ Edward M Thomas, "Playing Chicken at the WTO: Defending an Animal-Welfare Based Trade Restriction under GATT's Moral Exception" (2007) 34:3 Boston Coll Envtl Aff L Rev 605.

²⁵ *Ibid* at 609.

²⁶ *Ibid* at 608.

application of policy exceptions than was the case under GATT, and indicating that an animal welfare measure might be justified as a matter of morality.²⁷

Thomas also summarizes some criticisms raised by animal welfare advocates of the WTO's interpretive approach to the relevant provisions of the treaties. He argues that the DSB should take those arguments into consideration and "re-evaluate its interpretation of several key components of GATT" to address problems and inconsistencies that the critics have brought to light.²⁸ In the end the proposed import restrictions Thomas discusses did not make it into the broiler chicken legislation that the EU adopted, so a test of his argument that trade-related animal welfares could survive WTO scrutiny would have to wait for a later day.

By this time, the conflict that would eventually result in the *EC – Seal Products* decision was already starting to emerge. The EU adopted a measure banning imports and sales of seal products in 2009, following earlier similar actions by some member states.²⁹ Since the legislation mainly affected imported seal products (and, arguably, was motivated by a goal of targeting and pressuring Canada's sealing industry), it became apparent that a trade conflict might ensue. On the positive side, although commentators like Stevenson had pointed out the way the chilling effect of a risk of trade litigation could deter legislators from acting to protect animals, the EU had proceeded with its seal ban anyway and seemed prepared to defend it at the WTO. But trade scholars continued to see reason to doubt that the WTO would permit an import ban driven by moral

²⁷ *Ibid* at 611.

²⁸ *Ibid* at 634-637.

²⁹ See the full discussion of this background and of the dispute in Chapter Seven.

concerns about animal cruelty outside the enacting jurisdiction to stand. Peter Fitzgerald's 2011 analysis of the WTO-legality of the ban (written after the EU adopted the legislation, but before the WTO case) finds it "very unlikely" that the seal products measure would be justified under the public morals exception in trade law.³⁰ Fitzgerald's analysis predicts that the WTO would construe the public morals exception narrowly,³¹ and would find the seal products ban as drafted not to be narrowly tailored to its objectives, and also to be arbitrary in some aspects of its application. Like Thomas, however, Fitzgerald sees possibility for a trade measure motivated by animal welfare concerns to be carefully drafted in such a way that it *could* hold up in a WTO dispute.

Bruce Wagman and Matthew Liebman's 2011 book on comparative and international animal law, *A Worldview of Animal Law*, summarizes the relationship between animal welfare and the WTO in a way that is consistent with Stevenson's view, almost a decade earlier, that trade rules were a "malign influence." They see the effect of the WTO on animals as an impediment to progress on animal protection at best, and as potentially increasing inhumane treatment of animals:

Because a nation cannot discriminate against another nation for using a certain method of producing an animal product, commerce and WTO compliance may promote the inhumane treatment of animals in other countries, or at least delay a change in practices ... the global community is thus hindered in its ability to move towards more humane practices by the strict limitations of the international trade rules ... Perhaps the biggest barrier to such a change is the fact that the WTO has never had even a secondary focus on animal issues. It is primarily a market economy organization, and its rules are focused almost exclusively on maximizing the function of the global market. Neither

³⁰ Peter L Fitzgerald, "Morality' May Not Be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law" (2011) 14 J Int'l L & Pol'y 85 at 87.

³¹ *Ibid* at 109.

general nor specific animal welfare issues have ever been a topic of consideration for the WTO.³²

To sum up, all of these scholars see a real risk of WTO law impeding progress on animal protection. At best, they see a narrow possibility that animal welfare measures could be crafted so as to be found WTO-legal. The picture here is of a fundamentally antagonistic relationship between trade law and animal protection.

2.2.1 Beyond the WTO: Mega-Regional Trade Agreements as a Threat to Animals

There are many trade agreements outside the WTO system, including bilateral treaties, regional trading blocs, and, more recently, very large agreements among multiple parties that span large sections of the globe. Non-WTO trade agreements generally are referred to here as preferential trade agreements (PTAs), and the relatively new category of big multiparty trade partnerships are referred to as mega-regional trade agreements (MRTAs). Both types of trade agreement are analyzed in detail in Chapter Eight.

For the purposes of this chapter, what is important to note is that the scholarly and advocacy discussions around the relationship between animal protection and trade also extend to PTAs, which are becoming more important as ambitious new agreements re-set the rules of international trade. PTAs and especially MRTAs aim to increase trade liberalization and extend into areas that WTO law does not address. For some observers, this development is an amplification of the “malign influence” of trade law, evidence of an ascendant economic globalization agenda that will be even more inimical to animal

³² Bruce A Wagman & Matthew Liebman, *A Worldview of Animal Law* (Durham, NC: Carolina Academic Press, 2011) at 305-307.

protection reform efforts both domestically and internationally. Animal advocates fear that the more aggressive integration agenda under new PTAs will result in dilution of regulations for the protection of animals, bringing them down to the level of the trading partners with weaker animal protection laws.

This concern was especially visible in the negotiations between the EU and the US to create a new Trans-Atlantic Trade and Investment Partnership (TTIP) that aims to liberalize trade between the world's two largest economies.³³ The EU has some of the world's most progressive laws on animal protection, and animal welfare rules are generally much less strict in the US. Eurogroup for Animals, a civil society lobbying organization that focuses on improving animal welfare in the EU,³⁴ sounded the alarm about the potential for regulatory integration under the TTIP to undermine Europe's relatively high standards for animal welfare, and kept pressure on EU officials to ensure that animal protection remained a salient issue in the negotiations.

Eurogroup for Animals launched a Trade and Animal Welfare project in 2015, largely “as a response to the realisation amongst the membership that something must be done about TTIP.”³⁵ Eurogroup for Animals worried that regulatory cooperation under

³³ European Commission, “About TTIP – Impact,” online: <http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/impact/> (TTIP would cover “trade between the world's two largest economies – which together account for more than 40% of world trade”). Depending on how the size of the domestic economy is measured, China may now have surpassed the US as the world's largest economy.

³⁴ Eurogroup for Animals, “Our mission, a triple role” online: <https://www.eurogroupforanimals.org/our-vision-and-mission>.

³⁵ Iyan Offor, “TTIP Part 1 – A ‘Historic’ Look at Eurogroup's Lobbying Efforts” (July 14, 2017) Eurogroup for Animals, online: <http://www.eurogroupforanimals.org/ttip-part-one>.

TTIP would put animal welfare at risk, and welcomed the suspension of TTIP negotiations in 2016 because “the deal was shaping up to be a bad one for animals.”³⁶

In a similar vein, a coalition of civil society groups (including the Institute for Agriculture and Trade Policy, Compassion in World Farming and Friends of the Earth Europe) released a briefing note in 2015 describing TTIP as “a Trojan Horse that will threaten our food safety and environment,”³⁷ decrying language on animal welfare in the EU negotiating proposals as nonbinding and “so weak that it may put animal welfare standards at risk,” and warning that regulatory harmonization would undermine EU animal welfare rules by allowing lower-welfare US products to be imported with no requirement of compliance with the higher EU standards.³⁸

2.3 Stage Two: A Sheep in Wolf’s Clothing?

Even as scholars were articulating their concerns about the “malign influence” of trade rules on animal protection, some of the analyses discussed above recognized that things might not be irredeemably bad, and that there is at least potentially space within trade law for animal protection objectives to be pursued. As the WTO dispute settlement system has matured and generated a substantial body of jurisprudence, it has become clear that the DSB and particularly the WTO’s Appellate Body is sensitive to the need to balance trade with legitimate regulatory purposes. The DSB has carefully crafted its decisions to achieve that balance, by contrast with the more restrictive approach under

³⁶ *Ibid.*

³⁷ Institute for Agriculture and Trade Policy, Center for Food Safety, Compassion in World Farming, GRAIN & Friends of the Earth Europe, “How TTIP undermines food safety and animal welfare” (February 2015), online: http://www.foeeurope.org/sites/default/files/publications/briefing_ttip_food_safety_feb2015_1.pdf, at 9.

³⁸ *Ibid* at 6-7.

GATT.³⁹ A separate, relevant development is the growing profile of animal protection as a matter that is taken increasingly seriously both locally and at the international level. As Chapter Four explains, internationally there is now an emerging body of rules, principles, proposals and law reform efforts that some scholars are referring to as “global animal law.” Animal protection is an international governance problem that was not prominent when the WTO treaties were negotiated in the 1990s. Since then, it has gained recognition as something that deserves to be given weight in the balance between trade liberalization and non-trade social values.

EC – Seal Products was the first case to assess the compatibility of a trade measure based on animal welfare objectives with WTO law. Thus, the case is an important test of just how much of a “malign influence” and an obstacle to progress on animal protection WTO law actually is in the context of a fully litigated dispute. And the answer is: it is not as bad as was previously feared.

As the *EC – Seal Products* case was proceeding through the WTO system, Robert Howse and Joanna Langille published an article arguing that WTO law should be interpreted to have enough flexibility and deference to local policy choices to permit moral legislation based on expressive, rather than purely instrumental, rationales to stand.⁴⁰ That is, measures designed in part to express moral outrage towards a practice that harms animals – and not just to function as a practical way of limiting animal

³⁹ For more on this, see Chapters Five and Six. Chapter Five sets out a more detailed analysis of the evolution of the international trade regime and its dispute settlement processes. Chapter Six analyzes the GATT and WTO jurisprudence in key animal protection cases before *EC – Seal Products*.

⁴⁰ Robert Howse & Joanna Langille, “Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values” (2012) 37 *Yale J Int’l L* 367.

suffering – should be recognized as defensible under the public morals exception in WTO law. As Howse and Langille argue, “[l]egitimate, well-founded, moral justifications such as respect for animal welfare and repugnance at complicity with cruelty to animals should not be dismissed as grounds for regulation, nor treated in a narrow and skeptical fashion.”⁴¹

Howse and Langille propose that the interpretive approach they recommend is essential to reflect the very wide diversity of cultural traditions, moral positions, and ethical views in the WTO membership.⁴² To impose conformity in too heavy-handed a way would jeopardize the legitimacy of the WTO.⁴³ Howse and Langille find ample grounds in prior WTO case law to support this approach. Anticipating the WTO ruling in *EC – Seal Products*, they predict that the outcome will allow space in WTO law for morally motivated animal protection legislation.

In a follow-up article in 2015, after the WTO had ruled in the *EC – Seal Products* case, Howse, Langille and I assess the case as “a highly significant if partial victory for a pluralist approach,” praising the DSB’s “open-textured approach to the public morals exception” while noting that there are still some problems with the decision from a pluralist perspective.⁴⁴ (For a detailed discussion of the *EC-Products* decision, see Chapter Eight.)

⁴¹ *Ibid* at 432.

⁴² *Ibid* at 428.

⁴³ *Ibid*.

⁴⁴ Robert Howse, Joanna Langille & Katie Sykes, “Pluralism in Practice: Moral Legislation and the Law of the WTO After *Seal Products* (2015) 48 *Geo Wash Int’l L Rev* 81 at 88.

Overall, *EC – Seal Products* confirms that WTO law allows fairly generous scope for the expression of moral positions in legislation, and it leaves no further room for doubt that animal welfare is a recognized and important justificatory basis for legislation affecting trade. We also note in that article that the WTO “took into account the growing global tendency towards taking animal welfare seriously in concluding that it could be a component of the public morals exception,” and we anticipate that the decision “open[s] the door to future animal welfare defenses and provide[s] an important endorsement for the protection of animal welfare.”⁴⁵

Both the reasoning and the outcome of *EC – Seal Products* suggest that international trade law is not as damaging to animal protection as scholars feared in the 1990s and early 2000s, at least with respect to progress on animal welfare at the domestic level. But what of progress in international law? As discussed above, Harrop and Bowles found evidence that the WTO legal regime was a barrier to the development of international animal law. By contrast, Charlotte Blattner argues in a 2016 article (after the *EC – Seal Products* decision) that the recognition of animal sentience and animal welfare in WTO case law have actually enhanced the international discourse on these matters and support the protection of animal interests at the global level.⁴⁶

Blattner notes that existing international legal frameworks for animal protection are preoccupied with conservation, largely anthropocentric in their concern with preserving animals for the future benefit of humanity, and demonstrate little recognition

⁴⁵ *Ibid* at 113.

⁴⁶ Charlotte Blattner, “An Assessment of Recent Trade Law Developments from an Animal Law Perspective: Trade Law as the Sheep in Wolf’s Clothing?” (2016) 22 *Animal L* 277.

of the interests or ethical significance of animals in their own right.⁴⁷ In her view, WTO law, especially the *EC – Seal Products* decision, has “introduced the possibility of legitimizing the global protection of animal interests.”⁴⁸ At the same time, Blattner recites the many inadequacies of WTO law as a legal mechanism for animal protection at the global level, including the fact that “under WTO law, members are not required to provide a certain level of welfare for animals” but are only (at best) permitted space in which they may choose to do so.⁴⁹ Blattner concludes that although “[f]or many decades up until the present day, the WTO has been identified as a major obstacle for national and international efforts to further animals' interests,” international trade law may be “less of a wolf in this game. Rather, it might turn out to be the sheep in wolf’s clothing.”⁵⁰

David Favre, a leading animal law scholar who has advocated for many years for an international instrument to protect animals, sums up the state of play in a recent book chapter. Favre observes that the lack of express reference to animal welfare in the WTO treaties leaves animals vulnerable because the WTO regime “may be the most important legal framework regarding animals as it controls international trade of live animals and animal products, such as meat and skin.”⁵¹ To this extent, Favre echoes the negative (or Stage One) view of the WTO as an impediment to progress on animal protection. But, noting the *EC – Seal Products* panel’s acceptance of moral concern about seal welfare as an acceptable justification for the EU seal products ban, Favre observes that “[t]his seems

⁴⁷ *Ibid* at 282-284.

⁴⁸ *Ibid* at 299.

⁴⁹ *Ibid* at 303.

⁵⁰ *Ibid* at 308.

⁵¹ David Favre, “An International Treaty for Animal Welfare” in Deborah Cao & Steven White, eds, *Animal Law and Welfare – International Perspectives* (Heidelberg: Springer, 2016) 87 at 95.

to open a new door of animal welfare considerations,” although it is “too soon to suggest the potential scope of this new path.”⁵²

In short, the Stage Two view of the trade-animal protection relationship is mixed, but cautiously optimistic by comparison with the grim predictions of Stage One.

2.4 Stage Three: Towards “Syncretic Norms”?

Looking ahead, there are reasons to believe that more significant developments on trade and animal protection may occur not at the WTO but in the context of new PTAs, especially MRTAs, which typically bind members to a set of affirmative obligations on social issues.⁵³ In the case of MRTAs in particular, these new norms have systemic influence that potentially extends beyond the parties to the agreement. Although there are no PTAs with fully elaborated commitments on animal welfare standards, there are references to animal welfare in some agreements negotiated by the EU, and modern trade agreements typically include detailed, legally binding commitments on the environment that encompass obligations concerning the protection of animal species.⁵⁴

Although these projects to liberalize international trade do still risk increasing aggregate animal suffering by intensifying the international trade in animals and their products (as the critics discussed under Stage One have highlighted), the emerging legal frameworks under PTAs may also present fruitful opportunities for the articulation and application of robust, positive international obligations on animal protection.

⁵² *Ibid* at 96.

⁵³ These agreements are analyzed in detail in Chapter Eight.

⁵⁴ See Chapter Eight.

Andrew Jensen Kerr has explored this possibility in a recent article looking at the scope afforded to protection of animal interests in the Environment Chapter of the new Trans-Pacific Partnership (the TPP, which I also refer to here as the Comprehensive and Progressive Trans-Pacific Partnership⁵⁵ or CPTPP).⁵⁶ Kerr “question[s] the negative juxtaposition of the TPP with animal welfare”⁵⁷ by those who argue that “trade liberalization is an inherent threat to animal well-being,”⁵⁸ seeing promise in this new legal regime for the articulation of animals’ interests. He observes that animal law and environmental law have “conflicting goals,” because animal rights theory prioritizes individual animals, while environmental law is about protecting ecosystems, but, at the same time, they are “twin doctrines” with shared goals.⁵⁹

The fact that the TPP Environment Chapter includes obligations concerning habitat management and trade in endangered animals helps to make the commonalities and connections between the twin doctrines clearer, potentially supporting the development of a “syncretic norm” of animal welfare (as the title of Kerr’s article puts it) in the context of environmental governance. Kerr suggests that the presence of an “animal welfare sensibility” implicit in the TPP Environment Chapter “might even help to overcome the theoretic tensions in U.S. animal and environmental law.”⁶⁰

⁵⁵ *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, 8 March 2018, [2018] ATS 23 (entered into force on 30 December 2018 for Canada, Australia, Japan, Mexico, New Zealand, and Singapore, and entered into force 14 January 2019 for Vietnam).

⁵⁶ Andrew Jensen Kerr, “The Trans-Pacific Partnership and the Construction of a Syncretic Animal Welfare Norm” (2017) 27 *Duke Env’t L & Pol’y Forum* 155.

⁵⁷ *Ibid* at 156.

⁵⁸ *Ibid* at 155.

⁵⁹ *Ibid* at 156-157.

⁶⁰ *Ibid* at 157.

Kerr’s analysis suggests several intriguing possibilities in the relationship between animal welfare and trade going forward. First, the integration of some level of attention to animal interests into the TPP Environment Chapter is a further step in bridging the long-standing dichotomy between environment and animal welfare, a divide that is no longer as deep as it once seemed even in the WTO context (as Blattner’s take on the WTO case law brings out). Along the same lines, I have argued elsewhere that international trade law is helping to point the way to a more integrated concept of animal protection that recognizes the connections between conservation and welfare.⁶¹ Second, the TPP and other non-WTO trade agreements often include affirmative provisions relevant to animal protection – the missing piece in WTO law, which recognizes animal protection only in the context of exceptions to the general rules of the regime. Third, this perspective of the relationship between animal protection and international trade law opens up the possibility of seeing it not simply as one of opposition (where trade law blocks progress on animal protection) but as an interaction where each has a role in shaping and influencing the other.

2.5 Conclusion

The overview presented here of scholarship and commentary on the relationship between animal protection and international trade law indicates that there has been a shift in the way observers think about that relationship, with *EC – Seal Products* marking an important watershed. Before *EC – Seal Products*, predictions about the potential fate of animal protection in an ascendant international trade were gloomy. The prevailing view

⁶¹ In Katie Sykes, “Globalization and the Animal Turn: How International Trade Law Contributes to Global Norms of Animal Protection” (2016) 5:1 *Transnational Env’tl L* 55.

was that WTO law, and international trade more generally, is a force directly opposed to strong animal protection measures. Perhaps, understandably, scholars saw a body of law that primarily conceives of animals as articles of commerce as inevitably inimical to animal interests, and to law reform efforts that seek recognition of animals as sentient beings with inherent moral significance.

These concerns certainly are not unfounded, but, in retrospect, the analyses of this period may unduly discount doctrinal arguments that animal protection measures *can* be consistent with WTO law. *EC – Seal Products* not only confirmed that this was the case – that WTO law does have room for animal welfare – but also acknowledged the importance of animal welfare as a legislative objective and as an international value. More recent scholarship sees in both WTO law and emerging trade regimes outside the WTO the potential for a mutually constitutive interaction between international trade law and global animal law.

If we look at the relationship of animal law and trade law as one of interaction and a potentially productive encounter between legal regimes, rather than one of opposition and blockage, then it starts to appear especially suitable for analysis through the lens of constructivist legal theory.⁶² In the next chapter, I set out the methodological framework used in this thesis: a constructivist methodology that is specifically concerned with how international law forms through a process of interaction. This is the theory of interactional international law developed by Jutta Brunnée and Stephen Toope.⁶³

⁶² Kerr's article (*supra* note 56) applies constructivist analysis.

⁶³ Primarily in Jutta Brunnée & Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010). Additional sources are discussed in Chapter Three.

Interactional international law provides a theoretical vocabulary and theoretical tools that enhance understanding of the mutually constitutive interactive process that work like Blattner's and Kerr's has identified.

Chapter 3 Methodological Framework: Interactional International Law

3.1 Introduction

Chapter One, the Introduction, summarized my argument that international trade law is contributing positively to the formation of global animal law. It also introduced the theory of interactional international law, the theoretical model applied in this thesis to analyze and understand both how international norms concerning animals are developing, and the relationship of international trade law to that process of development. In this chapter, I present a more detailed account of Brunnée and Toope’s theory of interactional international law.¹ This sets the stage for the application of the theory in the following chapters, as a framework for understanding international trade law as the site of “practices of legality” (in Brunnée and Toope’s terminology) that contribute to the

¹ Most importantly, in Jutta Brunnée & Stephen J Toope, *Legitimacy and Legality in International Law* (Cambridge: Cambridge University Press, 2010) [Brunnée & Toope, *Legitimacy and Legality*]. See also Jutta Brunnée & Stephen J Toope, “International Law and Constructivism: Elements of an Interactional Theory of International Law” (2000) 39:1 *Columbia J Transnat’l L* 19 [Brunnée & Toope, “Elements of an Interactional Theory”]; Jutta Brunnée & Stephen J Toope, “Interactional International Law: An Introduction” (2011) 3:2 *Int’l Theory* 307 [Brunnée & Toope, “Introduction”]; Jutta Brunnée & Stephen Toope, “Constructivism and International Law” in Jeffrey L Dunoff & Mark A Pollack, eds, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013) 119 [Brunnée & Toope, “Constructivism and International Law”]; Jutta Brunnée & Stephen J Toope, “The Sovereignty of International Law?” (2017) 67 *UTLJ* 496 [Brunnée & Toope, “Sovereignty”]; Jutta Brunnée, “The Sources of International Environmental Law: Interactional Law” in Jean d’Aspremont & Samantha Besson, eds, *The Oxford Handbook of the Sources of International Law* (Oxford: Oxford University Press, 2017) 960 [Brunnée, “Sources”]; Jutta Brunnée & Stephen J Toope, “Self-Defence Against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?” (2018) 67:2 *Int’l & Comparative L Q’ly* 263 [Brunnée & Toope, “Self-Defence Against Non-State Actors”]; Jutta Brunnée & Stephen J Toope, “Interactional Legal Theory, The International Rule of Law, and Global Constitutionalism” in Anthony F Lang & Antje Wiener, eds, *Handbook on Global Constitutionalism* (Cheltenham: Edward Elgar, 2018) 170 [Brunnée & Toope, “Global Constitutionalism”]; Jutta Brunnée, Book Review of *International Law in a Transcivilizational World* by Onuma Yasuaki (2018) 59:2 *Harvard Int’l L J* 431.

creation, development and maintenance of international legal norms concerning the protection of animals.²

Brunnée and Toope's theory of interactional international law is based on three main propositions. The first is that "legal norms can only arise in the context of social norms based on shared understandings."³ The second is that "internal features of law," which they refer to as "criteria of legality," underpin the obligatory nature of law and its ability to command adherence.⁴ The third is that "legal norms are built, maintained, and sometimes destroyed through a continuing practice of legality."⁵

This Chapter is organized around those three components and the ways they manifest in the development of international legal norms concerning animal protection: the emergence of norms based on shared understandings; the distinctive nature of legal norms; and the idea of practices of legality.

3.2 Why a Constructivist Methodology?

The theory of interactional international law starts with a foundation in constructivist social theory, and its account of how norms come into being. A basic

² This chapter revisits some of the same material and arguments that I have previously written about in an article (Katie Sykes "Nations Like Unto Yourselves': An Inquiry into the Status of a General Principle of International Law on Animal Welfare" (2011) 69 *CYIL* 1 [Sykes, "Nations"]) and also in my LLM thesis (Katie Sykes, *The Beasts in the Jungle: Animal Welfare in International Law* (LLM thesis, Schulich School of Law, 2011) [unpublished] [Sykes, "Beasts in the Jungle"]). In this thesis, as in those previous works, I examine the emergence of global animal law using the framework of interactional IL theory. There are two significant, and related, differences between this project and the previous ones. First, the development of global animal law has moved further along since those earlier analyses, an evolution that is both manifested in and contributed to by the *EC – Seal Products* decision. Second, my primary focus here is on the dialogue between the international trade law regime (specifically) and global animal law (rather than the status of animal welfare in international law in general).

³ Brunnée & Toope, *Legitimacy and Legality*, *supra* note 1 at 15.

⁴ *Ibid.*

⁵ *Ibid.*

insight of constructivism is that social structures and the actors within them are mutually constituted through interaction with one another.⁶ On this view, agents do not simply create a structure in a one-way operation; the structure itself and participation in its creation shape the actors and their ideas of what the structure should be and what its purpose is, as well as vice versa. As Brunnée and Toope put it, “interests are not simply ‘given’ and then rationally pursued, but ... social construction of actors’ identities is a major factor in interest formation.”⁷ In other words, constructivists ask *why* actors have their identities and interests: what makes them what they are, and what makes them want what they want?

Applying this framework to international law, constructivist scholars see the international legal system not simply as an artifact created by states in furtherance of their interests, but also as shaping the identity of states and their interests, through its “ability to reshape the discourse of the international community and state conceptions of what is possible and even desirable in international relations.”⁸

This understanding of the relationship between agent and structure, and between identity and social context, is fundamental to the constructivist approach to international relations and international law. It is also an important point of contrast with realist or rationalist accounts that take agents (which in the international legal system generally means states) and their interests as given, and portrays international policies and laws as

⁶ Brunnée & Toope, “Elements of an Interactional Theory,” *supra* note 1 at 27. See also Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999) at 21; John Gerard Ruggie, “What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge” (1998) 52:4 *Int’l Organization* 855 at 856.

⁷ Brunnée & Toope, *Legitimacy and Legality*, *supra* note 1 at 13.

⁸ Harlan G Cohen, “Can International Law Work? A Constructivist Expansion” (2009) 27 *Berkeley J Int’l L* 636 at 639.

outputs created by states in the pursuit of their interests and shaped primarily by the power relations among them.⁹

The latter model (sometimes called realist, neo-realist, rationalist, neo-utilitarian, neo-liberal, or materialist¹⁰) of how international relations and law work has been labeled “objectivism” by Andrew Lang, following the use of the term in the social theory of Pierre Bourdieu.¹¹ By “objectivist” Lang means a theory that sees actors and their interests as objective, material phenomena that exist independent of our ideas about them, and with respect to international trade law, it yields a model in which “states bargain with one another in pursuit of their own self-interest, typically seeking the greatest possible market access for their exports while at the same time avoiding, as far as possible, making market access commitments of their own.”¹²

What Lang calls “objectivism” also has much common ground with rationalist theories of international law, which see international law as the outcome of states’ rational pursuit of their own interests.¹³ I follow Lang in mainly using the term “objectivist” here, but it is roughly interchangeable with “rationalist,” a term I also use.

⁹ Brunnée & Toope, “Elements of an Interactional Theory,” *supra* note 1 at 31-32.

¹⁰ This list is admittedly a somewhat reductive grouping together of approaches that are not identical, but they do have in common the premise that states create international policies and laws in the pursuit of material self-interest. These approaches thus share a fundamental point of difference with constructivism, which sees states and the international system as creating one another mutually through interaction, and accords more importance to the role of ideational factors.

¹¹ Andrew Lang, *World Trade Law After Neoliberalism: Re-Imagining the Global Economic Order* (Oxford: Oxford University Press, 2011) at 164.

¹² *Ibid* at 161.

¹³ For two different accounts based on the objectivist or rationalist position, see Jack Goldsmith & Eric Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005); Andrew Guzman, *How International Law Works: A Rational Choice Theory* (Oxford: Oxford University Press, 2008). Goldsmith and Posner are very skeptical that international law has any real effect, whereas Guzman’s account, also based on rational choice theory, is more positive.

Objectivist or rationalist models of international law have undeniable intuitive appeal and explanatory power. I share the view of Andrew Guzman, whose *How International Law Works* is one of the leading rational-choice explanations of international law, that in adopting one methodology there is no need to attack others or prove them wrong, as there is “room within the study of international law for a multiplicity of methodologies” and serious inquiries using a variety of different methodological approaches can enhance understanding.¹⁴

Objectivism is in some ways very well suited to analyzing international trade law. Undeniably, states’ rational pursuit of their perceived economic interests plays at least some part in the creation of trade law. But objectivism falls short when it comes to explaining the interpretive and ideological questions that permeate international trade law, as Lang has shown¹⁵ (and as further discussed below).

Especially as a methodology for making sense of global animal law, the objectivist approach has important limitations. In fact, an observer applying the objectivist optic would probably conclude that there is no such thing as global animal law. An account of international law as the product of competition among states pursuing self-seeking interests could only see global animal law as epiphenomenal. Animals have neither states, nor power; they may have interests, but they certainly have no means of pursuing them in the context of international negotiation and lawmaking. It may perhaps reflect the influence of objectivist ways of thinking about international law that when

¹⁴ *Ibid* at 21. As Brunnée and Toope note, constructivism seems to be quite well suited to explaining phenomena in a way that is open to diverse perspectives, and many international relations scholars reportedly use both constructivist and rationalist approaches. Brunnée & Toope, “Constructivism and International Law,” *supra* note 1 at 125 and 125 n 1.

¹⁵ Lang, *supra* note 11 at 159-189.

animal questions arise in international law they are sometimes marginalized as merely a sentimental distraction from more serious problems,¹⁶ a manifestation of cultural imperialism,¹⁷ or a hypocritical mask for self-interest.¹⁸

The “animal turn”¹⁹ in international law looks quite different when observed through the lens of constructivism and interactional theory. Constructivism defines interests “in both material and non-material terms,” and examines “the role that culture, institutions and norms play in shaping identity and influencing behavior.”²⁰ That approach allows more space for meaningful engagement with the cultural, ethical, and ideational aspects of the human-animal relationship.

The basic principle of constructivism – that agents and structures are mutually constitutive, and international politics and law are integrally bound up with ideas, values, and ideological presuppositions – shapes both interactional IL theory and the analysis set

¹⁶ The moral and animal-protection arguments in support of the EU ban on seal products that was at issue in *EC – Seal Products* have been categorized by some observers as sentimental and emotional, rather than rational. See, e.g., Tamara Perišin, “Is the EU Seal Products Regulation a Sealed Deal?” (2013) 62 ICLQ 373 at 375 (asserting that an emotional reaction to the cuteness of seals may make some people “intuitively biased” in favour of the EU ban). See further discussion in Section 7.4.1 below. Compare Will Kymlicka and Sue Donaldson’s observation that the struggle for animal rights has been late to gain a foothold in leftist political movements in part because of concern that “including animals in the Left’s pantheon of just causes will diminish the very currency of justice and thereby erode the moral seriousness with which human injustices are treated.” Will Kymlicka & Sue Donaldson, “Animal Rights, Multiculturalism and the Left” (2014) 45:1 J Social Philosophy 116 at 119.

¹⁷ Anne Peters, “Liberté, Égalité, Animalité: Human-Animal Comparisons in Law” (2016) 5 *Transnat’l Env’tl L* 25 at 37 (acknowledging that “[a] recurring normative objection against intensified animal protection law with a potentially global scope is the reproach of cultural imperialism”); Keiko Hirata, “Why Japan Supports Whaling” (2005) 8 *J Int’l Wildlife L & Pol’y* 129 at 141-142 (noting the gap between international and domestic Japanese norms concerning whaling, and that many Japanese believe “international criticism of Japan’s whaling practice is a form of ‘Japan bashing’ that reflects cultural imperialism”).

¹⁸ See, e.g., Philip I Levy & Donald H Regan, “*EC – Seal Products: Seals and Sensibilities* (TBT Aspects of the Panel and Appellate Body Reports)” (2015) 14:2 *World Trade Review* 337 at 344-349 (discussing the risk that trade measures based on moral outrage towards animal cruelty might also reflect protectionist motives, and the difficulty of distinguishing between the permissible and impermissible motives).

¹⁹ On the term “the animal turn,” see Section 4.2.2 below.

²⁰ Brunnée & Toope, “Elements of an Interactional Theory,” *supra* note 1 at 20-21.

out in this thesis. In the simplest terms, the argument could be summed up as follows: interests are not all that matters and not the sole explanation for international law; ideas matter too; and interests do not exist independently of ideas. Constructivists “[acknowledge] the importance of power and material interests” but at the same time “focus attention upon the role that culture, ideas, institutions, discourse, and social norms play in identifying and influencing behavior.”²¹

Objectivism is probably the dominant explanatory approach in international trade discussions today,²² not only in academic but also in public discourse on trade. But there is also a rich and deep tradition of constructivist scholarship of international economic law, going back to the work of the constructivist political scientist John Gerard Ruggie.

Ruggie argued that the post-war system of international economic governance, before the neoliberal turn of the 1970s and 1980s, was based on a shared sense of the role and purpose of trade in international society and on a shared set of ideas about the relationship between markets and social governance, generally accepting the legitimacy of a fairly high level of state intervention in the economy to protect social welfare. Borrowing terminology from Karl Polanyi, Ruggie described the normative framework of the postwar international economic legal regime as “embedded liberalism.”²³ In this

²¹ Brunnée & Toope, “Constructivism and International Law,” *supra* note 1 at 121.

²² *Ibid.*

²³ John Gerard Ruggie, “International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order” (1982) 36:2 *Int’l Organization* 379 at 382-385, 393-399; Andrew T F Lang, “Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the International Trade Regime” (2006) 9 *JIEL* 81; see also Robert Howse, “From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trade Regime” (2002) 96 *AJIL* 94.

paradigm, international trade governance, like the other great post-war global institutions, was *for* something: a shared project of international peace and prosperity.²⁴

Post-war embedded liberalism in economic governance grew out of a particular historical moment. It is no longer an accurate description of what Lang calls the trade regime's "normative orientation."²⁵ But Ruggie's insights about economic governance *having* a normative orientation and needing to be embedded in social purpose remain powerful and illuminating.

Those insights provide an important corrective to the objectivist understanding of the international trade regime as having no inherent purpose and being explicable simply as the outcome of a competitive struggle between the participating states to further their own interests or purposes. Lang recounts the objectivist view of how trade law is generated as follows:

[S]tates bargain with one another in pursuit of their own self-interest, typically seeking the greatest possible market access for their exports while at the same time avoiding, as far as possible, making market access commitments of their own, at least where such commitments have domestic political costs. The outcomes of these negotiations, as reflected in the texts of the WTO agreements, fundamentally reflect the distribution of power between these state actors, so that the most powerful states are typically able to demand more market access for their exports than less powerful states.²⁶

The objectivist understanding of the international trade regime as a content-empty negotiating forum is also reflected in the WTO's own presentation of itself on its web site

²⁴ Lang, *supra* note 11 at 41 (here focusing on the historical relationship between international trade and human rights institutions and a vision of commerce and human rights as "two halves of a *single* project of world peace" and "two mutually reinforcing parts of a single vision of international peace and prosperity" (emphasis in the original)).

²⁵ *Ibid* at 19.

²⁶ Lang, *supra* note 11 at 161.

as “[e]ssentially ... a place where member governments go, to try to sort out the trade problems they face with each other.”²⁷ A sidebar on the same page on the WTO web site picks out a quotation from a radio discussion of the WTO’s role, in which various propositions were made about things that the WTO ought to do: “One of [the participants] finally interjected ‘Wait a minute. The WTO is a table. People sit round the table and negotiate. What do you expect the table to do?’”²⁸

Constructivist analysis pays attention to what the objectivist model elides: the ideological struggle and dialogue that are played out in, and constitutive of, the trade regime. From this standpoint, we miss a lot if we think of the international trade regime as merely an inert and value-neutral “table” that does not do anything. As Lang puts it, the trade regime is a dynamic “mental world” that is intersubjective in nature, “a social product, collectively produced.”²⁹ It is both constituted by and constitutive of social actors engaged in a struggle of ideas, values and interpretation.

This understanding of what trade lawmaking does and how it generates meaning allows for deeper insight into the relationship between animal protection and trade law than the objectivist approach can provide. An objectivist account of the subject is certainly possible, but would not tell us much of interest. One could easily tell a story about the increasing prominence of animal-protective norms in the context of the international trade regime that focused exclusively states’ pursuit of their own self-interest as they bargain around a table, with the negotiations resulting in treaty

²⁷ WTO, “What is the World Trade Organization?” online:
<https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm>.

²⁸ *Ibid.*

²⁹ Lang, *supra* note 11 at 180-181.

agreements reflecting the distribution of power among those states. Along those lines, invocation of animal welfare as a basis for trade-law exceptions is sometimes associated with fears that domestic industries in richer WTO members with relatively high animal-protection standards – the EU, for example – will be outcompeted by cheap imports from (often poorer) countries with lower standards. An analysis that looked no further than these material factors might well see expressions of concern for animal protection as nothing more than a pretext for a member like the EU to limit access to its markets in the pursuit of pure self-interest.

There is no serious question that the differentials in global power and economic leverage that objectivist accounts highlight are part of the picture in international trade negotiations and relationships. That said, objectivist, interest-based analysis does not satisfactorily explain *why*, for example, the EU, would make efforts to enhance animal protection in the trade context. If the EU is (and all the other players are also) driven solely by a material interest in protecting its own industries, why not simply renege from all its own animal-protection commitments? From the point of view of pure self-interest, what is in it for any human nation to make animal protection part of its international agenda? In this sense animal protection is a particularly instructive object lesson in the limitations of what Lang calls “materialist and interest-based analyses.”³⁰ Its place in international law and in the international trade regime cannot be completely accounted for with reference only to raw material interest, because in the end the decision to prioritize the interests of other species must have an element of disregarding one’s own

³⁰ Lang, *supra* note 23 at 84.

material interest and has to be driven by some sense of ethical obligation, however mixed such motives may be with self-serving and material calculations.

Although I view the international trade governance system not as a mere “table” but as a social institution with a social purpose (or purposes), both shaped by and shaping the actors who participate in it, I do not mean to imply that the WTO or any other trade agreement has an institutional role of creating or propagating a community of shared values or norms in the thick sense, what Brunnée and Toope call a “shared global identity or deep value coalescence.”³¹ Our world is too diverse for claims that international law can or should achieve this type of strong substantive consensus to be either empirically accurate or normatively appealing.

International trade law, with its relatively narrow focus on fair rules for economic interaction, is an especially poor candidate for bringing about some kind of backdoor global constitutionalism³² – and in particular is not a vehicle for imposing neoliberal values, in the sense of promoting a “neoliberal normative vision for world order.”³³ One does not have to go so far as seeing the trade regime as an inert bargaining table detached from any social purpose to keep a comfortable distance from the idea of trade law as a

³¹ Brunnée & Toope, *Legitimacy and Legality*, *supra* note 1 at 13.

³² There is an extensive body of scholarship that does see the international economic legal regime and especially the WTO as a kind of global constitutional order: see, e.g., Ernst-Ulrich Petersmann, “Multilevel Judicial Governance as Guardian of the Constitutional Unity of International Economic Law” (2008), 30 *Loy LA Int’l & Comp L Rev* 367; Ernst-Ulrich Petersmann, “The WTO Constitution and Human Rights” (2000), 3 *JIEL* 19.

³³ Robert Howse, Joanna Langille & Katie Sykes, “Pluralism in Practice: Moral Legislation and the Law of the WTO After *Seal Products*” (2015) 48 *Geo Wash Int’l L Rev* 81 at 90; see also Lang, *supra* note 11 at 4.

form of global constitutionalism instantiating a particular normative vision for world order, neoliberal or otherwise.

But a more thorough and precise understanding both of the formation of legal norms in the trade context and of the genealogy of international norms of animal protection reveals that this story, although not exactly wrong, is incomplete. For one thing, it is not the case that animal-protective norms are a creation of the West imposed on the rest of the world. On the contrary, their instantiation in law, including domestic law, is in part the product of international interaction and the cross-pollination of ideas rooted in different cultures.³⁴ The evolution of legal norms in the international trade regime is better understood as the outcome of a collective process of interaction, ideological struggle, and persuasion, rather than a simple imposition of the will of the more powerful on the less powerful.

It is not that power relationships do not matter or are not reflected in the legal texts that emerge from this process. They do, and they are. But a simple mapping from power differentials to outcomes fails to account for the development of norms with a specifically legal nature, characterized by persuasiveness, legitimacy, and the qualities that generate a sense of obligation and a pull to compliance.³⁵

Brunnée and Toope's interactional theory of international law is especially well suited to analyzing the development of international legal principles concerning animal protection, because it steers a middle course between objectivist or positivist theory

³⁴ See discussion in Sykes, "Nations," *supra* note 2 at 36-41.

³⁵ See generally Brunnée & Toope, *Legitimacy and Legality*, *supra* note 1.

(which would probably have little to say about animal protection in international law, given its very limited reflection in treaty law or in power relations between states) and natural law theory (which might consider animal protection to have a place in international law as a universal moral principle, but can have less explanatory force when it comes to analyzing the effects of supposed legal principles in influencing the behaviour of international actors).³⁶

3.3 Norms and Shared Understandings

3.3.1 The Constructivist Understanding of Norms

The first component of Brunnée and Toope's interactional theory of international law is the proposition that legal norms evolve out of social norms based on shared understandings. This argument is based on constructivist accounts of how norms in general (not just legal norms) come to be. As Brunnée and Toope observe, constructivism's account of "norm creation, evolution and destruction ... has proven to be the strongest bridging point between some international legal theorists and the constructivists."³⁷

Brunnée and Toope define norms, at a high level of generality (that is, not limited to legal norms), as "standards of behavior created through mutual expectation in a social setting."³⁸ This high-level definition includes, but is not limited to, legal norms.³⁹ The

³⁶ See discussion in Sykes, "Beasts in the Jungle," *supra* note 2 at 32-42, comparing how positivist, natural law and interactional theory apply in analyzing the place of animal welfare in international law.

³⁷ Brunnée & Toope, "Constructivism and International Law," *supra* note 1 at 119.

³⁸ *Ibid.*

³⁹ *Ibid.*

concept of shared understandings has common ground with accounts of how norms generally come into being in international society, and Brunnée and Toope draw on the work of other constructivist theorists who have analyzed the genesis and diffusion of international norms.

Congruent with the constructivist concept of mutuality of agent and structure, Brunnée and Toope see shared understandings as created through interaction in a social context. Shared understandings are shared “precisely because they are maintained and generated through social interaction.”⁴⁰ Once shared understandings exist, they, in turn, influence the actors who generated them: “shared understandings become ‘structures’ that shape how actors perceive themselves and the world, how they form interests and set priorities, and how they make arguments or evaluate others’ arguments.”⁴¹

Brunnée and Toope posit that actors generate and maintain shared understandings through social learning in “communities of practice,” a term borrowed from Emmanuel Adler and others.⁴² This means that norms are not simply formed in people’s minds and communicated to others, but created and maintained through an ongoing process of negotiation and engagement in social practice. The practice shapes the identities and relationships of those participating in it, just as much as the participants create the practice.⁴³ It should be noted that the word “communities” in “communities of practice” does not necessarily imply egalitarian relationships or harmony, and is not intended to

⁴⁰ Brunnée & Toope, *Legitimacy and Legality*, *supra* note 1 at 65.

⁴¹ *Ibid.*

⁴² *Ibid* at 62-64; Emanuel Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations* (London and New York: Routledge, 2005).

⁴³ Brunnée & Toope, *ibid* at 62-63.

mask the unequal power relationships that sometimes characterize international interaction.⁴⁴

Brunnée and Toope also make use of concepts used by other constructivist theorists of international relations to explain the process by which norms and shared understandings are formed. One such conceptual tool is the idea that norms emerge in stages of a life cycle or “norm cycle,” posited by Martha Finnemore and Kathryn Sikkink.⁴⁵ Another is Peter Haas’s account of norm construction through the activities of “epistemic communities.”⁴⁶ These accounts focus on the generation of norms by actors – the agent rather than the structure side of the equation – and thus for purposes of interactional IL theory they need to be supplemented by a focus on interaction in communities of practice.

3.3.2 International Norms and Animal Protection

The idea of norms based on shared understandings, the norm cycle and epistemic communities are all concepts that have resonance for observers of the evolution of animal protection as a “globally recognized issue” and an ethical concern for humanity (in the words of the *EC – Seal Products* panel⁴⁷). These ideas about how norms evolve in

⁴⁴ *Ibid* at 63.

⁴⁵ *Ibid* at 57-59; Martha Finnemore & Kathryn Sikkink, “International Norm Dynamics and Political Change” (1998) 52 *Int’l Organization* 887.

⁴⁶ Brunnée & Toope, *ibid* at 59-60; Peter Haas, “Epistemic Communities” in Daniel Bodansky, Jutta Brunnée & Ellen Hey, eds, *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2007) 791 [Haas, “Epistemic Communities”]; Peter M Haas, “Introduction: Epistemic Communities and International Policy Coordination” (1992) 46:1 *International Organization* 1 [Haas, “Policy Coordination”].

⁴⁷ *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products* (Complaints by Canada and Norway) (2013), WTO Docs WT/DS400/R, WT/DS401/R, WT/DS400/R/Add1, WT/DS401/R/Add1 at paras 7.409, 7.420. See discussion in Chapter One.

international society are illuminating when applied to the evolution of global animal law so far, and to offer some insight into its significance and potential next developments.

Finnemore and Sikkink define norms as rules of social behaviour that are distinguished by their “prescriptive (or evaluative) quality of ‘oughtness.’”⁴⁸ Norms “involve standards of ‘appropriate’ or ‘proper’ behavior” that are inherently social: “We only know what is appropriate by reference to the judgments of a community or a society. We recognize norm-breaking behavior because it generates disapproval or stigma and norm conforming behavior because it produces praise or, in the case of a highly internalized norm, because it is so taken for granted that it provokes no reaction whatsoever.”⁴⁹

Two points can be made about this model of norms as knowable through social judgment. First, it fits with Brunnée and Toope’s emphasis on the centrality of social interaction to norm creation and maintenance. Second, it has explanatory power when applied to the “accelerated evolution regarding how we view the status of animals” observed by Cupp.⁵⁰ Social judgments and expressions of approval or condemnation about animals are changing, and the evolution of animal-protective norms becomes more visible where that change is happening. Practices that only a short time ago – decades or just years – were widely, unquestioningly accepted as appropriate and socially acceptable (in a taken-for-granted manner) now generate disapproval and stigma, at least in some

⁴⁸ Finnemore & Sikkink, *supra* note 45 at 891.

⁴⁹ *Ibid* at 891-892.

⁵⁰ Richard L Cupp, Jr, “Animals as More than ‘Mere Things,’ But Still Property: A Call for Continuing Evolution of the Animal Welfare Paradigm” (2016) 84 U Cinn L Rev 1023 at 1033 (also mentioned in Chapter One).

societies, and to some extent internationally. The normative landscape is shifting,⁵¹ so significantly and quickly that people who have engaged in behavior once seen as appropriate and unremarkable seem quite taken aback to find themselves suddenly excoriated for it.

One example of this shift in the normative landscape is trophy hunting. In 2015, a dentist from Minnesota called Walter Palmer on a hunting safari in Zimbabwe shot and killed a lion known as Cecil, who was distinguished by his magnificent black mane, and had been collared and tracked by researchers at Oxford University.⁵² The killing sparked intense outrage around the world, reflecting not just the imperiled status of lion populations but also the cruelty of the way Cecil was killed and the particular charisma he had as an individual.⁵³ The hunter faced prosecution for illegally hunting Cecil, protestors picketed his dental practice, and he went into hiding.⁵⁴ It must have been a bewildering experience given that hunting is widely seen as a proper and acceptable, even venerated, activity,⁵⁵ and that objecting to trophy hunting would probably have seemed like a fringe position not very long before the Cecil incident.

⁵¹ Jessica Eisen has theorized this evolution in the normative consensus on animal protection using Laurence Tribe's theory of an "evolving ethic," which recognizes that "fundamental legal transformations unfurl through successive public and legal shifts wherein each shift changes the horizons of possibility for what may come next." Jessica Eisen, "Beyond Rights and Welfare: Democracy, Dialogue, and the Animal Welfare Act" (2018) 51:3 U Mich J L Reform 469 at 496.

⁵² Charlotte Blattner, "Can Extraterritorial Jurisdiction Help Overcome Regulatory Gaps of Animal Law? Insights from Trophy Hunting" (2017) 111 AJIL Unbound 419 at 419. "The Death of Cecil the Lion", Editorial, *The New York Times* (31 July 2015), online: The New York Times <<https://www.nytimes.com/2015/07/31/opinion/the-death-of-cecil-the-lion.html>>; Katie Sykes, "Globalization and the Animal Turn: How International Trade Law Contributes to Global Norms of Animal Protection" (2016) 5:1 Transnat'l Env't'l L 55 at 66-67.

⁵³ "The Death of Cecil the Lion," *ibid* (noting that "obviously Cecil, a beautiful beast, is the beneficiary of very selective attention").

⁵⁴ *Ibid*.

⁵⁵ In Canada, some of the provinces have adopted legislation enshrining the right to hunt, "affirming that the capacity for humans to stalk and kill non-humans for enjoyment is among the former's cherished fundamental rights." Vaughan Black, "Rights Gone Wild" (2005) 54 UNBLJ 3 at 3.

Another example is the rapid fall from grace of entertainment facilities that keep captive whales and dolphins, like SeaWorld in the US and Marineland and the Vancouver Aquarium in Canada.⁵⁶ For decades they have been beloved institutions; one scholar described SeaWorld as “one of the most popular and available versions of the wild that contemporary American and international tourists can encounter.”⁵⁷ Now, the normative consensus on the acceptability of keeping large marine mammals in captivity to perform and entertain has shifted. There are protestors outside the theme parks, investigative journalists and documentarians exposing the conditions endured by the animals in those facilities,⁵⁸ and stricter regulation.⁵⁹

A related point can be made about the status of animal protection in international law. Norms operate in international law scholarship as much as in other social institutions, and sometimes their invisible, taken-for-granted quality can determine what is seen as fitting within a discipline like international law and what is not. Animal welfare, as distinct from the protection of species and biodiversity, has not featured much in international law or legal scholarship until recently.⁶⁰ Global animal law scholars seek

⁵⁶ Katie Sykes, “The Whale, Inside: Ending Cetacean Captivity in Canada” (2019) 4:1 Can J Comp & Contemp L 349.

⁵⁷ Susan G Davis, *Spectacular Nature: Corporate Culture and the Sea World Experience* (Berkeley: University of California Press, 1997) at 9.

⁵⁸ Famously, the 2013 documentary on SeaWorld, *Blackfish* (*Blackfish*, 2013, DVD (Los Angeles, Cal: Magnolia Pictures, 2013)) played a significant part in changing public opinion about SeaWorld and cetacean captivity. In Canada, the *Toronto Star*'s investigative series on Marineland had a similar effect (see Linda Diebel & Liam Casey, *Marineland: Inside the Controversy* (Toronto: Star Dispatches, 2013)).

⁵⁹ Canada has just (in June 2019) passed legislation that outlaws keeping captive cetaceans for display: the *Ending the Captivity of Whales and Dolphins Act*, SC 2019, c 11 (formerly Bill S-203).

⁶⁰ Peters, *supra* note 17 at 29 (observing that the “highly differentiated body of international human rights law stands in stark contrast with the almost complete absence of international rules governing the welfare of animals”); Stuart Harrop “Climate Change, Conservation and the Place for Wild Animal Welfare in International Law” (2011) 23:3 J Env'tl L 441 at 442 (describing animal welfare as “the impoverished relative of an already poor relation within the hierarchies of international law and policy”); Werner Scholtz, “Injecting Compassion into International Wildlife Law: From Conservation to Protection?” (2017) 6:3 Transnat'l Env'tl L 463 at 466 (noting that international wildlife law fails to reflect “the settled moral and legal significance of human-animal interaction” and is mainly concerned with

to bring animal protection into the fold of international law, by “erect[ing] a conceptual basis and contribut[ing] to the practical development of the field by furnishing appropriate legal arguments and concepts,” and “stimulat[ing] law reform by identifying legal gaps.”⁶¹

The emergent status of animal law as a serious and identifiable phenomenon in international law – that is, global animal law – is reminiscent of Finnemore and Sikkink’s observations about the status of gender-focused and feminist scholarship in the field of international relations. In Finnemore and Sikkink’s 1998 article, they observed that the leading international relations journal *International Organization* had published only one article related to gender or women in its first fifty years.⁶² They posit that this omission may reveal the presence of a real but unarticulated norm: “there may have been a well-internalized norm (with a taken-for-granted quality) that research on gender and women did not constitute an appropriate topic for international relations scholarship.”⁶³

Arguably, there has been a similar understanding, so obvious it has not needed to be stated, that animal issues (insofar as they are distinct from environmental protection) do not belong in international legal discourse or scholarship.⁶⁴ Scholars of global animal law are turning a critical light on that taken-for-granted assumption, exposing it, questioning it, and changing it.

conservation while “largely ignor[ing] the fact that it regulates sentient beings, which are capable of experiencing pain and suffering”).

⁶¹ Anne Peters, “Global Animal Law: What It Is and Why We Need It” (2016) 5:1 *Transnat’l Evt’l L* 9 at 20.

⁶² Finnemore & Sikkink, *supra* note 45 at 894 n 34.

⁶³ *Ibid* at 894 n 34.

⁶⁴ Scholtz, *supra* note 60 at 7-9, criticizing international environmental law’s blind spot with respect to the ethical dimension of how sentient animals are treated, and its anthropocentrism.

3.3.3 The Norm Cycle

Finnemore and Sikkink identify three stages in the emergence of “life cycle” of a norm in international society.⁶⁵ The first stage is the emergence of a norm. At this stage, proponents of the norm – “norm entrepreneurs,” in their phrase – persuade others to recognize and adopt the norm and to elevate it to international status.⁶⁶ Norm entrepreneurs, whose role in getting a norm established at this stage is all-important, are “agents having strong notions about appropriate or desirable behavior in their communities.”⁶⁷ They are “critical for norm emergence because they call attention to issues or even ‘create’ issues by using language that names, interprets and dramatizes them.”⁶⁸

The second stage is widespread acceptance of the norm. At some point there is a threshold level of acceptance by a critical mass of states, following which the norm “cascades.”⁶⁹ This stage is “characterized ... by a dynamic of imitation as the norm leaders attempt to socialize other states to become norm followers.”⁷⁰ The third stage is internalization: the norm becomes internalized, and compliance with it is taken for granted as a standard for good state behaviour.⁷¹

Finnemore and Sikkink do not make strong claims about which characteristics, qualities or circumstances increase the chances that a norm will take hold transnationally

⁶⁵ Finnemore & Sikkink, *supra* note 45 at 895.

⁶⁶ *Ibid* at 893, 895.

⁶⁷ *Ibid* at 896.

⁶⁸ *Ibid* at 897.

⁶⁹ *Ibid* at 895.

⁷⁰ *Ibid*.

⁷¹ *Ibid* at 895, 898.

and “cascade,” leaving the question open for further empirical investigation, but they do summarize several plausible hypotheses from the literature.⁷²

Certain formal characteristics, such as clarity and specificity, increase the chance that a norm will be effective.⁷³ This proposition resonates with the argument of interactional theory (discussed below) that norms must possess characteristic qualities of legality to become legal norms, and thus to be binding or to command fidelity.

In addition, analogy or similarity to existing norms may increase the chance of acceptance.⁷⁴ This quality of “adjacency” to already-established norms is especially important, Finnemore and Sikkink argue, in international law, “since the power or persuasiveness of a normative claim in law is explicitly tied to the ‘fit’ of that claim with existing normative frameworks.”⁷⁵

This observation helps to explain the rhetorical strategies of animal advocates who borrow from and analogize to human rights frameworks, structuring claims on behalf of nonhuman animals as analogous to established human rights norms both in substance – for example, by pushing for recognition of animals’ basic rights to life, liberty and freedom from torture) and in form (presenting these claims as “Universal Declarations”).⁷⁶ Peters describes these analogies as “transferable legal concepts,” noting

⁷² *Ibid* at 905-909.

⁷³ *Ibid* at 907.

⁷⁴ *Ibid* at 908.

⁷⁵ *Ibid* at 908.

⁷⁶ For example, the proposed Universal Declaration of Animal Rights (draft (as revised in 1989) online: <http://jose.kersten.free.fr/aap/pages/uk/UDAR_uk.html>), the draft Universal Declaration of Animal Welfare (2011 version available in the Global Animal Law database, online: <<https://www.globalanimallaw.org/database/universal.html>>), the Declaration of the Rights of Great Apes proposed by the Great Ape Project (Paola Cavalieri & Peter Singer, eds, *The Great Ape Project: Equality Beyond Humanity* (London: Fourth Estate, 1993), and the “Declaration of Rights for Cetaceans: Whales and Dolphins” proposed by a conference of scientists and scholars (Declaration of Rights for Cetaceans:

that they borrow from “established legal institutions and concepts for the benefit of human beings.”⁷⁷ For example, the “five freedoms” for farmed animal welfare in “structure and terminology are based quite clearly on the ‘four freedoms’ applicable to human beings” formulated by President Franklin D. Roosevelt⁷⁸ (and reflected in international human rights instruments).

The insight that the emergence and acceptance of norms is linked to “adjacency,” and that adjacency to already established norms can make the evolution of shared understandings more likely, is a useful way of understanding how animal advocacy efforts that consciously borrow from international human rights frameworks contribute to building norms based on shared understandings.

3.3.4 Epistemic Communities

Haas’s account of the role of epistemic communities in international relations also contributes to the picture of how shared understandings evolve and ground norms. Epistemic communities, by Haas’s definition, are “networks of knowledge-based experts”⁷⁹ made up of “professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area.”⁸⁰ What distinguishes an epistemic community from members of

Whales and Dolphins, online: <www.cetaceanrights.org>). See the discussion of the deployment of this tool of “adjacency” to advocate for international animal rights Section 4.5.1 below.

⁷⁷ Peters, *supra* note 17 at 34.

⁷⁸ *Ibid.*

⁷⁹ Haas, “Policy Coordination,” *supra* note 46 at 2.

⁸⁰ *Ibid* at 3.

a profession in general is their commitment to a “common policy enterprise” based on a shared worldview,⁸¹ shared normative beliefs and shared ideas of causation and validity.⁸²

Epistemic communities may be national (working within a single country), but transnational epistemic communities can emerge “as a result of the diffusion of community ideas through conferences, journals, research collaboration, and a variety of informal communications and contacts.”⁸³ They play an important role in “helping states identify their interests, framing the issues for collective debate, proposing specific policies, and identifying salient points for negotiation,”⁸⁴ especially when issues are complex and decision-making involves a high degree of uncertainty.

Epistemic communities have the authority and influence to play this role because of their “reputation for impartial expertise.”⁸⁵ They are not the same as interest groups or activists, whose prescriptions are seen as being driven by conviction or ideology rather than disinterested knowledge. Haas asserts, for instance, that international environmental lawyers are not an epistemic community, in part because they “lack the public respect for impartial views about the world to which their advice is deployed.”⁸⁶ Epistemic communities, therefore, can overlap with Finnemore and Sikkink’s “norm entrepreneurs,” the actors who advocate for recognition of an emerging norm especially at the first stage of its life, but are certainly not coterminous with them.

⁸¹ *Ibid* at 27

⁸² *Ibid* at 3; Haas, “Epistemic Communities,” *supra* note 46 at 793.

⁸³ Haas, “Policy Coordination,” *supra* note 46 at 17.

⁸⁴ *Ibid* at 2.

⁸⁵ Haas, “Epistemic Communities,” *supra* note 46 at 793.

⁸⁶ *Ibid* at 802.

3.3.5 Regime Encounters

In addition to the mechanisms of norm formation that Brunnée and Toope refer to, there is another to add, adopted from Andrew Lang's constructivist analysis of the relationship between the international trade and human rights regimes: the idea of a "regime encounter." Lang describes a regime encounter between human rights and trade which has at times been characterized by deep conflict, notably with the mobilization of global justice movements against the WTO in the 1980s and 1990s.⁸⁷ This was fertile ground for an especially active period of international norm creation around a vision of globalization that was an alternative to economic globalization, emphasizing social justice, development and the empowerment of the poor and oppressed.

The progressive alternative version of globalization to a large extent defined itself in opposition to the neoliberal politics perceived as driving the expansion of the trade regime.⁸⁸ In other words, the global human rights movement crystallized, and started off its own norm cycles, in part through the encounter with another international regime, the international trade regime.

Lang's concept of a regime encounter has similarities with Brunnée and Toope's account of how norms are shaped by the work of norm entrepreneurs, including domestic and global social justice movements, NGOs and civil society groups. But an additional piece of the picture that Lang's analysis brings into focus is the way the particular vision

⁸⁷ Lang, *supra* note 11 at 61-104.

⁸⁸ *Ibid.*

of human rights espoused by the global movement for social justice and human rights was (and still is) constituted in opposition to the international trade regime.

The idea of a regime encounter suggests that resistance and opposition can be key ingredients in norm formation. Through protest, criticism and debate, ideas that were once latent or inchoate can become crystallized and articulated as full-fledged norms that may then go on to win more adherents and eventually “cascade.”⁸⁹ If the struggle plays out in a formal or semi-formal legal forum, it may also be part of a “practice of legality” by means of which legal norms are, in Brunnée and Toope’s account, built and maintained (as discussed below).

On the face of it, the proposition that dispute and contestation play a part in creating international legal norms may seem at odds with Brunnée and Toope’s interactional theory, with its emphasis on consensus and normative convergence. But in my view this point is actually consistent with and implied by interactional IL theory, whose central tenet is that law is formed through *interaction*. Interaction inherently involves contestation, political struggle and encounters between different worldviews. Sometimes this process can reveal lesser or greater areas of overlapping consensus or shared fundamental assumptions. It also prevents false consensus, papering over or ignoring divisions that have not been resolved.

As Lang shows with respect to the human rights / trade encounter, the struggles of the 1980s and 1990s led to a fruitful, sophisticated examination of the relationship between trade and human rights from within both regimes, “in order to work out how the

⁸⁹ See Section 3.3.3.

two regimes might more productively relate to one another.”⁹⁰ The regime encounter is a locus of struggle and opposition, but also one where understandings can ultimately be shared between proponents of different ideational frameworks, even if the common ground may be limited and unstable. International legal regimes do not form or exist in isolation from one another, “as strangers to one another,”⁹¹ but in a context of ideas about overlapping objectives and theoretical foundations, and ongoing struggles over the nature and purpose of each regime as well as the relationship between them.

The encounter between international trade law and animal protection is also a site of contestation where shared understandings, potentially leading to the development of international legal norms, can be formed. The previous chapter discussed Blattner’s argument that engagement with animal protection by the WTO has helped to legitimize the idea of global legal protections for animals,⁹² and Kerr’s work on the potential for animal protection elements in the TPP Environment Chapter to reshape US legal culture’s assumptions about the division between animal welfare and environmental law.⁹³ These examples fit into Lang’s account of how regime encounters work.

The trade-animal protection regime encounter has an important difference from the trade-human rights encounter that Lang focuses on: animal protection is much less established in international law than human rights. At this point, animal protection has no more than an embryonic presence in international law. This regime encounter is

⁹⁰ Lang, *supra* note 11 at 124.

⁹¹ *Ibid* at 23.

⁹² Charlotte Blattner, “An Assessment of Recent Trade Law Developments from an Animal Law Perspective: Trade Law as the Sheep in Wolf’s Clothing?” (2016) 22 *Animal L* 277.

⁹³ Andrew Jensen Kerr, “The Trans-Pacific Partnership and the Construction of a Syncretic Animal Welfare Norm” (2017) 27 *Duke Env’tl L & Pol’y Forum* 155.

between a new international legal regime in its early stages of formation (animal protection), in interaction with an established, powerful and mature one (trade).

3.3.6 From Norms to Law

To sum up, Brunnée and Toope's theory of interactional international law explains the emergence and evolution of norms in global society through a process of social interaction, often including the work of norm entrepreneurs and epistemic communities, that gives rise to "shared understandings." Lang's concept of "regime encounters" adds the idea that this process may also include struggle and contestation with existing international legal regimes.

Shared understandings are a prerequisite for international legal norms, but do not in themselves constitute legal norms. They are a kind of normative consensus, but they need not amount to convergence on shared norms in a thick sense, or "deep value coalescence."⁹⁴ Shared understandings *may* be deep, or they may be more limited or minimal. Where they lie on this spectrum affects what kind of law can emerge from them: "the deeper the shared understandings, the greater the possibility of ambitious law."⁹⁵

Shared understandings constitute a "foundation" for law, but law does not emerge unless they "come to be intertwined with distinctive internal qualities of law and practices

⁹⁴ Brunnée & Toope, *Legitimacy and Legality*, *supra* note 1 at 13.

⁹⁵ *Ibid* at 56.

of legality.”⁹⁶ The next Section covers Brunnée and Toope’s account of what the distinctive internal qualities of law are.

3.4 The Distinctive Qualities of Law

Legal norms are a special subset of norms. A legal norm is one that is binding, that those subject to it are obligated to follow; international legal norms are “possessed of a special ability to influence and behavior of international actors.”⁹⁷ Brunnée and Toope argue that this character of bindingness is generated not by the fact that law is imposed by an outside or supervening authority (in international law, a horizontal system, there is no such authority) but by internal characteristics that particularly belong to law, drawn from the legal theory of Lon Fuller.⁹⁸

3.4.1 Traditional Sources

Interactional theory’s approach to determining what constitutes law (or is on the way to becoming a legal norm) is not the same as the usual starting point in much of international legal scholarship, which identifies law by looking to recognized sources of international law.⁹⁹

The starting point in this inquiry is usually Article 38(1) of the Statute of the Court of International Justice, which sets out a list of sources.¹⁰⁰ It provides that, when

⁹⁶ *Ibid.*

⁹⁷ Brunnée & Toope, “Elements of an Interactional Theory,” *supra* note 1 at 24.

⁹⁸ *Ibid* at 27, 48; Brunnée & Toope, “Introduction,” *supra* note 1 at 310.

⁹⁹ See generally Jean d’Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford: Oxford University Press, 2011).

¹⁰⁰ *Statute of the International Court of Justice*, as annexed to the *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 [ICJ Statute].

“decid[ing] in accordance with international law such disputes as are submitted to it,” the Court shall apply the following:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.¹⁰¹

This list of sources can be summed up (in more current terminology) as: treaties, customary international law, general principles of international law, and secondary sources including judicial decisions.

Article 38 (or, more precisely, its predecessor, Article 38 of the Statute of the Permanent Court of International Justice) has been called “the most important attempt to specify the sources of international law”¹⁰² and is “often put forward as a complete statement of the sources of international law.”¹⁰³

Yet this taxonomy of formal sources of international law, although it is a useful starting point, is not the end of the inquiry. It leads into “deeper questions about the

¹⁰¹ ICJ Statute Art 38(1). Article 59 specifies that judgments of the Court are binding only on the parties and in the particular case, so judicial decisions of the ICJ are not binding law in the same way that precedential decisions in common-law jurisdictions are.

¹⁰² James Crawford, *Brownlie’s Principles of Public International Law*, 8th ed (Oxford: Oxford University Press, 2012) at 21.

¹⁰³ *Ibid* at 22.

nature and function of sources of international law.”¹⁰⁴ In part the deeper questions arise from the lack of “constitutional machinery of law-making” at the international level, analogous to that which exists within states.¹⁰⁵ The traditionally recognized sources are authoritative not because they emanate from such an authority (since none exists), but are best understood as “*evidence* of a normative consensus among states and other relevant actors concerning particular rules or practices.”¹⁰⁶

The “deeper questions” Brunnée alludes to are linked to one fundamental question: what is it that makes international law *law*? Answering this question involves looking at the legitimacy and authority of law, or what persuades those who are subject to it treat it as binding. What makes states comply with international law, given that there is no enforcement authority to punish them for not doing so, and in what circumstances do they recognize it as law to be complied with, given that it does not originate from a constitutional authority? What gives international law authority and legitimacy? These questions are especially important in the study of evolving or emerging international law, or norms that are at some point in the process of potentially becoming law, a category that global animal law fits into.

3.4.2 Evolving Law-Making Processes

Global animal law, to the extent that it has a presence in the international legal system at all at this point, consists in large part of emergent or aspirational principles without a strong presence in the Article 38 sources.¹⁰⁷ Although species protection is an

¹⁰⁴ Brunnée, “Sources,” *supra* note 1 at 961.

¹⁰⁵ Crawford, *supra* note 102 at 20.

¹⁰⁶ *Ibid* at 21 (emphasis in the original).

¹⁰⁷ See generally Chapter Four.

established objective of international environmental law, animal welfare norms “remain incidental in international legal regimes” and are mainly notable for their absence from treaty law or binding international law in the usual sense.¹⁰⁸ Furthermore, the proposition that animal-protective principles have global and cross-cultural legitimacy is a highly contested one.¹⁰⁹

One possible conclusion that could be reached from this evidence is, of course, that there *is* no global animal law, outside of species protection, which would then be seen as simply an aspect of biodiversity not distinguished in any significant way from the protection of endangered species of plants.¹¹⁰ And yet that conclusion would fail to account for the widespread and increasing activities of norm creation and diffusion concerning animal welfare and animal protection in international society, aimed in part at ensuring the expression of these norms in law.

The traditional Article 38 taxonomy of sources leaves out new processes of norm creation that have an important place in today’s international legal system, such as decisions of conferences to the parties to treaties, standard-setting by treaty plenary bodies, guidelines created by international agencies, and so-called “soft” or nonbinding law generally.¹¹¹ For Brunnée, the prominence of such processes and the intertwining of “hard” and “soft” rules in international environmental law makes that area “fertile terrain

¹⁰⁸ Peters, *supra* note 61 at 13.

¹⁰⁹ Peters, *supra* note 17 at 37.

¹¹⁰ Laura Nielsen, *The WTO, Animals and PPMs* (Leiden: Martinus Nijhoff, 2006) at 44.

¹¹¹ See, e.g., Alan Boyle, “Some Reflections on the Relationship of Treaties and Soft Law” (1999) 48 ICLQ 549; Alan Boyle, “Soft Law in International Law-Making” in Malcolm Evans, ed, *International Law* (Oxford: Oxford University Press, 2014) 118; Christine Chinkin, “The Challenge of Soft Law: Development and Change in International Law” (1989) 38 ICLQ 850; Arnold N Pronto, “Understanding the Hard/Soft Distinction in International Law” (2015) 48:4 Vanderbilt J Transnat’l L 941; Bamali Choudhury, “Balancing Soft and Hard Law for Business and Human Rights” (2018) 67:4 ICLQ 961.

for an exploration of the evolving range of law-making processes.”¹¹² One of the examples she cites to illustrate the permeable boundaries and overlap of “hard” or binding law and “soft” principles is the concept of sustainable development. Sustainable development is articulated in “soft” instruments such as the 1992 *Rio Declaration on Environment and Development*.¹¹³ It is also referred to in the preamble of the *Marrakesh Agreement Establishing the World Trade Organization*¹¹⁴ as an objective animating the global trading system. In WTO dispute settlement proceedings, Brunnée notes, this reference to sustainable development in the trade regime’s constitutive treaty has been “an entry point for a more environmentally minded interpretation of trade law by dispute settlement panels and the Appellate Body.”¹¹⁵

These observations carry over to global animal law, where most provisions relating to animal welfare “are contained in secondary law emanating from international organizations, bodies, and conferences of the parties.”¹¹⁶ To understand the significance of these norms and the process of their creation the Article 38 list of sources is of limited help. It is often more illuminating to look for what Brunnée calls “family resemblance” between established sources and other (newer, softer, more aspirational) varieties of lawmaking.¹¹⁷

¹¹² Brunnée, “Sources,” *supra* note 1 at 966.

¹¹³ UN Doc A/CONF.151/26 (vol. I); 31 ILM 874 (1992).

¹¹⁴ 1876 UNTS 493, 33 ILM 1144 (1994).

¹¹⁵ Brunnée, “Sources,” *supra* note 1 at 980.

¹¹⁶ Peters, *supra* note 61 at 14.

¹¹⁷ Brunnée, “Sources,” *supra* note 1 at 980.

3.4.3 Fuller's Criteria of Legality

For Brunnée and Toope, the family resemblance between established legal norms and evolving or potential legal norms is seen in certain characteristics that connect law to a form of natural justice, or the concept of the rule of law. They adopt as markers of this quality of law the “criteria of legality”¹¹⁸ enumerated by Lon Fuller. Fuller’s criteria (or something like them) “are central to every effort to define the rule of law and they capture distinctive traits of legal practice.”¹¹⁹

Fuller’s criteria of legality¹²⁰ are:

- *Generality*. This requirement means that there must be rules of general application, as opposed to *ad hoc* determinations on a case-by-case basis.
- *Promulgation*. Law must be made publicly available so that people who are subject to it know what it is that they are subject to.
- *Non-retroactivity*. Generally speaking, law should apply only prospectively and not retroactively.
- *Clarity*. Law must have at least a baseline level of clarity and intelligibility.
- *Avoidance of contradiction*. Law cannot impose requirements that contradict one another.

¹¹⁸ Lon Fuller, *The Morality of Law*, revised ed (New Haven: Yale University Press, 1969); see also discussion in Brunnée & Toope, *Legitimacy and Legality*, *supra* note 1 at 20-33; Brunnée & Toope, “Elements of an Interactional Theory,” *supra* note 1 at 53-55.

¹¹⁹ Brunnée & Toope, ““Self-Defence Against Non-State Actors,”” *supra* note 1 at 278.

¹²⁰ Summarized from Fuller, *supra* note 118 at 49-91.

- *Possible to obey.* Law cannot demand compliance that is impossible to perform.
- *Relative constancy.* There should not be constant changes in law so that people cannot organize their affairs and behaviour to comply with the rules.
- *Congruence of official action with declared rules.* Officials should not behave in a way, or interpret or apply law in a manner, that is completely unsupported by the apparent meaning of the law.

Fuller argued that these features expressed what he called the “internal morality of law.”¹²¹ Fuller defended the proposition that law has its own inner morality in his arguments against legal positivism, most famously in his debate with the great positivist philosopher HLA Hart. Hart insisted on the separateness of law and morality and that the distinction must be observed between is and ought, between “law as it is and law as it should be.”¹²² For the positivist Hart, what gives law its force as law is its provenance from duly constituted lawmaking authorities.¹²³

Fuller, by contrast, saw the rule of law as something more than the rule of the powerful. Purported laws could, he argued, be laid down by those in authority, but if they lacked the characteristics of law – if they were kept secret, for example, or demanded contradictory things or were impossible to follow – they would not actually be law but just the arbitrary exercise of power, which is not the same thing. For Brunnée

¹²¹ Fuller, *supra* note 118 at 4.

¹²² HLA Hart, “Positivism and the Separation of Law and Morals” (Holmes Lecture) (1958) 71 Harv L Rev 593.

¹²³ *Ibid.*

and Toope, it is the criteria of legality that explain law's "obligatory quality"; when they are met, "law will tend to attract its own adherence."¹²⁴

Fuller's theory is a form of natural justice theory, but it is a minimalist, procedural version of natural justice. It requires no "fundamental shared commitments to a single political morality."¹²⁵ Fuller's theory is in the middle ground between the positivist rejection of any moral standard for judging the legality or legitimacy of law, and strong versions of natural justice that evaluate law against external morality.

The idea of law's internal morality, and the emphasis on communication, intelligibility and interpretation in Fuller's theory, locate the binding force of law elsewhere than in its provenance from a ruler with the authority to promulgate law. The theory explains law as something distinct from an exercise of raw power. Fuller's account of law's authority emphasizes mutual collaboration in a social enterprise, where those to whom law applies "are not merely subjects, but are interacting agents creating law through specific processes of communication."¹²⁶

Fuller's own focus was domestic, not international law. Brunnée and Toope note that he rarely turned his attention to international law, and when he did so he suggested that the rule of law in international society might be unfeasible.¹²⁷ For Brunnée and Toope, though, a conception of law as a non-hierarchical enterprise based on reciprocity is especially helpful for making sense of the international legal system, a horizontal structure with no central authority which nevertheless functions recognizably as law.

¹²⁴ Brunnée & Toope, *Legitimacy and Legality*, *supra* note 1 at 27.

¹²⁵ *Ibid* at 21.

¹²⁶ *Ibid* at 24.

¹²⁷ *Ibid* at 33 and n 60.

They also see Fuller’s theory as able to address “the greatest challenge facing international law: to construct normative institutions while admitting and upholding the diversity of peoples in international society,” because of its agnosticism about substantive ends.¹²⁸

Reciprocity, communication and mutual participation are essential features of ordering human affairs through law, and it is the idea of participation in law as an enterprise or form of social ordering that leads to the last of interactional theory’s three pillars: the “practice of legality.” For Brunnée and Toope, participation in a practice of legality is what builds law and keeps it going, while the absence of a practice of legality is an indication of a purported legal norm that has fallen into disuse or never really became law.¹²⁹

3.5 The Practice of Legality

The idea of a practice of legality brings together the other two themes of the interactional framework (shared understandings and the criteria of legality) by defining lawmaking as a particular kind of social interaction. Brunnée describes the practice of legality as a process of norm application that satisfies the requirements of legality.¹³⁰ When norm creation meets the criteria of legality and “is matched with norm application, interpretation and implementation that also satisfies them ... actors are able to organize their interactions through law.”¹³¹

¹²⁸ *Ibid* at 21.

¹²⁹ Brunnée & Toope, “Introduction,” *supra* note 1 at 312-314.

¹³⁰ Brunnée, “Sources,” *supra* note 1 at 963.

¹³¹ Brunnée & Toope, “Sovereignty,” *supra* note 1 at 499.

The practice of legality has obvious commonalities with the processes of generating social norms and shared understandings that interactional IL theory highlights. In particular, there is a parallel to the idea of “communities of practice,” in Adler’s terminology, as the source of social norms.¹³² Similarly, the norm-building work of “norm entrepreneurs” and “epistemic communities” could occur within a practice of legality. But it is a particular kind of practice that meets the distinctively legal criteria identified by Fuller. The practice of legality (as distinct from other kinds of social practice) involves norm application – “legal argumentation, interpretation, implementation or enforcement measures” – that manifests the criteria of legality.¹³³

This is a model of creation, application, maintenance and modification of law – and even of its destruction – through a dynamic, ever-evolving process, “continuing struggles of social practice”¹³⁴ involving interaction among all the actors in the system. Interactional IL theory says that international law commands fidelity, and is seen as legitimate, because it is created and upheld through this particular kind of process. Law is not imposed on subjects, but is the product of active give-and-take among all participants that exhibits the “internal morality of law” as Fuller perceived it. A practice of legality “produces law that is legitimate in the eyes of the persons to whom it is addressed.”¹³⁵

¹³² Brunnée & Toope, “Introduction,” *supra* note 1 at 313.

¹³³ Brunnée, “Sources,” *supra* note 1 at 964.

¹³⁴ Brunnée & Toope, *Legitimacy and Legality*, *supra* note 1 at 22.

¹³⁵ *Ibid* at 27.

3.6 The Idea of a Continuum of Legality

The dynamic nature of the practice of legality also implies that law itself is not fixed or static, and since law can be in a state of becoming (or unbecoming) law it also follows that law “not an all-or-nothing proposition”¹³⁶ or an on/off switch. There can be law by degrees, or a “continuum of legality,” and it is “possible to talk about law that is being constructed.”¹³⁷ The idea of a “continuum of legality” is a helpful analytical device for deepening understanding of global animal law, an area that is still largely aspirational and embryonic.

Interactional theory’s idea of a “continuum of legality” is a particularly useful theoretical lens through which to examine an emerging area of international law in its early stages, as global animal law is. Traditional, positivist models of what counts as international law, heavily influenced by the Article 38 list of sources, do not tell us very much about the extensive and burgeoning developments in this area.

On the traditional view, there is little to say about these developments except that they do not amount to *law*. That may be the conclusion of an interactional analysis, too. In Chapter Four, I will apply the interactional framework to inquire whether “global animal law” has reached the stage in its evolution where it can properly be called law, and it is probably not a spoiler to say that for the most part it has not. But interactional theory does not stop at a simple yes or no answer to the question of whether law has emerged. It enables observers to organize and make sense of steps being taken towards

¹³⁶ Brunnée & Toope, *Legitimacy and Legality*, *supra* note 1 at 23.

¹³⁷ *Ibid* at 22-23; Brunnée & Toope, “Elements of an Interactional Theory,” *supra* note 1 at 47-48.

the formation of law, and recognize and understand signs of further work that would develop, apply and maintain global animal law (a practice of legality). It implies no assumptions about whether new and emerging norms will move further along the continuum and attain a more clearly legal status, but it provides the analytical tools needed to identify and evaluate stages in the process.

3.7 Conclusion

This chapter has introduced the interactional theory of international law developed by Brunnée and Toope, and outlined its elements: norms based on shared understandings, the distinctive qualities of legal norms, and the idea of a practice of legality. The analytical tools of interactional theory are useful for understanding the formation of global animal law, and the effect on the formation of global animal law of interaction with the international trade law regime. This theoretical model assists in organizing and making sense of what might otherwise seem to be disparate and incoherent phenomena,¹³⁸ and reveals the potential for the practice of legality unfolding in the WTO dispute settlement system to move animal-protective principles further along the “continuum of legality.”

Global animal law is a rich area for investigation using a constructivist approach and interactional theory. In this respect, it can be compared to international environmental law, Brunnée’s main area of expertise, which she describes, as “fertile

¹³⁸ See Peters, *supra* note 61 at 15 (observing that “the piecemeal offering of international and regional law [on animal protection] does not form a coherent and ‘thick’ body of law” because the provisions are “fragmented, often qualified, often inconsistent, unenforceable, and moreover unknown to most lawyers, law enforcers and legal scholars alike”).

terrain for an exploration of the evolving range of law-making practices” because there is so much and such a variety of new lawmaking work happening in this field.¹³⁹ Brunnée and Toope observe that “most of the work seeking to draw together the insights of constructivism and international legal theory” has focused on areas – including international environmental, human rights and criminal law – where there has been “extraordinary normative evolution” since the second half of the twentieth century.¹⁴⁰

Brunnée and Toope do not include animal protection in that list (except to the extent that it forms part of international environmental law), perhaps because it is such a new area in international law that it did not come to their attention, or because there was not much to say about it when their book on interactional theory came out in 2010 (not very long ago, but a long time ago in the evolution of global animal law). Global animal law is another area experiencing extraordinary normative evolution, and it, too, is fertile terrain for applying constructivist analysis and the interactional international law framework.

With respect to international trade law’s contribution to global animal law, the most powerful concept offered by interactional IL theory is that of a “practice of legality” as a place of normative contestation as well as adherence to norms. The trade regime, especially the WTO dispute settlement system, is engaged in the business of interpreting, upholding and enforcing the legal norms that are internal to itself, the rules of international trade. But it also plays a part in articulating and refining norms that are external to itself and are rooted in other areas of international law. This is a process that

¹³⁹ Brunnée, “Sources,” *supra* note 1 at 966.

¹⁴⁰ Brunnée & Toope, “Constructivism and International Law,” *supra* note 1 at 136-137.

tends to make emergent norms gradually become more law-like. The international trade regime's own particular brand of a practice of legality is contributing to the growth of animal protection norms in global law.

Interactional theory provides a framework for explaining why the WTO decision in *EC – Seal Products* is such an important development in global animal law, and the further possibilities that could follow. Interactional theory proposes that social interaction in a practice of legality is indispensable in turning social norms into law. Logic suggests that this indispensable element is all the more important when a norm faces significant hurdles on the journey to becoming law, which is the case for animal protection. This theoretical proposition helps to explain the significance of engagement with animal protection in the context of practices of legality in the trade regime, notably the WTO DSB and compliance and capacity-building processes under PTAs. Later chapters (Five through Eight) examine in more detail how this is happening. First, in Chapter Four, I explain the emerging phenomenon of global animal law and apply the interactional framework to assess its viability as law.

Chapter 4 Global Animal Law

4.1 Introduction

This thesis argues that international trade law, especially since *EC – Seal Products*,¹ contributes to the development of animal protection norms in international law. This chapter examines the international animal law side of that equation. It begins with an explanation of what scholars mean by the term “global animal law,” why they see a need for this body of law to arise now, and how the philosophical foundation of global animal law was laid in the wider intellectual movement known as the “animal turn.” The chapter then surveys the landscape of global animal law, looking at international legal instruments and initiatives on the environment, animal welfare, and animal rights.

I then apply the tools of interactional international law (discussed in Chapter Three) to assess to what extent global animal law has now emerged as law, as understood by interactional theory – that is, a set of legal norms exhibiting the characteristics of law and being articulated and applied through a practice of legality. Finally, I look at how the encounter between global animal law and international trade law might turn out to solve some of the deficiencies that global animal law now has as putative body of law.

¹ *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products* (Complaints by Canada and Norway) (2013), WTO Docs WT/DS400/R, WT/DS401/R, WT/DS400/R/Add1, WT/DS401/R/Add1 as modified by *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products (Complaints by Canada and Norway)* (2014) WT/DS401/AB/R [*EC – Seal Products*].

4.2 What is Global Animal Law?

The term “global animal law,” or “GAL,” has emerged in the last decade or so as a label for various efforts to enhance international governance mechanisms to protect animals, to give voice to their interests, and to regulate the way they are treated by humans. Global animal law is a disparate and fragmented phenomenon that consists in large part of advocacy, proposals and theoretical arguments, as well as some elements of positive law.

The recognition of global animal law as a phenomenon is largely due to the work of legal scholars who are working to identify, categorize, theorize and further develop transboundary and supranational law for animal protection.² Appropriately, global animal law scholars are working in a number of places around the world.

In Europe, one of the leading scholars and theorists in this area is Anne Peters, Director of the Max Planck Institute for Comparative Public Law and International Law.³ A cluster of European scholars who studied under Peters and are now doing further work

² Charlotte Blattner, “An Assessment of Recent Trade Law Developments from an Animal Perspective: Trade Law as the Sheep in Wolf’s Clothing?” (2016) 22 *Animal L* 277 at 279 (“Global animal law ... is a branch of international law dealing with the trans-boundary reality of human-animal relations”).

³ Anne Peters, “Introduction to Symposium on Global Animal Law (Part I): Animals Matter in International Law and International Law Matters for Animals” (2017) 111 *AJIL Unbound* 252; Anne Peters, “Introduction to Symposium on Global Animal Law (Part II): The Case for Global Legal Animal Studies” (2017) 111 *AJIL Unbound* 395 [Peters, “Global Legal Animal Studies”]; Anne Peters, “Liberté, Égalité, Animalité: Human-Animal Comparisons in Law” (2016) 5 *Transnat’l Env’t’l L* 25 [Peters, “Human-Animal Comparisons”]; Anne Peters, “Global Animal Law: What It Is and Why We Need It” (2016) 5:1 *Transnat’l Env’t’l L* 9 [Peters, “Global Animal Law”]; Anne Peters, Saskia Stucki & Livia Boscardin, *Animal Law: Reform or Revolution?* (Zürich: Schulthess, 2015).

in this direction include Saskia Stucki⁴ and Charlotte Blattner.⁵ Another European-based project, more focused on cataloguing animal protection laws around the world at all levels of government, including international, is the Global Animal Law Project, founded by Antoine Goetschel.⁶ Sabine Brels, a leader of the Global Animal Law Project, has also researched and written on the evolution of animal law globally⁷ and the need for an international approach to animal protection.⁸ Paola Cavalieri, an Italian moral philosopher, has focused much of her work on universal human rights – one of the signature projects of international law; her argument that the internal logic of human rights requires that they include at least some nonhuman animals have important implications for the idea of rights in international law.⁹

In the US, David Favre has been working for decades to build a workable model for an international animal welfare treaty,¹⁰ and the Animal Legal & Historical Center¹¹ housed at Michigan State University (where Favre is based) maintains a database of

⁴ Saskia Stucki, “Symposium on Global Animal Law (Part I): (Certified) Humane Violence? Animal Welfare Labels, the Ambivalence of Humanizing the Inhumane, and What International Humanitarian Law Has to Do with It” (2017) 111 AJIL Unbound 277; Saskia Stucki, “Towards Hominid and Other Humanoid Rights: Are We Witnessing a Legal Revolution?” (2016) online: <https://intr2dok.vifa-recht.de/receive/mir_mods_00000726>.

⁵ Charlotte Blattner, “Tackling Concentrated Animal Agriculture in the Middle East through Standards of Investment, Export Credits, and Trade” (2018) 10 Middle Eastern J L & Governance 141; Charlotte Blattner, “Can Extraterritorial Jurisdiction Help Overcome Regulatory Gaps of Animal Law? Insights from Trophy Hunting” (2017) 111 AJIL Unbound 419; Charlotte Blattner, *The Extraterritorial Protection of Animals: Admissibility and Possibilities of the Application of National Animal Welfare Standards to Animals in Foreign Countries* (PhD thesis, University of Basel, 2016) [unpublished]; Charlotte Blattner, “Sheep in Wolf’s Clothing,” *supra* note 5.

⁶ Global Animal Law Project, online: < <https://www.globalanimallaw.org/index.html>>.

⁷ Sabine Brels, *Le Droit du Bien-Être Animal dans le Monde* (Paris, L’Harmattan, 2017).

⁸ Sabine Brels, “A Global Approach to Animal Protection” (2017) 20:1 J Int’l Wildlife L & Pol’y 105.

⁹ Paola Cavalieri, *The Animal Question: Why Nonhuman Animals Deserve Human Rights*, translated by Catherine Woollard (Oxford: Oxford University Press, 2001). See also Paola Cavalieri & Peter Singer, eds, *The Great Ape Project: Equality Beyond Humanity* (London: Fourth Estate, 1993).

¹⁰ See, e.g., David S Favre, “An International Treaty for Animal Welfare” (2012) 18 Animal L 237.

¹¹ Online: <https://www.animallaw.info/site/world-law-overview>.

global and international animal-related laws. Thomas Kelch has written extensively on globalization, animal law, and the need to identify globally shared values and principles of governance for animal protection.¹² The work of Steven White in Australia¹³ and Werner Scholtz in South Africa also highlights gaps in international law with respect to the protection of animals.¹⁴

Peters writes that academics working in the global animal law field “are developing proposals to fill gaps in international law, are reformulating traditional legal concepts such as rights, jurisdiction, or civilians, and are reconfiguring the domestic law-international law divide.”¹⁵ Global animal law borrows from the methodological approach of scholars of “transnational” or “global” law more generally, in that it is not limited to international law in the classic sense of binding legal obligations between states, but also looks at comparisons between different legal regimes and at mechanisms beyond “hard” law, such as international standard-setting.¹⁶ This broader lens is necessary to capture the phenomenon of global animal law because “the relevant body of hard international law is very fragmented and thin.”¹⁷

¹² Thomas G Kelch, *Globalization and Animal Law: Comparative Law, International Law, and International Trade* (Alphen Aan Den Rijn: Kluwer Law International, 2011); Thomas G. Kelch, “CITES, Globalization, and the Future of Animal Law,” in Randall S Abate, ed, *What Can Animal Law Learn from Environmental Law?* (Washington, DC: Environmental Law Institute, 2015); Thomas G. Kelch, “Towards Universal Principles for Global Animal Advocacy” (2016) 5:1 *Transnat’l Env’tl L* 81 [Kelch, “Universal Principles”]; Thomas G Kelch, “Cultural Solipsism, Cultural Lenses, Universal Principles, and Animal Advocacy” (2014) 31 *Pace Env’tl L Rev* 403; Thomas G Kelch, “The WTO Tuna Labeling Decision and Animal Law” (2012), 8 *J Animal & Natural Resource L* 121.

¹³ Steven White, “Into the Void: International Law and the Protection of Animal Welfare” (2013) 4:4 *Global Policy* 391; Deborah Cao & Steven White, eds, *Animal Law and Welfare: International Perspectives* (Cham: Springer, 2016).

¹⁴ Werner Scholtz, “Injecting Compassion into International Wildlife Law: From Conservation to Protection?” (2017) 6:3 *Transnat’l Env’tl L* 463 [Scholtz, “Compassion”]; Werner Scholtz, “Killing Them Softly? Animal Welfare and the Inhumanity of Whale Killing” (2017) 20:1 *J Intl Wildlife L & Pol’y* 18.

¹⁵ Peters, “Global Legal Animal Studies,” *supra* note 5 at 396.

¹⁶ Peters, “Global Animal Law,” *supra* note 5 at 20-22.

¹⁷ *Ibid* at 22.

Two background factors have driven the emergence of global animal law as a legal phenomenon and a subject of scholarship – one practical, and the other more ideational. The first, practical factor is the growing need for transnational cooperation on the protection of animals in an interconnected world where human activities that affect animals increasingly have international dimensions. The second, ideational factor is the philosophical foundation for global animal law that is found in the growing scholarly discourse around human-animal relationships and the moral status of animals, sometimes referred to as the “animal turn.” The animal turn in philosophy and other scholarly disciplines has paved the way for the animal turn in international law.

4.2.1 The Need for a Transnational Approach

Anne Peters’s foreword to the recent symposium on global animal law in the journal *Transnational Environmental Law* is entitled “Global Animal Law: What It Is and Why We Need It.”¹⁸ This title highlights an important question about the emergence of global animal law: why should it exist? Animal protection, especially animal welfare, has traditionally been a domestic matter, so what need is there for an international body of law on this matter?

An obvious answer to this question is that human activities affecting animals are no longer confined within national borders. This means that effective regulation of those activities now needs a transnational reach as well. Thus, Blattner describes global animal law as “dealing with the trans-boundary reality of human-animal interaction,” taking into

¹⁸ Peters, “Global Animal Law,” *supra* note 5.

account “the economic forces involved in the globalized animal industry, as well as the multilevel regulation of it.”¹⁹

Bruce Wagman and Matthew Liebman observe that animal protection matters may be internationally regulated either because of the nature of the problem being addressed – if it involves “multiple countries and border crossings” and so requires an international solution – or because the animals themselves are “transnational or migratory, and thus require international treatment.”²⁰ The need for international cooperation to protect animals who are “transnational or migratory” is not new, and underlies international governance regimes such as the *Convention on Migratory Species*.²¹ By contrast, Wagman and Liebman’s first category, human activity affecting animals that involves multiple jurisdictions and crosses borders, is creating new practical challenges for international governance because it is growing so fast, especially in the area of food production.²²

The speed of recent growth in production and consumption of animal products, especially for food, is staggering. Since the 1960s, “milk consumption has almost doubled, meat consumption has more than tripled, and egg consumption has increased by a factor of five.”²³ Developing countries are building new meat export industries to provide the growing global demand, and consumption of meat and eggs has gone up

¹⁹ Blattner, *supra* note 2 at 279-280.

²⁰ Bruce A Wagman & Matthew Liebman, *A Worldview of Animal Law* (Durham: Carolina Academic Press, 2011) at 24.

²¹ *Convention on the Conservation of Migratory Species of Wild Animals*, 23 June 23 1979, 1651 UNTS 333 (entered into force 1 November 1983) [CMS].

²² Miyun Park & Peter Singer, “The Globalization of Animal Welfare: More Food Does Not Require More Suffering” (2012) 91:2 *Foreign Affairs* 122 at 123.

²³ *Ibid* at 124.

sharply in rapidly developing Asian countries, especially China.²⁴ Growth is driven both by an increasing global population and by increasing per capita consumption of animal foods.²⁵

The rise in the sheer amount of animal products being produced and consumed has happened at the same time that trade barriers have progressively reduced and the global economy has become more integrated. This change, too, adds to the practical challenge of effectively regulating the way the animals are treated. Park and Singer observe that intensive methods of animal agriculture that have the most troubling welfare impacts are being taken up in developing countries, especially in Asia and Latin America, just as they are coming under fire in richer countries:

The result has been an unmitigated disaster for animals: more animals in more places are confined in restrictive conditions utterly unlike their natural environments and are pushed beyond their physiological limits to produce ever-greater numbers of eggs, gallons of milk, and pounds of flesh. It is a tragic turn of events that just as these methods are being modified or even phased out in the countries where they were first invented, they are being introduced in their old, unmodified forms in other countries around the world. The exportation of industrialized animal-production models has inflicted misery on animals on an unprecedented scale.²⁶

Kelch describes this phenomenon as a form of “outsourcing.”²⁷ Activities that are strictly regulated or expensive in one jurisdiction can be moved to another to realize cost and regulatory advantages, and relatively frictionless international trade makes this more

²⁴ Clive JC Phillips, *The Animal Trade: Evolution, Ethics and Implications* (Boston: CABI, 2015) at 55.

²⁵ *Ibid* at 56-57.

²⁶ Park & Singer, *supra* note 22 at 128.

²⁷ Kelch, “Universal Principles,” *supra* note 12 at 82.

feasible. The relocation of intensive animal production is, effectively, a way of outsourcing cruelty.

Globalization and the growing trade in animal products create a governance gap that requires international cooperation to solve. The same phenomena have also increased the visibility of animal suffering and public support for action to address it in a global or transnational manner. Park and Singer note that the increasing number of animals in animal trade as well as the new availability of video footage revealing what happens to the animals has driven interest among “policy-makers, businesspeople, nongovernmental organizations, and ordinary citizens” in the treatment of animals “wherever they may be.”²⁸ As a result, [i]t is no longer sufficient for governments to be concerned for the welfare of animals within their own borders: animal welfare is quickly becoming an issue of international concern.²⁹

The need for global animal law is closely linked to the evolution of international trade law. Globalization has driven an explosion in economic exploitation of animals, a gap in regulation that has to be met with a transnational approach, and recognition that animal protection is no longer just a domestic matter. Alongside this practical need, the second underlying condition that has supported the emergence of global animal law is a framework of ideas, which comes from the wider intellectual movement known as the animal turn.

²⁸ *Ibid* at 123-124.

²⁹ *Ibid* at 124.

4.2.2 The 'Animal Turn' and Global Animal Law

Peters identifies global animal law as “a manifestation and a driver of the broader ongoing ‘animal turn’ in the social sciences and humanities.”³⁰ The term “the animal turn” denotes a move to thinking seriously about animals as ethically significant, and rethinking the meanings of human-animal relationships, across a number of academic disciplines and also in society more generally. The reference to a “turn” towards thinking seriously about animals suggests a new direction, but it is also one with a long history. And, while what makes the “animal turn” a “turn” is in part a shift towards taking questions about animals more seriously in mainstream discourse, these questions and theories about the ethical significance of animals remain mainly marginal. Both the gradual mainstreaming of animal rights discourse and its continuing marginality are important to understanding the emergence of global animal law – and to what extent it has really established itself as law, as evaluated using the measures of interactional international law.

The “animal turn” was named, most famously, in a 2007 article by Harriet Ritvo. Ritvo pointed out a “more frequent focus of scholarship” on animals in humanities and science disciplines, manifested in more published books and articles, conference presentations, and new journals focusing on animals.³¹ She saw this burgeoning interest as opening up new areas of inquiry and ways of thinking about animals: “As it has expanded the range of possible topics in a number of disciplines, the animal turn has also

³⁰ Peters, “Global Animal Law,” *supra* note 4 at 23 (internal citations omitted).

³¹ Harriet Ritvo, “on the animal turn” (2007) 136 *Daedalus* 118 at 119.

suggested new relationships between scholars and their subjects, and new understandings of the role of animals in the past and at present.”³²

But at the same time, as Ritvo notes, serious study of animals still remains at the margins, in an “awkward location or set of locations.”³³ Kari Weill writes that the fight against speciesism so far has “not had the same force in the academy” as struggles against sexism and racism.³⁴ For Ritvo, this marginality is part of what makes animal questions interesting and powerful: it “allows the study of animals to challenge settled assumptions and relationships – to re-raise the largest issues – both within the community of scholars and in the larger society to which they and their subjects belong.”³⁵

The foundation of the animal turn is in philosophy. As Angus Taylor has observed, the case of extending legal rights or stronger legal protection to animals ultimately turns on philosophical questions:

Legal protections for human beings are grounded in our conviction that they have significant moral status: that every individual has a fundamental worth, or dignity, that must be respected. ... Whether at least some animals have the sort of non-instrumental value that ought to afford them protection from exploitation has been the subject of vigorous debate among philosophers for the past four decades.³⁶

The philosophical debate that Taylor describes extends back further than what eventually came to be labeled the “animal turn.” Taylor identifies it as beginning four decades ago – in about the 1960s to 1970s.

³² *Ibid.*

³³ *Ibid* at 122.

³⁴ Kari Weill, “A Report on the Animal Turn” (2010) 21:2 *differences* 1 at 1.

³⁵ Ritvo, *supra* note 31 at 122.

³⁶ Angus Taylor, “Philosophy and the Case for Animals” in Peter Sankoff, Vaughan Black & Katie Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law, 2015) 11 at 11.

A transformational moment in this movement was the publication of Peter Singer's *Animal Liberation* in 1975.³⁷ Singer linked the fight for recognition of animal interests to human rights-based and equality movements. A key element in Singer's argument that animal liberation and human liberation struggles are comparable is his identification of the systematic discounting of animals as "speciesism," by analogy with other forms of unjustifiable identity discrimination such as sexism and racism. The term "speciesism" was coined by Richard Ryder, a writer, psychologist and animal activist, who first used it in a privately produced leaflet protesting against animal experimentation.³⁸ Ryder has said in an interview that he came up with the word in an "Archimedes moment in the bath."³⁹

The term "speciesism" draws analogy between the oppression of animals and the oppression of certain classes human beings because of their morally irrelevant characteristics. The analogy is based on the premise that the boundary between different species is no more morally relevant than that between different races or sexes, at least not as a justification for excluding nonhuman animals from moral consideration or for abusing them. Singer writes in *Animal Liberation* that "speciesists allow the interests of their own species to override the greater interests of members of other species," just as racists "violate the principle of equality by giving greater weight to the interests of members of their own race when there is a clash between their interests and the interests

³⁷ Peter Singer, *Animal Liberation* (New York: Harper, 2009) [1975].

³⁸ Animal Voices Radio, "The One Word that Started It All: Dr. Richard Ryder Talks About Speciesism, Painism and Happiness" (interview with Richard Ryder, April 9, 2013), online: <https://animalvoices.ca/2013/04/09/the-word-that-started-it-all-dr-richard-ryder-talks-about-speciesism-painism-and-happiness/>.

³⁹ *Ibid*; Richard Ryder & Kenan Malik, "You won't find chimps having this debate," *The Guardian*, 13 June 2006, online: <https://www.theguardian.com/uk/2006/jun/13/animalwelfare.world>

of another race,” and sexists “violate the principle of equality by favoring the interests of their own sex.”⁴⁰

Singer’s utilitarian philosophical framework for recognizing and counting animal interests has its roots in the work of the father of modern utilitarianism, Jeremy Bentham.⁴¹ Bentham, famously, argued that the key characteristic of animals that made them matter in the moral calculus is their capacity for suffering, or what we now call sentience. In a well-known footnote in his *Principles of Morals and Legislation*, Bentham predicted that “[t]he day may come, when the rest of the animal creation may acquire those rights which never could have been withheld from them but by the hand of tyranny.”⁴² Bentham argued that just as the colour of a person’s skin “is no reason why a human being should be abandoned without redress to the caprice of a tormentor,” so too such irrelevant characteristics as having four legs or a tail did not put animals over a line that made it acceptable to “[abandon] a sensitive being to the same fate.”⁴³ For Bentham, what demarcated that line was not rationality or the power of speech, but sentience: “The question is not, Can they reason? nor, Can they talk? but, Can they suffer? Why should the law refuse its protection to any sensitive being?”⁴⁴

An important part of the “animal turn” in law is recognition of animal sentience as a morally significant fact, and debate about what it means (and should mean) for the extension of legal concepts like rights and interests beyond the exclusive domain of humans. In this way, global animal law is connected to analogous struggles of

⁴⁰ Singer, *supra* note 37 at 9.

⁴¹ *Ibid* at 7-8.

⁴² *Principles of Morals and Legislation* (New York: Hafner, 1961) at 310 n 1.

⁴³ *Ibid*.

⁴⁴ *Ibid*.

marginalized human groups for recognition and legal protection. Paola Cavalieri, whose work draws links between animal law and universal human rights, has described the “animal question” as a questioning of assumptions underlying a cultural paradigm of hierarchy between humans and animals.⁴⁵ Cavalieri situates the animal turn within a broader process of moral progression, the “substitution of hierarchical visions with presumptions in favour of equality.”⁴⁶ Yet global animal law remains marginal, fighting to establish its legitimacy, in a way that other justice movements such as human rights are not.

A major challenge for the legitimacy of global animal law is the international and inter-cultural diversity in the ways that societies think about animals, and the extent to which they see it as appropriate to give them legal protection. Peters recognizes that attitudes towards animals within a society are shaped by “habits, religion, the wealth of [the] society, its state of industrialization, and other cultural factors.”⁴⁷ The development of global animal law requires special sensitivity to “problems of Eurocentrism, of legal imperialism, and of a North–South divide.”⁴⁸ Global animal law “should not naively export European values but should seek an overlapping consensus,” based in arguments that can carry across cultures and “have the potential to become universal.”⁴⁹ For Peters, one such argument is “findings of natural science on the sentience of animals.”⁵⁰

⁴⁵ Paola Cavalieri, *The Animal Question: Why Nonhuman Animals Deserve Human Rights* (trans Catherine Woollard) (Oxford: Oxford University Press, 2001) at 3-4.

⁴⁶ *Ibid* at 4.

⁴⁷ Peters, “Global Animal Law,” *supra* note 3 at 22.

⁴⁸ *Ibid*.

⁴⁹ *Ibid*.

⁵⁰ *Ibid*.

Kelch, similarly, sees that for global animal law to gain traction, “cultural divides that may seem impenetrable must be traversed.”⁵¹ He argues that culturally transcendent universal principles can be derived from an ethic of caring, based in feminist care theory. This perspective is also rooted in animal sentience and the capacity of animals to suffer; caring, sympathy and empathy, he posits, are evoked by the suffering of animals used in experimentation and factory farming.⁵²

Engaging meaningfully with cultural differences in attitudes concerning animals, while avoiding the pitfalls of cultural imperialism, has been one of the most difficult challenges on the road to working out a coherent theoretical basis for global animal law. The starkest difficulties arise when putative universal principles being worked out by global animal law advocates have to accommodate the animal use practices of traditional and Indigenous cultures. A concrete illustration of this difficulty is seen in the *EC – Seal Products* case and the EU’s special treatment of seal products from traditional Indigenous hunts. Applying the concept of animal welfare in a fair and even-handed way, without unfairly imposing the values of one society concerning animals on another and while also giving due weight to the cultural rights of Indigenous peoples, has proved a significant challenge both for the WTO and for global animal law scholars and advocates.⁵³

Global animal law has its challenges, but it also opens up fresh and fertile new possibilities in international law. Ritvo’s observation that the marginality of the animal turn can inspire questioning and re-thinking ideas at the centre of a discipline, “re-

⁵¹ Kelch, “Universal Principles,” *supra* note 12 at 83.

⁵² *Ibid* at 93-94.

⁵³ See Chapter Seven for a full discussion of this problem and of the shortcomings of the “strategy of avoidance” that the EU’s seal measure adopted.

rais[ing] the largest issues,” is pertinent here. Paying attention to the interests of animals challenges the fundamental anthropocentrism of international law. It is not surprising that international law, as a human institution, should be anthropocentric – but, at the same time, evaluating its claims of justice and moral authority with an awareness of the exploitation of animals reveals gaps in the coherence of international law’s justificatory discourse.

The first area of international law where animal interests have gained a foothold, and the only area of treaty law that scholars have identified as part of global animal law,⁵⁴ is international environmental law. Although it would be hard to deny that international environmental law is largely anthropocentric, it is not entirely so; it is also concerned with the protection and preservation of the nonhuman natural world. Animals are included in that protection, and in this area there is at least some space for their interests to be recognized and articulated.

4.3 International Environmental Law

Major international environmental treaties include legal protections for wild animals in specific contexts: they regulate trade in endangered species,⁵⁵ the protection of

⁵⁴ Blattner, “Sheep in Wolf’s Clothing,” *supra* note 5 at 280 (stating that the only international conventions that are part of global animal law are those dealing with the conservation or preservation of certain animal species).

⁵⁵ *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 3 March 1973, 993 UNTS 243, Can TS 1975 No 32 (entered into force 1 July 1975) [CITES].

migratory species,⁵⁶ the protection of biological diversity,⁵⁷ habitat protection,⁵⁸ fisheries management,⁵⁹ and the conservation and hunting of whales,⁶⁰ among other matters.⁶¹ Additionally, international institutions promote nature conservation, including the protection of wild animals; perhaps the most prominent is the International Union for the Conservation of Nature, which is a non-governmental organization but whose members include “governments and government agencies alongside scientific, professional and conservation bodies.”⁶²

There are also a number of “soft” international environmental instruments that allude to human responsibilities to protect wildlife and nature, including animals. The 1972 Stockholm Declaration⁶³ refers to humanity’s “special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat.”⁶⁴ The *World Charter for Nature*,⁶⁵ adopted by the UN General Assembly in 1982,⁶⁶ states that “the population levels of all life forms, wild and domesticated, must be at least sufficient for their

⁵⁶ *Convention on the Conservation of Migratory Species of Wild Animals*, 23 June 23 1979, 1651 UNTS 333 (entered into force 1 November 1983).

⁵⁷ *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79, in force 29 December 1993. Available at: <https://www.cbd.int/convention/text/>.

⁵⁸ *Berne Convention on the Conservation of European Wildlife and Natural Habitat*, 19 Sept. 1982, ETS 104, (entered into force 1 June 1982). Available at: <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/104>.

⁵⁹ *United Nations Convention on the Law of the Sea*, 10 December 1982, 21 ILM 1261, 1833 UNTS 3 (entered into force 16 November 1994).

⁶⁰ *International Convention for the Regulation of Whaling*, 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948).

⁶¹ See generally Michael Bowman, Peter Davies and Catherine Redgwell, *Lyster’s International Wildlife Law*, 2d ed (Cambridge: Cambridge University Press, 2010).

⁶² *Ibid* at 9.

⁶³ Report of the UN Conference on the Human Environment, UN Doc A/CONF.48/14/Rev1 3.

⁶⁴ *Ibid*, Principle 4.

⁶⁵ Annex to GA Res 37/7, UNGAOR, 1982, Supp. No. 51, UN Doc A/37/51.

⁶⁶ It was adopted by 111 votes to 1; the only dissenting vote was the US. Harold W Wood Jr, “The United Nations World Charter for Nature: The Developing Nations’ Initiative to Establish Protections for the Environment” (1985) 12:4 Ecology L Q’y 977 at 979.

survival, and to this end necessary habitats shall be safeguarded”⁶⁷ and that special protection should be given “to the habitat of rare or endangered species.”⁶⁸ The International Union for the Conservation of Nature (IUCN) World Conservation Strategy, in its 1991 revised version, states that humans have responsibility “towards other forms of life with which we share this planet,” and affirms that “all the species and systems of nature deserve respect regardless of their usefulness to humanity.”⁶⁹

From the perspective of global animal law scholars, the problem with international environmental law is its anthropocentrism. Protection of animals is incidental to their value to humans, whether as material resources to be exploited now, or for the economic, esthetic or recreational benefit of future generations of humans. Scholtz criticizes the lack of concern with animal welfare in international environmental law, arguing that this gap shows international environmental law’s failure to “reflect the recognition of the moral worth of animals.”⁷⁰ In Scholtz’s view, this failure is a manifestation of the “near divorce of environmental law from ethics.”⁷¹

International environmental law addresses the protection of wild animals as part of the management and conservation of nature and natural resources. But animals are different from other natural phenomena, because (as global animal law points out) they are sentient. As Donaldson and Kymlicka note, “amongst the many different types of entities within the ecosystem, some beings have a subjective existence that calls for

⁶⁷ *Charter for Nature*, *supra* note 65, General Principle 2.

⁶⁸ *Ibid*, General Principle 3.

⁶⁹ IUCN/UNEP/WWF, *Caring for the Earth: A Strategy for Sustainable Living* (Gland, Switzerland: IUCN/UNEP/WWF, 1991) at 13-14.

⁷⁰ Scholtz, “Compassion,” *supra* note 14 at 464.

⁷¹ *Ibid*.

distinctive moral responses.”⁷² Only animals are such beings; plants, wetlands, rivers and ecosystems are not.

Foregrounding animal sentience and its ethical implications tends to lead to thinking about categories like “conservation” and “animal welfare” in a different way. The traditional view is that the conservation of wild animals belongs in the same legal category as environmental conservation generally. This category is separate from animal welfare, which is distinguished because animal welfare focuses on the wellbeing of individual animals, whereas environmental protection is only concerned with the survival of the species.

Bowman, Davies and Redgwell set out a taxonomy of philosophical underpinnings of environmental law based on the sources of the value that we accord to nature.⁷³ They identify three types of value: (i) *instrumental*, which is the value of something that can put to use by others; (ii) *inherent* – value that nature possesses in itself, for example because we value its beauty; and (iii) *intrinsic*, or value “which an entity possesses of itself, for itself, regardless of the interests or utility of others.”⁷⁴ Value can also be categorized according to where it is found – in individual specimens, in species or communities, or in entire ecosystems.⁷⁵ Intrinsic value, importantly, can be situated at two levels, individual and species. The good of the individual is what Bowman, Davies and Redgwell call “good-of-its-own”: the conditions needed for the

⁷² Sue Donaldson & Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford: Oxford University Press, 2011), at 158.

⁷³ Bowman, Davies & Redgwell, *supra* note 61 at 61-91. See also discussion in Katie Sykes, “Globalization and the Animal Turn: How International Trade Law Contributes to Global Norms of Animal Protection” (2016) 5 TEL 55 at 59-61.

⁷⁴ Bowman, Davies & Redgwell, *ibid* at 62-63.

⁷⁵ *Ibid* at 68-73.

individual to flourish, experience wellbeing, and avoid pain and suffering. The good of the species is “good-of-its-kind”: the conditions needed for the species to thrive.⁷⁶

Where international environmental law deals with animals, it is mainly concerned with the good of species (“good-of-its-kind”), and it reflects the instrumental value of wild animals more than their inherent or intrinsic value. There has, however, been some evidence of change in these emphases over time. It would not be accurate to say that international environmental law completely fails to reflect the inherent and intrinsic value of wild animals or to address their good as individuals.

One example of this change in underlying values is the international regime for the regulation of whaling. Cymie Payne has described the beginning stages of the international whaling regime in the early twentieth century as a property management regime created to cope with a classic tragedy of the commons.⁷⁷ Whaling nations cooperated to prevent the exhaustion of a valuable resource, classifying whales outside national borders as no longer *res nullius* (no-one’s property, a free resource) but now *res communis* (property commonly owned by the parties).⁷⁸

The modern international whaling regime reflects different values from just management of a commonly owned resource. The International Whaling Commission has adopted a moratorium on commercial whale hunting regardless of whether the

⁷⁶ *Ibid* at 73-77.

⁷⁷ 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.” Garrett Hardin, “The Tragedy of the Commons” (13 December 1968) 62:3859 *Science* 1243.

⁷⁸ Cymie Payne, “ICJ Halts Antarctic Whaling – Japan Starts Again” (2015) 4:1 TEL 181 at 192.

species in question is endangered. Anthony D'Amato and Sudhir Chopra argue that this particular regime has moved through a series of stages that reflect evolving global consciousness, culminating in what they argue is the beginnings of a recognition of whales' right to life.⁷⁹ They suggest that this progression mirrors a change in environmental law itself: "We may be at the brink of replacing the view that 'nature' exists only to serve people, with a larger ecological awareness that people share and ought to share the planet with many other sentient creatures."⁸⁰

There are many other places in international environmental law where there is recognition of the inherent and intrinsic value of wildlife, not just its utilitarian or instrumental value. For instance, the preamble of CITES alludes to the importance of 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."⁸¹ It also refers to the value of wild fauna and flora from "aesthetic, scientific, cultural [and] recreational," as well as economic, points of view. The preamble of the *Convention on Biological Diversity* mentions the "intrinsic" value of biological diversity.⁸² The *World Charter for Nature* asserts 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."⁸³

⁷⁹ Anthony D'Amato & Sudhir K Chopra, "Whales: Their Emerging Right to Life" (1991) 85 Am J Int'l L 21.

⁸⁰ *Ibid* at 23.

⁸¹ CITES, *supra* note 55.

⁸² *Supra* note 57.

⁸³ *Supra* note 65, Preamble.

There are also various provisions and instruments in international environmental law that aim to protect the welfare of wild animals (these are described in more detail under “Animal Welfare” in Section 4.4). Animal welfare is concerned with the wellbeing of the individual animal (“good-of-its-own”) and is grounded in the intrinsic value of animals, their value for their own sake, since there is no instrumental utility to humans in reducing the suffering of animals or improving the level of wellbeing that the animals experience. But, to the extent that animal welfare norms are included in international environmental law, they are “isolated,” “incidental in international legal regimes, which have as their primary objective the regulation of the harvesting and trading of animals, conservation, and biodiversity.”⁸⁴

4.4 Animal Welfare and International Law

Juxtaposing biodiversity protection and animal welfare in international law is a study in contrasts. The protection of wildlife and biodiversity is established and well developed in international law. The welfare of individual animals, on the other hand, is “almost completely unaddressed.”⁸⁵ The paucity of international law on animal welfare is partly explained by the fact that it is generally seen as a subject for domestic regulation,⁸⁶ one on which local preferences and policy choices can diverge significantly.

But “almost completely unaddressed” is not completely unaddressed. Animal welfare does have some presence in international law. It is a matter on which there is some degree of emerging global consensus, and recognition of the need for global

⁸⁴ Peters, “Global Animal Law,” *supra* note 3 at 13.

⁸⁵ Peters, “Human-Animal Comparisons,” *supra* note 3 at 29.

⁸⁶ Laura Nielsen, *The WTO, Animals and PPMs* (Boston: Brill, 2007) at 7.

cooperation. While there are certainly variations among countries' approaches to the details of animal welfare protection and their choices about how different categories of animals should be treated, there is little controversy about the abstract principle that animals should be treated humanely. Animal welfare is "the key principle underpinning the governance of animals in most developed countries, and it is becoming increasingly important in the developing world."⁸⁷ Most domestic legal systems have some kind of protection for animal welfare.⁸⁸ States have also manifested their commitment to protecting animal welfare in the context of international interactions. Bowman, Davies and Redgwell speak of "the pervasiveness of international concern for animal welfare, and the wealth of recent formal expressions of commitment to that objective" such that, as they argue, it may be possible to identify a general principle of international law concerning animal welfare at this point.⁸⁹ Otter, O'Sullivan and Ross argue that animal welfare "appears to be evolving into an international norm underpinning a global animal protection regime."⁹⁰

To understand the status of animal welfare in international law, it is helpful to apply Brunnée and Toope's concept of the "continuum of legality."⁹¹ Animal welfare has

⁸⁷ Caley Otter, Siobhan O'Sullivan & Sandy Ross, "Laying the Foundations for an International Animal Protection Regime" (2012) 2:1 J Animal Ethics 53 at 53.

⁸⁸ See discussion in Katie Sykes, "'Nations Like Unto Yourselves': An Inquiry into the Status of a General Principle of International Law on Animal Welfare" (2011) 69 CYIL 1 at 28-29.

⁸⁹ Bowman, Davies & Redgwell, *supra* note 61 at 680.

⁹⁰ Otter, O'Sullivan & Ross at 53. See also Rachele Adam & Joan Schaffner, "International Law and Wildlife Well-Being: Moving from Theory to Action" (2017) 20:1 J Int'l Wildlife L & Pol'y 1, discussing a workshop held in 2015 at the George Washington University Law School aiming to "bridge the gap" between international wildlife law's focus on conservation and sustainable use of wildlife, and animal law's focus on "humane treatment of the individual animal and moral considerations of wildlife wellbeing" (*ibid* at 1).

⁹¹ Jutta Brunnée & Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010) at 22-23; see discussion in Chapter Three.

a presence on the continuum of international legality. There is extensive and growing attention to animal welfare in international society, and growing indications of international consensus that this is a matter to be taken seriously. But it is positioned at the less “legal” end of the continuum. It remains mostly unaddressed at the other end of the spectrum, where law, in the strict sense of binding and enforceable rules, is found.

The overview of animal welfare in international law that follows is divided into three categories. The first is aspirational statements or proposed international instruments. The second is what Peters identifies as “secondary” law: provisions “emanating from international organizations, bodies, and conferences of the parties”⁹² in the context of treaty regimes. The third is the provisions in international environmental (wildlife protection) treaties that address animal welfare.

4.4.1 Aspirations

The most important example in this first category is the Universal Declaration of Animal Welfare (UDAW),⁹³ a statement of principles promoted by an international animal welfare NGO called World Animal Protection (WAP).⁹⁴ This text was created with the intention of presenting it as a resolution for adoption by the UN General Assembly. The UDAW is being promoted by building up “community support and citizen participation,” primarily by gathering signatures to a petition favouring its

⁹² Peters, “Global Animal Law,” *supra* note 3 at 14.

⁹³ The text of the 2011 version of the draft UDAW, which appears to be the most recent version, is posted in the Global Animal Law database, available at <https://www.globalanimallaw.org/database/universal.html>. See also Miah Gibson, “The Universal Declaration of Animal Welfare” (2011) 16 Deakin L Rev 539, which appends an earlier (2007) draft.

⁹⁴ World Animal Protection was previously known as the World Society for the Protection of Animals. See www.worldanimalprotection.ca.

adoption.⁹⁵ The text itself has gone through at least two draft versions, reflecting discussions among stakeholders and members of the international community.

The draft UDAW begins by affirming that “animals are sentient beings and that their welfare is an issue worthy of consideration and respect by Member States.”⁹⁶ It states that the states potentially adopting it are (or would be) “conscious that humans share this planet with other species and other forms of life and that all forms of life co-exist within an interdependent ecosystem.”⁹⁷ It incorporates the famous “five freedoms” that were identified – with a conscious echo of the four freedoms underlying universal human rights – in the 1965 Brambell Report on animal welfare in factory farming.⁹⁸ The UDAW states that “the ‘five freedoms (freedom from hunger, thirst and malnutrition; freedom from fear and distress; freedom from physical and thermal discomfort; freedom from pain, injury and disease; and freedom to express normal patterns of behaviour)’ provide valuable general guidance for animal welfare.”⁹⁹ The operative Articles of the UDAW define animal welfare to include health and “both the physical and the psychological state of the animal,”¹⁰⁰ and sentience as “the capacity to have feelings, including pain and pleasure, [implying] a level of conscious awareness.”¹⁰¹ The UDAW refers to ongoing scientific research and new knowledge concerning animal sentience.¹⁰² It would express a commitment on the part of states to take all appropriate steps to

⁹⁵ Otter, O’Sullivan & Ross, *supra* note 87 at 66.

⁹⁶ UDAW, *supra* note 93, Preamble.

⁹⁷ *Ibid.*

⁹⁸ *Report of the Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems* (London: HMSO, 1965) (Chairman: Professor F W Rogers Brambell, FRS)

⁹⁹ UDAW, *supra* note 93, Preamble.

¹⁰⁰ *Ibid.*, Draft Article II.

¹⁰¹ *Ibid.*, Draft Article III.

¹⁰² *Ibid.*, Draft Article III.

“prevent cruelty to animals and to reduce their suffering”¹⁰³ and for the principles in the UDAW to be the common basis for policies, legislation and standards around the world on animal welfare.¹⁰⁴

The UDAW is not hard law; as a draft document proposed but not yet formally put forward, let alone adopted, as a UN resolution it is not even soft law. But the iterative process of articulating, discussing, and redrafting a set of principles on animal welfare that could realistically be put forward for endorsement by all the UN member states is an example of the process of building international shared understandings, even if a firm consensus on the principles expressed in the UDAW has not yet been achieved.

4.4.2 Secondary Law

The second category is what Peters refers to as “secondary law”: principles articulated by international organizations and conferences of treaty parties which may function as guidelines and/or agreed standards for implementing primary treaty provisions. There is a great variety in this category, but in general such provisions can be seen as somewhat analogous to regulations or secondary legislation in domestic systems.

One interesting point to be made about secondary law from an interactional IL perspective is that, although in the traditional formal taxonomy of international legal sources it is subordinate or not real law, in interactional terms it can, depending on the specific nature of the rules, be almost as law-like and binding as treaty law, and sometimes even more so. As Brunnée observes (with respect to international

¹⁰³ *Ibid.*, Draft Article IV.

¹⁰⁴ *Ibid.*, Draft Articles V-VI.

environmental law), these secondary processes may result in “detailed, mandatory regulatory or procedural standards” which may be formally nonbinding but nevertheless are “routinely implemented” by the parties.¹⁰⁵ The very activity of discussion, cooperation, interpretation and decision-making that goes into creating such provisions is a robust practice of legality, without which treaty obligations may lose their grounding in shared understandings and become weakened.¹⁰⁶

Peters cites a handful of animal welfare provisions in the category of secondary law,¹⁰⁷ the most significant of which is the framework for animal welfare protection created by the World Organisation for Animal Health (abbreviated to the OIE, the initialism for the original French name of the body – the *Office International des Epizooties*). The OIE has promulgated codes on both terrestrial and aquatic animals, and both now include general principles and specific recommendations on animal welfare.¹⁰⁸ The OIE’s Terrestrial Animal Health Code has been described as “[t]he one intergovernmental animal regulatory instrument that encompasses a wide variety of animals, and not just endangered animals.”¹⁰⁹

¹⁰⁵ Jutta Brunnée, “The Sources of International Environmental Law: Interactional Law” in Jean d’Aspremont & Samantha Besson, eds, *The Oxford Handbook of the Sources of International Law* (Oxford: Oxford University Press, 2017) 960 at 969.

¹⁰⁶ *Ibid* at 967-969.

¹⁰⁷ Peters, “Global Animal Law,” *supra* note 3 at 14. See also Brels, *supra* note 8 at 108-109, discussing decisions under CITES and the CMS that “discourage cruel practices”: bear bile farming (addressed in a decision of the CITES Conference of the Parties, Conservation of and Trade in Bears, Resolution Conf 10.8 (Rev CoP 14), online: <https://www.cites.org/eng/res/10/10-08R14.php>) and shark finning (addressed in a Memorandum of Understanding adopted under the CMS, Memorandum of Understanding Regarding the Conservation of Migratory Sharks, Art 13(h) (on shark finning), February 12, 2010, online: <https://www.cms.int/sharks/en/page/sharks-mou-text>).

¹⁰⁸ OIE Terrestrial Animal Health Code (2015) Section 7 (Animal Welfare), online: <http://www.oie.int/en/international-standard-setting/terrestrial-code/access-online/>; OIE Aquatic Animal Health Code (2015) Section 7 (Welfare of Farmed Fish), online: <http://www.oie.int/en/international-standard-setting/aquatic-code/access-online/>.

¹⁰⁹ Otter, O’Sullivan & Ross, *supra* note 87 at 56.

The practical effectiveness of OIE standards should not be exaggerated; as Favre observes of the OIE's standards on live animal transportation, for example, they "read like a checklist of issues that should be considered if you are going to engage in live animal transport" rather than "an actual standard that limits or prohibits practices that are harmful to animal welfare."¹¹⁰

What is perhaps most important about the work of the OIE in this area is that it functions as a kind of global consciousness-raising about the ethical importance of animal welfare. The OIE reminds the international community that animal welfare matters. It has adopted as part of its mission the goal 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."¹¹¹

4.4.3 Welfare in Environmental Treaty Law

There is a surprisingly high number of provisions tucked away in international environmental treaties that address wild animal welfare in some way. Bowman, Davies and Redgwell have done important work compiling these "incidental" or interstitial provisions from a wide range of different international environmental instruments and pointing out their conceptual connections to one another, devoting an entire chapter of the second edition of *Lyster's International Wildlife Law* to the "surprisingly wide range of treaty commitments" concerning welfare issues that affect wildlife.¹¹² Earlier work by

¹¹⁰ Favre, *supra* note 10 at 252.

¹¹¹ Bernard Vallat, "Foreword," in *Proceedings of the Global Conference on Animal Welfare: An OIE Initiative* (Paris, 23-25 February 2004), available at: http://www.oie.int/fileadmin/Home/eng/Conferences_Events/docs/pdf/proceedings.pdf.

¹¹² *Supra* note 61 at 682.

Bowman highlighted the pervasiveness of welfare-protective rules in international wildlife law, when hardly any other legal scholars were paying serious attention to animal protection and international law.¹¹³

The first, and so far the only, international treaties centrally concerned with protecting wild animal welfare are the two international agreements on humane standards in trapping,¹¹⁴ which are discussed in more detail in Chapter Six. Although the adoption of international agreements on welfare for wildlife is an important development, these agreements only involve four parties and their influence is relatively limited.

The most important wildlife treaty that contains animal welfare provisions is CITES. Once specimens of CITES-protected animal species are taken from the wild, the treaty requires that they be transported and cared for in a way that minimizes risks of injury, damage to health or cruel treatment.¹¹⁵ Bowman describes the treaty as being “replete with provisions relating to the welfare of individual living specimens.”¹¹⁶ Brels

¹¹³ See, e.g., Michael Bowman, “Conflict or Compatibility? The Trade, Conservation and Animal Welfare Dimensions of CITES” (1998) 1 J Int’l Wildlife L & Policy 9 [Bowman, “Conflict or Compatibility”]; Michael Bowman, “Normalizing the International Convention for the Regulation of Whaling” (2008) 29:3 Mich J Int’l L 293; Michael Bowman, “The Protection of Animals Under International Law” (1989) 4 Conn J Int’l L 487.

¹¹⁴ EC, *Agreement on International Humane Trapping Standards between the European Community, Canada and the Russian Federation*, [1998] OJ, L 42/43; EC, *International Agreement in the form of an Agreed Minute between the European Community and the United States of America on humane trapping standards*. [1998] OJ, L 219/26.

¹¹⁵ Articles 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, while Article 7 of CITES provides for discretionary waivers from the normal documentation requirements for certain specimens being transported as part of a zoo, circus, menagerie, plant exhibition or traveling exhibition, such a waiver can only be granted 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’ (Article 7(7)(c)).

¹¹⁶ Bowman, “Conflict or Compatibility?” *supra* note 113 at 10.

suggests that “CITES was also probably the most advanced in considering wildlife well-being at the time it was adopted in the early 1970s.”¹¹⁷

These welfare concerns are additional to the conservation and trade policies of CITES. Animal species will not be more likely to disappear if individuals taken for international trade experience poor welfare conditions, nor are they more likely to survive if those individuals experience good welfare conditions (assuming, of course, that the individuals do not die in either case, since that might lead to taking more of the species in question from the wild). Animal welfare is a distinct ethical priority and obligation that arises because animals are sentient creatures – there are, of course, no parallel provisions concerning CITES-protected plant species.

The welfare provisions of CITES are limited in scope. They apply only to members of endangered species that are listed in the CITES appendices and make “no claim to regulate the much larger transnational trade in domestic animals or animals who are farmed.”¹¹⁸ And they only apply once those animals are in the flow of international trade. In the 1980s the CITES conference of the parties attempted to create rules concerning cruelty in the manner of taking animal specimens from the wild, but these efforts did not succeed as they were seen as going beyond the scope of the treaty and into domestic jurisdiction.¹¹⁹ But the welfare provisions of CITES remain an important example of international treaty rules dealing with the wellbeing of individual animals,

¹¹⁷ Brels, *supra* note 8 at 109.

¹¹⁸ Otter, O’Sullivan & Ross, *supra* note 87 at 55.

¹¹⁹ See discussion in Sykes, *supra* note 88 at 24; Favre, *supra* note 10 at 246.

rules that the great majority of the international community has signed on to (CITES has 182 parties) and that have been established for several decades.

4.5 Animal Rights and International Law

The first thing to say about animal rights in international law is that there are none. Peters notes that the nonexistence of animal rights in international law mirrors domestic legal systems: “In the law of presumably all legal systems, and international law as it stands, humans are accorded rights; animals are not.”¹²⁰ Favre argues that among international negotiators using the term “animal rights” would “only cause confusion and suspicion.”¹²¹ All efforts to include animal rights in international law are aspirational.

But while the first thing to say about international animal rights is that they do not exist, it is not the only thing to be said. Animal rights discourse influences the way we think about animals, and it plays a part in shaping the law that does exist for animal protection. The work of advocates and scholars in this area is norm entrepreneurship: persuading others to accept the idea of animal rights, with the aim of gradually increasing the extent to which it is accepted.¹²²

4.5.1 Adjacency: Animal Rights and Human Rights

Proponents of animal rights consciously draw analogies to international human rights, and their roots in notions of dignity and moral significance that we think of as universally recognized. Cavalieri argues that the internal logic of human rights – the

¹²⁰ Peters, “Human-Animal Comparisons,” *supra* note 3 at 42.

¹²¹ Favre, *supra* note 10 at 239.

¹²² See the discussion of norm entrepreneurship in Section 3.3.3 above.

essential equality of members of the moral community – requires that they be extended beyond our species:

For it is clear, on the basis of the very doctrine that establishes them, human rights are not *human* ... not only is there nothing in the doctrine of human rights to motivate the reference to our species present in the phrase but it is the same justificatory argument underlying it that drives us towards the attribution of human rights to members of species other than our own.¹²³

By emphasizing the parallels between international human rights and animal rights, GAL scholars and advocates employ a strategy that interactional theory would recognize: adjacency to norms that are already established in international law.¹²⁴ Peters describes this strategy as one of borrowing “transferable legal concepts” that originally applied only to human beings, but “have more recently been picked up by scholars or activists in order to employ them for the benefit of animals.”¹²⁵ The strategy has both substantive and formal aspects.

Substantively, animal rights advocates point out the “fit” between animal rights theories and human rights normative frameworks. Cavalieri’s argument, outlined above, is that there is no principled distinction between humans who are included in the existing human rights paradigm, and animals who share the qualities (intelligence, communication, social bonds, or simply sentience) invoked as the basis of rights. This logic mirrors Singer’s analysis of speciesism: excluding nonhuman animals categorically from human rights is just a form of species chauvinism.¹²⁶

¹²³ Cavalieri, *supra* note 9 at 139.

¹²⁴ See discussion in Section 3.3.3 above.

¹²⁵ Peters, “Human-Animal Comparisons,” *supra* note 3 at 34.

¹²⁶ See discussion of the concept of speciesism and its relevance to human rights in Cavalieri, *supra* note 9 at 69-85.

Formally, animal rights advocates draw on the legitimacy of human rights discourse by adopting the structures and vocabulary familiar from international human rights instruments. Formally, animal rights advocates deliberately and strategically borrow from the legal language and structure of international human rights instruments such as the Universal Declaration of Human Rights.

Below I discuss three examples of this type of advocacy for including animal rights in international law. The first is a proposed international instrument recognizing basic rights for all animals. The other two concern the extension of the concept of rights to specific categories of animals: nonhuman great apes, and cetaceans.

4.5.2 The Universal Declaration of Animal Rights

In the 1970s, animal advocates drafted a proposed document recognizing the rights of animals: the Universal Declaration of Animal Rights (UDAR), which was originally adopted by the International League for Animal Rights in 1977.¹²⁷ The UDAR connects principles of respect for nature, prevention of animal suffering, and the dignity (even in death) of morally significant beings.¹²⁸ It proclaims that “all life is one,” “all living beings possess natural rights,” and “any animal with a nervous system has specific rights.”¹²⁹

¹²⁷ The text of the draft Declaration (as revised in 1989) is available online at http://jose.kersten.free.fr/aap/pages/uk/UDAR_uk.html [UDAR]. It is also reproduced in Don W Allen, “The Rights of Nonhuman Animals and World Public Order: A Global Assessment” (1983) 28:2 NYL Sch L Rev 377 at 414 n 259.

¹²⁸ Art 13(a) provides that dead animals must be treated with respect.

¹²⁹ UDAR, *supra* note 127, Preamble.

The UDAR states that wild animals “have the right to live free in their natural environment,¹³⁰” and the destruction of large numbers of wild animals is defined as genocide.¹³¹ Perhaps surprisingly in a declaration of animal rights, breeding animals for food is not ruled out, but any animal kept for this purpose “must be fed, managed, transported and killed without it being in fear or pain.”¹³² Animal rights “must be defended by laws as are human rights.”¹³³

The UDAR was submitted to the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1990, but after that it faded into obscurity.¹³⁴ The propositions it sets out are so far from the existing situation as to make mainstream acceptance unlikely. They are somewhat vague, and even self-contradictory; for example, the assertion that “[e]very animal that usually lives in a domestic environment must live and grow to a rhythm natural to his species” and “[a]ny change to this rhythm and conditions dictated by man for mercantile purpose, is a contradiction of this law”¹³⁵ does not seem compatible with acceptance of breeding and killing animals for food (whatever one’s views on the morality of eating animal-based food, it unavoidably involves death coming sooner than end of the animal’s lifespan in accordance with its “natural rhythm”).

¹³⁰ *Ibid*, Art 4(a).

¹³¹ *Ibid*, Art 12(a).

¹³² *Ibid*, Art 9.

¹³³ *Ibid*, Art 14(b).

¹³⁴ See discussion in Michael Bowman, “The Protection of Animals Under International Law” (1989) 4 *Conn J Int’l L* 487 at 496-497; Valerio Pocar, “Animal Rights: A Socio-Legal Perspective” (1992) 19:2 *J L & Soc’y* 214 at 223; Allen, *supra* note 127.

¹³⁵ UDAR, *supra* note 127, Art 5.

Michael Bowman has written that the main value of the UDAR is in “drawing attention to the general problem of abuse of animals and for itemizing many of the principal areas of concern.”¹³⁶ In other words, it is an instrument of norm entrepreneurship: it calls attention to what its proponents see as a gap in the law by using the vocabulary and structure of international human rights law to describe it, to argue that it needs to be changed, and to point out how the gap can be filled using the concepts and vocabulary of a branch of international law that is well established and accepted.¹³⁷

4.5.3 Great Apes

More recent declarations of animal rights focus on particular groups of animals, where the analogy to human rights is strengthened by growing scientific understanding of these particular animals’ capabilities. One example is The Great Ape Project, founded by Cavalieri and Singer in 1992. The Great Ape Project brings together scientists and scholars who have drafted a Declaration of the Rights of Great Apes Nations, which would acknowledge the rights of nonhuman great apes to life, liberty and freedom from torture, and have advocated for the international adoption of the Declaration by the United Nations.¹³⁸ There is no such international instrument to date. But the work of the Great Ape Project has influenced domestic adoption in some countries of special legal protections for chimpanzees, bonobos, gorillas and orangutans (referred to as nonhuman hominids or nonhuman great apes).

¹³⁶ Bowman, *supra* note 134 at 497.

¹³⁷ See Section 3.3.3 above.

¹³⁸ Cavalieri & Singer, *supra* note 9.

Notably, New Zealand's *Animal Welfare Act* prohibits research, testing or teaching involving the use of a nonhuman hominid without a permit; permits cannot be granted unless the activity is in the best interests of the individual or of its species (and, in the latter case, if the benefits are not outweighed by the harm to the individual).¹³⁹ A direct line can be traced to this legislative reform from the work of the Great Ape Project. According to Rowan Taylor, a proponent of legal reform to protect great apes in New Zealand, the campaign in support of the legislation took on real momentum after "an international movement had been spawned" by the publication of the Great Ape Project's book.¹⁴⁰

At the time that New Zealand's *Animal Welfare Act* was being drafted and discussed, there were calls for the legislation to include rights for nonhuman hominids. These would have been the rights to life, freedom from torture, and freedom from being subjected to medical or scientific experimentation. In the event, the legislation that was adopted is framed around protection of welfare rather than enshrinement of rights.¹⁴¹ A recent (2015) amendment adds as one of the purposes of the *Act* "to recognize all animals as sentient."¹⁴²

Spain has also made tentative, although ultimately incomplete, moves towards robust protections for nonhuman great apes, and these developments too show the influence of the scientific arguments set out by the Great Ape Project. In 2008, a Spanish parliamentary committee adopted a resolution to endorse the goals of the Great Ape

¹³⁹ *Animal Welfare Act 1999* (NZ), 1999/142, s 85.

¹⁴⁰ Rowan Taylor, "A Step at a Time: New Zealand's Progress Towards Hominid Rights" (2001) 7 *Animal L* 35 at 36.

¹⁴¹ *Ibid* at 37.

¹⁴² This language has been added to the Long Title of the Act.

Project, potentially going further than the New Zealand legislation does in the direction of recognizing some form of basic rights. But this effort went no further.

4.5.4 Cetaceans

Cetology, the study of whales and dolphins, has also produced insights into the capability and intelligence of these animals that have prompted some scientists and philosophers to reconceptualize their status in relation to humans. Researchers in the field have built up a complex, compelling picture of cetaceans' social organization and their highly sophisticated systems of communication. Hal Whitehead and Luke Rendell have argued, based on their own collective decades of study of sperm whale vocalizations as well as studies by others, that there is sufficient evidence at this point to conclude that cetaceans have their own culture – an attribute traditionally thought to be definingly and exclusively human.¹⁴³

As in the case of nonhuman great apes, deeper understanding of cetacean behaviour and cognition has prompted efforts to frame their moral and legal status in terms of rights. In 2010 a conference at the University of Helsinki put forward the “Declaration of Rights for Cetaceans: Whales and Dolphins,” asserting that individual

¹⁴³ Hal Whitehead & Luke Rendell, *The Cultural Lives of Whales and Dolphins* (Chicago, University of Chicago Press, 2015). Whitehead and Rendell adopt a broad definition of culture as “behavior patterns shared by members of a community that rely on socially learned and transmitted information” (*ibid* at 11). They see the song of the humpback whale as the best example of culture so defined in cetaceans, because there is strong evidence that it is a communal behaviour and learned socially (*ibid* at 192-194). Of course – as Whitehead and Rendell recognize – it can be objected that it is a false equivalence to talk about “culture” so broadly defined alongside the more complex and elevated examples of human culture, such as the fine arts and advanced technology (*ibid* at 203-212). The same objection may validly be raised about evidence of culture (tool-making and communication) in nonhuman great apes. At a minimum, however, our current understanding of these nonhuman animal behaviours disrupts the once accepted boundary between supposedly exclusively human characteristics and those of nonhuman animals. Like cognition and intelligence, the picture that emerges is of a connected continuum rather than a categorical distinction.

cetaceans have the right to life, should not be held in captivity, treated cruelly or taken from their natural environment, have the right to “freedom of movement and residence in their natural environment,” are not property, have the right to protection of their natural environment, and have the right to protection of their culture.¹⁴⁴ The preamble of the Declaration invokes the “principle of equal treatment of all persons” and proclaims that cetaceans are persons.¹⁴⁵ These claims about the status of whales are explicitly linked to scientific findings; the preamble notes that “scientific research gives us deeper insights into the complexities of cetacean minds, societies and cultures.”¹⁴⁶

Twenty years before this proposal of a declaration of rights, two prominent international law scholars, D’Amato and Chopra, had argued in an academic article that whales already had one right – the right to life – under customary international law.¹⁴⁷ D’Amato and Chopra argued that binding customary law recognizing whales’ right to life existed or was in the process of emerging, based on the presence of these two necessary elements, state practice and *opinio juris*.¹⁴⁸ Like the authors of the Helsinki Declaration (one of whom, in fact, was Sudhir Chopra), they ground this argument in part in the moral implications of our current, growing knowledge of the extraordinary complexity and sophistication of whales’ brains, communicative abilities and social organization.¹⁴⁹

¹⁴⁴ *Declaration of Rights for Cetaceans: Whales and Dolphins*, online: www.cetaceanrights.org. For discussion of the genesis and significance of this Declaration, see “Declaration of Rights for Cetaceans: Whales and Dolphins,” (2011) 14:1 J Int’l Wildlife L & Pol’y 75.

¹⁴⁵ Declaration of Rights for Cetaceans, *ibid*.

¹⁴⁶ *Ibid*.

¹⁴⁷ *Supra* note 79.

¹⁴⁸ *Ibid* at 23.

¹⁴⁹ *Ibid* at 21.

D'Amato and Chopra's argument is credible and supported by solid scholarship and argument, but it cannot be said that the idea of whales having rights has been accepted in mainstream international law. In 2014, the International Court of Justice ruled that Japan's JARPA II¹⁵⁰ research whaling program, ostensibly conducted under an exception to the international moratorium on commercial whaling, was illegal because it did not qualify for the scientific research exemption.¹⁵¹ Although ethical and philosophical questions about the rights and wrongs of killing whales were potentially implicated in the dispute, the Court expressly distanced itself from that aspect of the controversy, stating that "[t]he Court is aware that members of the international community hold divergent views about whales and whaling, but it is not for the Court to settle these differences."¹⁵² The issue was confined to a quite technical question of interpreting the language of the research whaling exemption.

4.6 Is Global Animal Law Law?

The preceding discussion has covered a number of different areas in international law and in the work of legal scholars where the problem of legal protection for animals is addressed or alluded to. This collection of legal obligations, intergovernmental

¹⁵⁰ JARPA II is the acronym for phase II of the Japanese Whale Research Program under Special Permit in the Antarctic. After this ruling, Japan discontinued this program and then announced a new research whaling plan: Government of Japan, Proposed Research Plan for New Scientific Whale Research Program in the Antarctic Ocean (NEWREP-A), available at http://iwc.int/document_3550.download.

¹⁵¹ *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, [2014] ICJ Rep 226, available at <http://www.icj-cij.org/docket/files/148/18136.pdf> [*Whaling in the Antarctic*]. See also Cymie Payne, "ICJ Halts Antarctic Whaling – Japan Starts Again" (2015) 4:1 *Transnat'l Env't'l L* 181; Brendan Plant, "Sovereignty, Science and Cetaceans: The *Whaling in the Antarctic* Case" (2015) 74:1 *Cambridge L J* 40;

¹⁵² *Whaling in the Antarctic*, *ibid* at para 69.

standards, statements of principle, and proposed initiatives is what the term “global animal law” describes. But is it actually law?

Global animal law scholars are frank about the deficiencies of these legal principles as an effective legal regime. Peters observes that the “piecemeal” phenomena that have been identified as part of global animal law are not “a coherent and ‘thick’ body of law,” because they are “fragmented, often qualified, often inconsistent, unenforceable, and moreover unknown to most lawyers, law enforcers and legal scholars alike.”¹⁵³

It is clear enough, then, that global animal law is not fully developed as something that even its supporters would identify as law in the full sense. But interactional theory can add important insights to this conclusion, by illuminating more specifically *how* global animal law is deficient as law, and what further evolution might strengthen its status.

4.6.1 Traditional Sources: Treaties and General Principles

The analysis presented in this thesis looks at global animal law from an interactional, rather than a positivist perspective. This means that the inquiry is not limited to checking for the presence of animal protection principles in the traditional sources of international law listed in Article 38(1) of the Statute of the International Court of Justice.¹⁵⁴ Interactional theory argues that just because a norm is reflected in a recognized source of law such as a treaty, it does not automatically follow that it is fully legal – and just because a norm emanates from a different source such as

¹⁵³ Peters, “Global Animal Law,” *supra* note 3 at 15.

¹⁵⁴ See discussion in Section 3.3 above.

intergovernmental standard-making it does not necessarily follow that it is not legal. As Brunnée puts it, “it is important to bear in mind that, while provenance from certain ‘sources’ may be ‘shorthand’ for a norm’s legal quality, the shorthand must not be mistaken for a complete explanation.”¹⁵⁵ At the same time, the traditional account of sources is a useful shorthand and a good starting point for assessing the status of global animal law.

Many norms that further the protection of animals are found in international environmental treaties. But these provisions reflect the sensibility of global animal law only in a very limited way. They are peripheral to legal regimes that are centrally concerned with conservation, trade and resource management. There is also evidence that animal protection norms in treaties are weak when evaluated using interactional theory, especially when it comes to the criterion of congruence of official action with stated norms – or, in other words, whether states actually comply with these norms in a concrete way and through a practice of legality. This problem is elaborated on in Section 4.6.3 below.

The other traditional source of international law that has been put forward as a basis for international animal protection norms is the category of general principles of international law, which is referred to in Article 38(1)(c) of the ICJ Statute. General principles are international norms that can be derived from principles pervasively recognized in domestic legal systems, if they are so universal that they can be said to be recognized as internationally binding norms. It has also been suggested by some jurists

¹⁵⁵ *Supra* note 105 at 962.

and scholars that general principles of international law may be based on natural law or values shared universally by members of the international community.¹⁵⁶

As discussed in Section 4.4 above, Bowman, Redgwell and Davies argue that commitment to the principle of animal welfare is so pervasive that there may now be a general principle of international law on this matter, which they argue would be procedural in nature, requiring that government actions that affect animal welfare be subject to some form of review or impact assessment.¹⁵⁷ I have also argued that there may be a substantive general principle of international law based on a consensus that animals should not be subjected to undue suffering, where there is no good reason for harming them or the suffering is completely out of proportion to the human purposes served.¹⁵⁸ These norms are so widely reflected in domestic legal systems, as well as some international instruments, that there is arguably enough here to ground a general principle of international law.

However, if a general principle concerning animal welfare exists, it is at a high level of abstraction and it is widely disregarded in practice.¹⁵⁹ Again, this would suggest that even if it fits into one of the recognized sources of international law, it may not work as binding law as interactional theory evaluates it.

¹⁵⁶ See discussion in Katie Sykes, *The Beasts in the Jungle: Animal Welfare in International Law* (LLM thesis, Schulich School of Law, 2011) [unpublished] at 28-32 and the Separate Opinion of Vice-President Weeramantry in *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, [1997] ICJ Rep 88 at 108-109 (describing the values underlying the principle of sustainable development as “among those pristine and universal values which command international recognition” and ground a general principle of international law).

¹⁵⁷ Bowman, Davies & Redgwell, *supra* note 61 at 680.

¹⁵⁸ Sykes, *supra* note 88.

¹⁵⁹ See the discussion of noncompliance and interactional theory in Section 4.6.3 below.

4.6.2 Shared Understandings

There can be little doubt that global shared understandings exist on some elementary, general propositions about the significance of animals' interests. For example, the preceding discussion indicates that there is normative consensus to the effect that animal sentience and animal suffering are morally significant facts that law should recognize, and that the actions of states should at least take animal welfare into account. There is also a solid consensus apparent in international law that the loss of a species is a tragedy, that killing of endangered animals and actions that threaten their habitats should be limited, and that trafficking in endangered animals and products from them is a scourge that nations have a responsibility to prevent and discipline.

But these uncontroversial principles are general and loose, and they do not go far in generating the kinds of actionable rules that would look more like an operational body of law with a strong basis in social practice. They represent a widely shared but shallow consensus, which would not be sufficient to ground what Brunnée and Toope call “ambitious law.”¹⁶⁰

The norms of global animal law are in the process of establishing themselves. In constructivist terminology, they are in an early stage of the “norm cycle.”¹⁶¹ Finnemore and Sikkink argue that at this early stage in their development, new international norms can be influenced by norms that are widely established domestically: “[m]any international norms began as domestic norms and become international through the

¹⁶⁰ Brunnée & Toope, *supra* note 91 at 56.

¹⁶¹ See Section 3.3.3 above.

efforts of entrepreneurs of various kinds.”¹⁶² This influence of domestic norms is “strongest at the early stages of a norm’s life cycle, and domestic influences lessen significantly once a norm has become institutionalized in the international system.”¹⁶³

These observations fit quite well with the current development of global animal law. Animal protection and especially animal welfare have long been regarded as primarily domestic matters. The norm entrepreneurs of global animal law are translating them into universal and global norms, in part in response to the perceived need for a global response to transboundary animal protection problems.

Although there is evidence of a basis in shared understandings for emerging norms of animal protection at a high level of generality, there is not much consensus – and sometimes significant disagreement – on more specific questions about how these principles should be reflected in action. What are the minimum required standards of animal welfare, and do they apply across international boundaries? To what extent must the regulation of hunting methods that conflict with principles of animal protection defer to the cultural importance of traditional hunting? How is the protection of animals to be balanced with economic development? What level of law enforcement resources are states responsible for devoting to combatting illegal trade in wildlife?

It is much more difficult to resolve questions like these than it is to reach consensus on high-level principles like the proposition that animals have some intrinsic moral significance and deserve some legal protection. Interactional theory suggests that

¹⁶² Martha Finnemore & Kathryn Sikkink, “International Norm Dynamics and Political Change” (1998) 52 *Int’l Organization* 887 at 893.

¹⁶³ *Ibid* at 893.

the more concrete, and more controversial, questions can only be worked out (if they can at all) in a way that would generate consensus-based legal norms through a process of interaction in the context of a practice of legality.¹⁶⁴ Compare, for example, Brunnée and Toope's account of how specific international norms concerning climate change, generated on the basis of vague treaty language, are being developed and reinforced through ongoing interaction in committee meetings, compliance proceedings, and similar settings.¹⁶⁵ Such opportunities for interaction and for the creation and maintenance of epistemic communities exist in global animal law to some extent through institutions like the OIE, but it is a limited extent. Without a robust institutional structure for interactional lawmaking, global animal law has limited ability to generate and uphold fully articulated norms with a solid basis in shared understandings.

It is worth noting here that every one of the difficult, specific normative questions concerning animal welfare listed above has featured, to some degree, in a controversy implicating international trade. The international trade law regime, unlike the embryonic collection of norms that make up global animal law, has sophisticated lawmaking structures that might serve as a forum for some of the interactional practice of legality around animal protection that so far does not have an institutional home of its own.

4.6.3 Noncompliance and the Congruence Requirement

One of the clearest shortcomings of global animal law when it is evaluated using the interactional framework is the lack of consistent official action that complies with

¹⁶⁴ See discussion of the practice of legality in Section 3.5 above.

¹⁶⁵ Brunnée and Toope, *supra* note 91 at 194-204.

animal-protective principles and demonstrates recognition that these principles are legally binding.

Congruence between official action and declared rules is one of Fuller's criteria of legality.¹⁶⁶ It is also connected to the concept of constructing law through interaction in a practice of legality.¹⁶⁷ At the most basic level, if there is some rule that is announced as law but official actors nevertheless actually conduct themselves as if it were not, then the criterion of congruence is not met and, further, there is no practice of legality.¹⁶⁸

Interactional theory's understanding of congruence, and of practices of legality, goes beyond simple conformity; it includes "a wider range of practices through which all participants in the international legal system demonstrate adherence to the norm as well as support its legality."¹⁶⁹ Some degree of non-conformity does not necessarily mean that legality is destroyed: "the congruence requirement can be met even when some actors violate or distort existing legal norms, provided that other participants in the legal system work to maintain those norms."¹⁷⁰ But disputing or rejecting norms can change their status: "depending on the circumstances, patterns of contestation may result in strengthened, modified, or new norms," and "[w]idespread failures to respect and uphold a given norm ... will eventually erode it."¹⁷¹

¹⁶⁶ See discussion in Section 3.4.3.

¹⁶⁷ See discussion in Section 3.5

¹⁶⁸ Jutta Brunnée & Stephen J Toope, "Interactional International Law: An Introduction" (2011) 3:2 Int'l Theory 307 at 313-314.

¹⁶⁹ Brunnée, *supra* note 105 at 964.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

In the case of animal protection, though, there is a real possibility that the lack of action reflecting stated principles may make it impossible to say that global animal law is really law, or even on the way to becoming law.

As Brunnée and Toope observe:

the requirement that a norm meet the legality criterion that official action must match the norm is a particularly tough-minded aspect of the interactional analysis, as is the need to study the subsequent practice of legality surrounding the norm. In standard accounts of international law, it has been too easy to argue that a rule exists despite widespread failure to uphold it simply because states try to justify their breaches or keep them secret.¹⁷²

Applying this “tough-minded” requirement, Brunnée and Toope conclude that the prohibition against torture, despite widespread protestations of approbation and adherence, has not in fact attained the status of a legal norm because there is widespread and well documented noncompliance with it.¹⁷³

The requirement of congruence of official action with norms is a high hurdle for principles of animal protection, especially (but not only) at the international level. In interactional theory, widespread noncompliance with a purported international norm – which means both a lack of congruence of official action with declared norms and the absence of a practice of legality – means that it loses or never attains the status of law.

Unpunished, unmonitored noncompliance and lack of enforcement are ubiquitous problems when it comes to laws whose stated purpose is to protect animals.

Underenforcement is pervasive across domestic jurisdictions, as well as at the

¹⁷² Brunnée & Toope, *supra* note 91 at 259-260.

¹⁷³ *Ibid* at 220-270.

international level. With respect to US law, Cass Sunstein emphasizes the contrast between the extensive animal protection laws that exist on paper and their ineffectiveness in practice due to official inaction:

U.S. law has come to recognize a wide array of protections for animals. Indeed, it would not be a gross exaggeration to say that federal and state laws now guarantee a robust set of animal rights. A major problem is that the relevant laws are rarely enforced. They exist, but for too many animals they are not worth the paper they are written on.¹⁷⁴

Similarly, at the international level, noncompliance with animal protection laws is common, and the meagre protections that exist for individual animals are (in Sunstein's words) often not worth the paper they are written on. For example, Michael Bowman notes that the animal welfare provisions of CITES are "routinely disregarded in the practices of many of the parties."¹⁷⁵

In other writing, I have argued that the problem of meeting the congruence requirement might be a limitation of interactional theory when it comes to explaining the

¹⁷⁴ Cass R Sunstein, "Can Animals Sue?" in Cass R Sunstein & Martha C Nussbaum, eds, *Animal Rights: Current Debates and New Directions* (Oxford: Oxford University Press, 2005) 251 at 252. See also Peter Sankoff & Sophie Gaillard, "Bringing Animal Abusers to Justice Independently: Private Prosecutions and the Enforcement of Animal Protection Legislation" in Peter Sankoff, Vaughan Black & Katie Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law, 2015) 307 at 307 (observing that "[i]f there is one thing that advocacy groups working on behalf of animals tend to agree upon, it is that prosecutors and regulatory agencies are too hesitant in enforcing legislation intended to punish acts of cruelty to animals. Whether this reticence stems from a lack of resources, institutional will, commitment to the objectives of the governing legislation, conviction regarding the status of animal cruelty as a 'legitimate' crime, or a combination of these factors, the result is the same: prosecutions remain a relatively rare occurrence in most jurisdictions"), Delcianna Winders' detailed empirical analysis of the failure of administrative warnings under the US *Animal Welfare Act* to deter subsequent violations and failure of authorities to follow up with enforcement action after warnings (Delcianna J Winders, "Administrative Law Enforcement, Warnings, and Transparency" (2018) 79:3 Ohio State L J 451), and Winders' analysis of the US Department of Agriculture blackout of *Animal Welfare Act* inspection reports in 2017 (Delcianna J Winders, "Fulfilling the Promise of EFOIA's Affirmative Disclosure Mandate" (2018) 95:4 Denver L Rev 909).

¹⁷⁵ Bowman, "Conflict or Compatibility," *supra* note 113 at 59; see also 60-61.

transformation of ethical, essentially non-self-interested values, including animal protection, into international law:

Practice compliant with norms that protect the powerless – such as torture victims and animals – is always going to be an unlikely occurrence, unless human beings change a great deal. Does this mean we must accept that only law that suits the interests of the powerful can really become, and remain, binding international law? ... When it comes to animal welfare, a theory in which state practice plays such a defining role is unlikely to have much room for recognizing legal principles that protect animals for their own sake. For human nations, rules of this type always require, at least to some extent, that self-interest yields to a perceived ethical imperative.¹⁷⁶

Animal protection may be a case that calls for a modified application of the ideas of congruence and the practice of legality, because these concepts proceed from the proposition that law is generated and maintained by the reciprocal, collective efforts of the interactions of participants in the legal system¹⁷⁷ – and animals, the beings who are most affected by the existence or absence of laws to protect them, have no capacity to participate directly in the system.

The interactional model, especially the requirement of congruence of official action with norms, suggests that it could be implausible for animal protection norms to truly become law as the model defines it. This is a possibility that, disappointingly, does not reflect the practical reality of a world full of animal-protective laws not worth the paper they are written on. However, interactional theory also proposes that law is “constructed” and “can partly exist,” and that its creation is an aspirational activity.¹⁷⁸ So while

¹⁷⁶ Sykes, *supra* note 88 at 20-21.

¹⁷⁷ Jutta Brunnée & Stephen J Toope, “Interactional Legal Theory, The International Rule of Law, and Global Constitutionalism” in Anthony F Lang & Antje Wiener, eds, *Handbook on Global Constitutionalism* (Cheltenham: Edward Elgar, 2018) 170 at 174.

¹⁷⁸ Jutta Brunnée & Stephen J Toope, “International Law and Constructivism: Elements of an Interactional Theory of International Law” (2000) 39:1 *Columbia J Transnat'l L* 19 at 54.

interactional theory may ultimately lead to a conclusion that evolving international norms of animal protection have only a very limited place in law, it also permits useful discussion of the process of constructing and aspiring to create new legal norms in the realm of global animal law.

Finally, there is a connection here, too, to international trade law. In the WTO context, animal protection is not a positive obligation, but only (at most) an exception to the system's core obligations concerning trade. But modern trade agreements outside the WTO system (that is, preferential trade agreements) routinely include positive obligations on environmental protection that are connected to meaningful compliance mechanisms, and these provisions are increasingly recognized as including norms that fit into the category of animal protection or global animal law. These developments are discussed in more detail in Chapter Eight. For now, it is enough to say that a stronger legal mechanism for enforcing animal protection norms in the trade context could supply part of what is missing from global animal law, and contribute to developing and reinforcing its legal character.

4.7 Conclusion

This chapter has presented an overview of the various animal-protective rules and initiatives that together make up global animal law. This collection of legal and almost-legal phenomena may be described as piecemeal, incoherent, fragmented and inconsistent. But the picture is somewhat less discouraging if we look at it as the evidence and product of a process of constructing international law.

Using the categories of interactional IL theory, global animal law has a place on the “continuum of legality,”¹⁷⁹ but it is not well established at the more definitively legal end of the continuum. Much of the process of formation of global animal law is still taking place at the stage of working to establish shared understandings. There are, however, examples of law based in the traditional international legal sources (treaties and general principles) built on those shared understandings. The extent to which these principles are truly legal in the interactional sense, including being built and maintained through practices of legality, remains questionable. In the case of stronger animal-protection principles, especially animal rights, even shared understandings have not emerged supporting their instantiation in international law, but the work of persuasion and norm entrepreneurship, and the research of epistemic communities associated with international animal rights advocacy, have contributed to the gradual evolution of shared understandings that are to some extent influenced by animal rights discourse.

The remaining chapters elaborate on the proposition that international trade law is contributing to the formation of global animal law, in a way that makes up part of the particular deficiencies that interactional theory diagnoses in this new area of international lawmaking. Chapter Five (the next chapter) lays the groundwork for that discussion by explaining the history and structure of the multilateral trade regime.

¹⁷⁹ See discussion of the idea of a continuum of legality in Section 3.6 above.

Chapter 5 The International Trade Regime: Origins, Fundamental Doctrines, and Norm Creation

5.1 Introduction

This chapter sets out an overview of the basic structure and treaty obligations of WTO law, in order to explain their interaction with animal protection and global animal law. The chapter begins with an account of the historical development of the trade regime from the GATT to the WTO and the place of the trade regime in the broader landscape of global governance. It also outlines the evolution of the trade dispute settlement system from the GATT era to the WTO. It goes on to describe key provisions of WTO law that are relevant to trade-related animal-protection initiatives.

The international trade regime was created to increase economic welfare, and its justificatory and theoretical foundations come from economic theory, starting with the classical liberal economists of the eighteenth century. But trade and trade law are bound up with questions of international politics, distributive justice and the pursuit of noneconomic values that economic theories do not fully address. The chapter touches on some of those questions: why an international regime for regulating trade exists, how the benefits and burdens of liberalized trade are allocated, and how to deal with tensions between trade and non-trade policy objectives.

Finally, this chapter considers the WTO, in particular the DSB, as a “practice of legality” as defined by Brunnée and Toope.¹

¹ Jutta Brunnée & Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010) at 15,27-28, 283-4; see discussion in Section 3.5.

5.2 The History of the International Trade Regime

5.2.1 Origins: Classical Economic Arguments for Liberalized Trade

The intellectual foundations of free trade and international trade regulation begin with theories formulated by the classical economists. The starting point is Adam Smith's theory of absolute advantage.² Even more important is the theory of comparative advantage, generally credited to David Ricardo.³ Both theories were elaborated on by John Stuart Mill.⁴

Before Smith and Ricardo, the predominant political-economic theory concerning international trade was mercantilism, which Winham sums up succinctly as a zero-sum competition between nations to maximize their exports: "countries sought to export more than import, and thereby to accumulate wealth and presumably power."⁵ Exporting goods in exchange for capital amounted to winning this game, and importing goods and paying capital for them amounted to losing.⁶

² Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Electronic Book Company, 2000) [1776].

³ David Ricardo, *Principles of Political Economy and Taxation* (ed R M Hartwell) (Harmondsworth: Pelican, 1971) [1817]. Some economists have argued that the economist Robert Torrens, Ricardo's contemporary, should have the principal credit for discovering and articulating this theory; see discussion in John S Chipman, "A Survey of the Theory of International Trade: Part 1, The Classical Theory" (1965) 33:3 *Econometrica* 477 at 479-483.

⁴ John Stuart Mill, *Principles of Political Economy*, ed Stephen Nathanson (Indianapolis: Hackett, 2004) [1848].

⁵ Gilbert R Winham, "The Evolution of the World Trading System - the Economic and Policy Context" in Daniel Bethlehem, Donald McRae, Rodney Neufeld & Isabelle Van Damme, eds, *The Oxford Handbook of International Trade Law* (Oxford: Oxford University Press, 2009) 6 at 8. See also summary of Smith's theory of absolute advantage in Michael Trebilcock, *Advanced Introduction to International Trade Law* (Cheltenham, UK: Elgar, 2015) at 1-2.

⁶ Monica Das, "Absolute and Comparative Advantage" in William A Darity Jr, ed, *International Encyclopedia of the Social Sciences*, 2d ed (Detroit: Macmillan Reference, 2008) Vol 1 5; Michael Trebilcock, Robert Howse & Antonia Eliason, *The Regulation of International Trade*, 4th ed (London: Routledge, 2013) at 2.

Smith challenged the mercantilist model by showing that nations can increase their economic wellbeing by concentrating production where they have the most strength and importing other products, rather than maximizing exports across the board. The theory of absolute advantage extends to nation states Smith's concept of the division of labour,⁷ according to which each worker specializes at the task he or she does best leading to an aggregate increase in efficiency of production. Similarly, nations have advantages in the production of some commodities, in that they can produce those commodities more cheaply.⁸

Smith argued that what is in the best interests of a nation is not simply ensuring a favourable balance of trade (more exports than imports).⁹ Instead, Smith argued, nations should purchase from foreign countries those commodities that can be imported more cheaply than they can be made at home, and should export the commodities they can produce efficiently.¹⁰

Smith illustrates the principle with the example of Scottish wine. While it would be possible, by using "glasses, hotbeds and hot walls" to grow good grapes in Scotland and make good wine out of them, it would be "at about thirty times the expense for which at least equally good can be bought from foreign countries."¹¹ The example makes it obvious that it would be unreasonable, and not conducive to accumulating greater wealth,

⁷ Winham, *supra* note 5 at 8.

⁸ Smith, *supra* note 1 at 595-597. See also discussion in Winham, *ibid* at 8-9 and in Trebilcock, *supra* note 5 at 1-2.

⁹ Smith, *ibid* at 588.

¹⁰ *Ibid* at 595.

¹¹ *Ibid* at 597.

for Scotland to prohibit the import of foreign wine in order to have a very expensive domestic wine industry.¹²

The rise of economic liberalism in the eighteenth and nineteenth centuries coincided with England's emergence as a dominant economic force after the Napoleonic wars.¹³ As a result, England had absolute advantage in the production of a lot of goods, so in a sense, for England at least, Smith's theory pointed to the same end result as mercantilism, although for different reasons: England should export a lot of things and not import very many things.

This is where Ricardo's theory of comparative advantage introduced a counterintuitive innovation into the economic analysis of trade. Ricardo showed that greater aggregate welfare can be realized through specializing in production of the goods that a country is *relatively* best at producing, as compared to other goods, and importing those other goods. Ricardo supports the argument with an example showing that Portugal should import cloth from England, even if Portugal could produce the cloth at less expense (expressed by Ricardo in terms of labour) than England could, if Portugal could deploy that same labour more beneficially to produce wine:

To produce the wine in Portugal, might require only the labour of 80 men for one year, and to produce the cloth in the same country, might require the labour of 90 men for the same time. It would therefore be advantageous for her to export wine in exchange for cloth. This exchange might even take place, notwithstanding that the commodity

¹² In the era of global warming, Scotland's lack of advantage in wine-growing is probably not as acute as it was in Smith's time, but still has not disappeared altogether. A 2015 news story in the *Telegraph* reported that Scotland's first home-grown wine was called "undrinkable" by wine critics. Victoria Ward, "Scotland's first wine branded 'undrinkable' by critics" *The Telegraph* (14 July 2015) online: <https://www.telegraph.co.uk/news/newstoppers/howaboutthat/11736496/Scotlands-first-wine-branded-undrinkable-by-critics.html>.

¹³ Winham, *supra* note 5 at 9-10.

imported by Portugal could be produced there with less labour than in England. Though she could make the cloth with the labour of 90 men, she would import it from a country where it required the labour of 100 men to produce it, because it would be advantageous to her rather to employ her capital in the production of wine, for which she would obtain more cloth from England, than she could produce by diverting a portion of her capital from the cultivation of vines to the production of cloth.¹⁴

In Ricardo's example, Portugal has the absolute advantage in wine production *and* cloth production. Portugal can produce wine for 80 units of labour (versus 90 in England) and the cloth for 90 units of labour (versus 100 in England). But *comparative* advantage favours using the resources to produce wine, and importing cloth. The resources that would have been used on wine production (90 units of labour) are freed up to be used more efficiently on cloth production (which only takes 80 units of labour). Ricardo's theory takes into account the opportunity cost of expending resources on the production of cloth when those resources could be more efficiently deployed in producing wine.

Ricardo's theory showed that aggregate welfare increases through specialization of production based on comparative advantage, and supports openness to imports of other goods.¹⁵ Ricardo argued that removing obstacles to free trade between nations would enhance both the prosperity of individual nations and collective wellbeing, and increase international harmony:

Under a system of perfectly free commerce, each country naturally devotes its capital and labour to such employments as are most beneficial to each. This pursuit of individual advantage is admirably connected with the universal good of the whole. By stimulating

¹⁴ Ricardo, *supra* note 3 at 153-4. See also the explanation of the theory (loosely based on Ricardo's example) in Simon Lester, Bryan Mercurio & Arwel Davies, eds, *World Trade Law: Texts, Materials and Commentary* (Oxford: Hart, 2012) at 22-24.

¹⁵ Winham, *supra* note 5 at 8-9; Trebilcock, Howse & Eliason, *supra* note 6 at 2-3.

industry, by rewarding ingenuity, and by using most efficaciously the peculiar powers bestowed by nature, it distributes labour most effectively and most economically; while, by increasing the general mass of productions, it diffuses general benefit, and binds together by one common tie of interest and intercourse, the universal society of nations throughout the civilized world.¹⁶

The ideas of the classical economists, especially the theory of comparative advantage, are still an important part of the justificatory basis for trade liberalization. As Dani Rodrik, a prominent critic of economic globalization, puts it, “[t]hese ideas were elegant, powerful, and could be stated with logical precision.”¹⁷ Contemporary accounts of trade regulation, such as the comprehensive text by Howse, Trebilcock and Eliason, habitually observe that the theory of comparative advantage remains “the basis of conventional international trade theory” today.¹⁸

Classical trade theory shows how reducing regulatory barriers to trade leads to economic benefits. Perhaps the more important insight it is the logical converse of that statement: there are economic costs associated with restrictions on trade.

As Ricardo’s reference to “bind[ing] together ... the universal society of nations throughout the civilized world,” theories of free trade also gesture towards a less instrumentalist proposition as well: that liberalized trade is a moral good, and that it promotes the integration of world societies in a deeper sense.¹⁹ These arguments (both

¹⁶ Ricardo, *ibid* at 152.

¹⁷ Dani Rodrik, *The Globalization Paradox* (New York: Norton, 2011) at 26.

¹⁸ Trebilcock, Howse & Eliason, *supra* note 6 at 3.

¹⁹ For the position that liberalized trade is a force for social good and an instrument for promoting peace, human rights and democracy, see, e.g., Daniel Griswold, “Trade, Democracy and Peace: The Virtuous Cycle” (April 20, 2007), speech presented at the “Peace Through Trade” Conference, World Trade Centers Association, Oslo, Norway, online: <https://www.cato.org/publications/speeches/trade-democracy-peace-virtuous-cycle>; Jagdish Bhagwati, *In Defense of Globalization* (Oxford: Oxford University Press, 2007).

the purely economic arguments and the broader proposition that trade liberalization brings about other good ends) suggest that governments should reduce barriers to trade by lowering or eliminating tariffs and removing other regulatory obstacles to the free movement of imports and exports across borders.

5.2.2 Bilateralism and the Most-Favoured Nation Network

British tariffs and other trade barriers on imported grains referred to as the Corn Laws were repealed in 1846, marking an important unilateral shift towards trade liberalization.²⁰ In 1860, Britain and France concluded the Cobden–Chevalier treaty, under which the two countries agreed to give each other better access to their respective markets by lowering tariffs and barriers to imports.²¹ The Cobden–Chevalier treaty included an unconditional most-favoured nation (MFN) clause.

Under the MFN obligation, each party to the treaty promises to offer the other party (or parties, in the case of a multilateral treaty) the most favourable trade treatment that it grants to any other country, including under agreements it may enter into with third countries in the future.²² Cobden–Chevalier incorporated the unconditional version of the MFN principle: Britain automatically received the most favourable treatment granted by France in any agreement with a third country C, even if C offered no concessions to Britain (and, reciprocally, France received the same unconditional commitment from

²⁰ Cheryl Schonhardt-Bailey, *From the Corn Laws to Free Trade: Interests, Ideas and Institutions in Historical Perspective* (Cambridge, MA: Massachusetts Institute of Technology, 2006); Winham, *supra* note 5 at 10; Trebilcock, Howse & Eliason, *supra* note 6 at 20-21; Mark R Brawley, “Agricultural Interests, Trade Adjustment and the Repeal of the Corn Laws” (2006) 8 *British J Politics & Int’l Relations* 467.

²¹ David Lazer, “The Free Trade Epidemic of the 1860s and Other Outbreaks of Economic Discrimination” (1999) 51:4 *World Politics* 447 at 470-471.

²² Trebilcock, Howse & Eliason, *supra* note 4 at 54.

Britain).²³ The MFN obligation has the effect of ratcheting down barriers to trade, as the most favourable terms agreed to between trading partners automatically extend across any other trading relationships they are party to that include an MFN provision.

Cobden–Chevalier set off a rapid spread of bilateral trade treaties. Lazer describes the spread of these bilateral MFN treaties, which created an “explosion of economic openness” in the 1860s, as an “epidemic” that spread in a manner analogous to contagion.²⁴ The result was, in effect, a system of global free trade under a decentralized network of bilateral treaties connected through their MFN clauses, without any supervening institution for oversight or governance.

5.2.3 Interwar Protectionism and the Turn to Multilateral Trade Governance

The nineteenth and twentieth centuries saw swings between periods of protectionism and economic globalization.²⁵ The economic depression of the 1870s pushed European countries to adopt protectionist measures and raise tariffs. The MFN treaties remained in place, but the countries that had signed up to them simply ignored them and imposed tariffs anyway. The United States, the rising economic power, had never been part of the free trade network, and protected its nascent industries with tariffs

²³ *Ibid* at 54-55. A different variation, conditional MFN, would make MFN treatment for (for example) Britain contingent on the third country C’s extension of concessions to Britain equivalent to those given by France to Britain under the original treaty (*ibid*).

²⁴ Lazer, *supra* note 21 at 447-8. See also Markus Lampe, “Explaining Nineteenth-Century Bilateralism: Economic and Political Determinants of the Cobden–Chevalier Network” (2011) 64:2 *Economic History Review* 644.

²⁵ Winham, *supra* note 5 at 11-12.

and other trade barriers.²⁶ The nineteenth century MFN network broke down completely in the First World War.²⁷

Following the 1914-18 war, economic production resumed and there were new efforts to cooperate internationally on trade. These included a 1927 treaty, the Geneva Convention for the Abolition of Import and Export Prohibitions and Restrictions, that was an early step towards multilateral regulation of trade measures.²⁸

In the 1930s, there was a global turn to protectionism that is widely seen as an economic disaster. Economists generally agree that protectionism in the 1930s was both a reaction to the Great Depression and a contributing factor to making the economic crisis worse, and that it shares part of the blame for the descent into totalitarianism and war that followed.²⁹ In 1930, The US passed the Smoot-Hawley Act, imposing high tariffs on imports.³⁰ Other countries retaliated with their own raised tariffs in a process of “competitive protectionism” that ratcheted trade barriers up around the world.³¹ A severe downturn in global trade ensued. Trade decreased by about two thirds from 1929 to 1934.³² Trade scholars capture the mutual destruction of this protectionist arms race in the term “beggar-thy-neighbour” protectionism.³³

²⁶ *Ibid.*

²⁷ Lazer, *supra* note 21 at 478.

²⁸ Winham, *supra* note 5 at 12.

²⁹ Douglas A Irwin, *Trade Policy Disaster: Lessons from the 1930s* (Cambridge, Mass: MIT Press, 2012); Douglas A Irwin, Petros C Mavroidis & Alan O Sykes, *The Genesis of the GATT* (Cambridge: Cambridge University Press, 2008) at 5-6; Robert Howse, “From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trade Regime” (2002) 96 *AJIL* 94 at 94-95.

³⁰ Winham, *supra* note 5 at 13.

³¹ *Ibid.*; Irwin, *supra* note 29 at 14-19.

³² Winham, *ibid.*

³³ See, e.g., Howse, *supra* note 29.

Reaction to these events – a desire never to repeat them – is probably the strongest factor motivating the creation of an international trade regime after the Second World War. The editors of the *Oxford Handbook on the World Trade Organization* reflect the near-universal view among trade scholars (including those who are critics of stronger forms of economic globalization) that 1930s-style protectionism was catastrophic:

The cataclysmic costs of ignoring this wisdom [that is, that trade barriers damage economic growth] were illustrated most visibly in the interwar years, when the beggar-thy-neighbour policies across nations worsened the Great Depression and set the stage for the Second World War. The hard lessons of rampant protectionism struck deep, and leading negotiators of the post-war economic system displayed an explicit recognition of the wide-ranging costs that illiberal trade policies could yield.³⁴

As Benvenisti might put it, the protectionist arms race and its results were a sobering lesson on the interdependence of the inhabitants of the global high-rise.³⁵

Beginning at the end of the Second World War, the Allies and later the wider international community set out to create an architecture for international economic governance. The drive to regulate global finance and trade came from shared desire to avoid recurrence of the mutually destructive competitive protectionism of the 1930s. It was also part of a broader project of international cooperation and institution-building in a “period of international idealism.”³⁶

³⁴ Amrita Narlikar, Martin Daunton & Robert Stern, “Introduction” in Amrita Narlikar, Martin Daunton & Robert Stern, eds, *The Oxford Handbook on the World Trade Organization* (Oxford: Oxford University Press, 2012) 1 at 3.

³⁵ Eyal Benvenisti, “Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders” (2013) 107:2 AJIL 295 at 295.

³⁶ Robert L McGeorge, “An Introduction and Commentary: Revisiting the Role of Liberal Trade Policy in Promoting the Idealistic Objectives of the International Legal Order (1994) 14 N Ill U L Rev 305 at 306.

The United Nations Monetary and Financial Conference at Bretton Woods, New Hampshire in 1944, brought in the system of international financial governance known as the Bretton Woods system, which lasted until the 1970s and aspects of which are still in place today.³⁷ The Bretton Woods framework was created to govern monetary policy and currency exchange as well as trade. Two global institutions emerged from Bretton Woods: the International Monetary Fund and the International Bank for Reconstruction and Development, now the World Bank.³⁸

A third institution was planned: the International Trade Organization (ITO). The ITO, however, was blocked by opposition in the US Congress and never came into existence.³⁹ One of the treaties that was to have been part of the ITO legal architecture, the General Agreement on Trade and Tariffs (GATT),⁴⁰ was provisionally concluded and became the basis of a multilateral legal regime of trade governance, albeit one that was quite different from and more limited than what the architects of the ITO had envisioned.⁴¹

³⁷ Trebilcock, Howse & Eliason, *supra* note 6 at 23-24. See also Benn Steil, *The Battle of Bretton Woods: John Maynard Keynes, Harry Dexter White, and the Making of a New World Order* (Princeton: Princeton University Press, 2013).

³⁸ Richard N Gardner, "The Bretton Woods-GATT System After Sixty-Five Years: A Balance Sheet of Success and Failure" (2008) 47 *Columbia J Transnat'l L* 31.

³⁹ Richard Toye, "The International Trade Organization" in Amrita Narlikar, Martin Daunton & Robert Stern, eds, *The Oxford Handbook on the World Trade Organization* (Oxford: Oxford University Press, 2012) 85 at 85, 95-98; Gardner, *ibid* at 36.

⁴⁰ *General Agreement on Tariffs and Trade*, 30 October 1947, 55 UNTS 194 (entered into force 1 January 1948) [GATT].

⁴¹ Trebilcock, Howse & Eliason, *supra* note 6 at 24-25.

5.3 The GATT Era

The term “GATT,” confusingly, can refer to more than one thing. First, there is the treaty itself. As explained in Section 5.2.3 above, the GATT was originally conceived as “an off-shoot of the broader and more ambitious ITO project.”⁴² GATT was to have been just one part of the more extensive ITO trade regulatory architecture, but when the US Congress declined to ratify the ITO Charter and that project came to an end, the GATT survived. Rather than a true international economic institution, GATT was merely “a provisional agreement, administered by the parties themselves, ... that originally was intended to address only a narrow range of tariff issues” until the process of negotiating the ITO was completed.⁴³

There is an element of historical accident in the fact that GATT was the only piece of the post-war international trade regime to enter into force. At the same time, there is also a certain logic to the survival of GATT, as it cements the parties’ commitment to the bedrock objectives that had motivated them to set up a multilateral framework for regulating trade. The GATT parties agreed to keep tariffs at or below fixed levels set out in schedules to the agreement, to refrain from imposing trade restrictions arbitrarily, and to engage in successive rounds of negotiations to roll back existing trade restrictions.⁴⁴ It reversed the direction of trade policy, from the ratcheting up of protectionism in the 1930s to a cooperative effort to progressively reduce trade barriers. The “paramount goal” of multilateral cooperation on trade, as Howse writes, “is

⁴² Irwin, Mavroidis & Sykes, *supra* note 29 at 98.

⁴³ McGeorge, *supra* note 36 at 306.

⁴⁴ Irwin, Mavroidis & Sykes, *supra* note 29 at 1-2. Specific provisions relevant to the relationship between trade and animal protection are discussed in more detail in Section 5.5.1 below.

the avoidance of a protectionist *summum malum* – the situation where domestic social or economic pressures lead some states to *increase* or *reinstate* barriers to trade, thus triggering a competitive reaction in kind by other states and eventually a ‘race to the bottom’ that is disastrous for the global economy.”⁴⁵

In addition to referring to the treaty itself, the term “GATT” can also refer to what was, in effect if not *de jure*, the institutional framework regulating international trade from 1947 to 1995.⁴⁶ As John Jackson, arguably the WTO’s most important intellectual architect, wrote in his proposal to reform the international trading system in 1990, GATT was then “generally recognized as the principal international organization and rule system governing most of the world’s international trade.”⁴⁷ Technically, GATT was not actually an international institution, but it did roughly function as one. Because the planned ITO structure never came into effect, GATT “had to fill the vacuum,”⁴⁸ and this happened mainly through ad hoc and improvised solutions that Jackson describes as “makeshift arrangements.”⁴⁹ The initial GATT text grew to incorporate “an interlocking series of over 100 agreements, tariff schedules, protocols and codes of conduct.”⁵⁰ The continuing project of negotiation rounds and interpretation and management of the legal framework also produced a kind of institutional infrastructure: a staff that became a

⁴⁵ Howse, *supra* note 29 at 94-95 (emphasis in the original).

⁴⁶ John H Jackson, “The Evolution of the World Trading System – The Legal and Institutional Context” in Daniel Bethlehem, Donald McRae, Rodney Neufeld & Isabelle Van Damme, eds, *The Oxford Handbook of International Trade Law* (Oxford: Oxford University Press, 2009) 30 at 31.

⁴⁷ John H Jackson, *Restructuring the GATT System* (New York: Royal Institute of International Affairs, 1990) at 1.

⁴⁸ Jackson, *supra* note 46 at 31.

⁴⁹ *Ibid.*

⁵⁰ McGeorge, *supra* note 36 at 306 n 1.

Secretariat, and, eventually a GATT Council that was “the principal permanent institution for the GATT” and had the main responsibility for directing it.⁵¹

One of the “makeshift arrangements” was a system for the settlement of disputes. As Jackson recounts, disputes between the GATT parties were generally dealt with through diplomatic means in the early years.⁵² Beginning in the 1950s, the parties adopted a system of arbitration by a panel of experts.⁵³ The GATT panel system retained some of the characteristics of a diplomatic process – what Weiler has termed the “ethos of diplomats”⁵⁴ – in that it was confidential and consensus-seeking.⁵⁵ Importantly, GATT panel decisions were adopted by the parties only by consensus (if no party objected to adoption), which meant that each GATT party had a veto over the adoption of the panel’s decision. This naturally created an impetus for panels to craft interpretations that would be acceptable to all, including the party that could be considered the loser in the dispute.

At the same time, the GATT arbitration system was also a move towards an adjudicative and adversarial mode of dispute resolution. As Jackson argues, the procedure was “more juridical ... designed to arrive impartially at the truth of the facts and the best interpretation of the law.”⁵⁶ The decisions of GATT panels remain an important source for interpretation of the treaty language. Some of the key GATT

⁵¹ Jackson, *supra* note 46 at 36.

⁵² *Ibid* at 46.

⁵³ *Ibid*.

⁵⁴ J H H Weiler, “The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement” (2002) 13 Am Rev Int’l Arb 177.

⁵⁵ See discussion of these and other diplomacy-like features of the GATT dispute settlement system in *ibid* at 181-184.

⁵⁶ Jackson, “Legal and Institutional Context,” *supra* note 62.

decisions concerning environmental measures, which are also significant for the relationship between trade and animal protection, are discussed in Chapter 6.

Finally, the term “GATT” refers not just to the 1947 treaty, but also to the *General Agreement on Trade and Tariffs 1994*,⁵⁷ which incorporates into the new WTO legal architecture both the original GATT and its accretion of side agreements, waivers, and interpretive understandings. Technically, this component of the WTO treaties is a distinct legal instrument from the original GATT.⁵⁸ In WTO terminology, the two agreements are referred to as GATT 1947 and GATT 1994, respectively. In this thesis (and commonly in international trade scholarship) the term “GATT” is used for both interchangeably, since there is (by design) continuity in the substantive legal provisions.

5.4 The WTO

The most profound and far-reaching change in the multilateral system of trade regulation so far was the creation of the WTO in 1995. On January 1, 1995, a suite of new treaties concluded during the Uruguay Round of GATT negotiations (defined in the WTO treaties as the “covered agreements”) came into force.⁵⁹ They included an agreement to bring into being a new international organization to govern world trade, the

⁵⁷ *General Agreement on Tariffs and Trade 1994*, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization* Annex 1A, 1867 UNTS 190, 33 ILM 1153.

⁵⁸ *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154, 33 ILM 1144 [*Marrakesh Agreement*] Art II.4.

⁵⁹ *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, 15 April 1994, 1867 UNTS 14, 33 ILM 1143.

WTO.⁶⁰ In the words of John Jackson, one of the architects of the WTO,⁶¹ the Uruguay Round “fundamentally overhauled the world trading institutional system.”⁶²

Although the creation of the WTO involved, in Jackson’s apt term, an “overhaul” of international trade regulation, there was also continuity with the GATT era. One important example of that continuity is the incorporation of GATT itself into the covered agreements.⁶³

In terms of institutional structure, the changes were significant. By contrast with the GATT’s improvised and “makeshift” structure, the WTO is a formally constituted international organization with personality in international law,⁶⁴ specified decision-making processes, and a full-fledged institutional infrastructure. The new WTO framework also included new agreements extending trade rules into new areas that had not been covered by GATT, with its narrow focus on trade in goods.

5.4.1 The New WTO Agreements

GATT remains the primary agreement regulating trade in goods, and is therefore a significant source of WTO legal provisions concerning animals – since live animals,

⁶⁰ *Marrakesh Agreement*, *supra* note 58.

⁶¹ Jackson published his arguments for a restructuring of the GATT system and the creation of a new World Trade Organization to govern the multilateral trade system – the ideas that took shape in the WTO – in his 1990 monograph *Restructuring the GATT System*, *supra* note 47. Debra Steger, who studied with Jackson as a graduate student, played a major role in the Uruguay Round negotiations as a senior negotiator for Canada, and became the first Director of the WTO Appellate Body Secretariat, recounts this history in “John H. Jackson – WTO Institution Builder” (2016) 19 *JIEL* 339.

⁶² Jackson, *supra* note 46 at 41.

⁶³ See discussion in Section 5.3 above.

⁶⁴ Winham, *supra* note 5 at 24.

animal parts and animal products are classified as goods.⁶⁵

The WTO covered agreements extending trade rules into areas that previously had not been regulated (or had been only minimally addressed, like agriculture⁶⁶). The adoption of these new agreements was a significant achievement in modernizing the trade regime, bringing in areas of increasing importance in the global economy such as services and intellectual property that were not addressed by GATT. The WTO covered agreements include the *Agreement on Trade-Related Aspects of Intellectual Property Rights*⁶⁷ (known as TRIPS), the *General Agreement on Trade in Services*⁶⁸ (GATS) and the *Agreement on Agriculture*.⁶⁹

The WTO also brought in new agreements specifying rules on specific issues concerning trade in goods. The *Agreement on Technical Barriers to Trade*⁷⁰ (TBT

⁶⁵ There is no specific definition of the term “goods” under the GATT (Sam Fleuter, “The Role of Digital Products Under the WTO: A New Framework for GATT and GATS Classification” (2016) 17:1 Chicago J Int’l L 153 at 162), but it is uncontroversial that animals and animal products are included in the term. Internationally traded articles are classified under a standardized product nomenclature, the Harmonized System (HS) Codes, which was developed by the Customs Cooperation Council (now the World Customs Organization) and is used by most major trading nations (World Customs Organization, *HS Nomenclature 2017 Edition*, online: <http://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs-nomenclature-2017-edition/hs-nomenclature-2017-edition.aspx>). Classification under the HS Codes facilitates determining the tariffs that apply to products, documenting transportation of goods, and gathering statistical information on trade in goods. See, e.g., Peggy Chaplin, “An Introduction to the Harmonized System” (1986) NCJ Int’l L & Com Reg 417; David M Attwater, “The General Rules for the Interpretation of the Harmonized Commodity Description and Coding System from a Canadian Perspective” (1996) 30 Int’l L 757. The first five sections of the HS nomenclature (codes beginning with 01 through 05) are animals and animal products. For example, heading No. 0101 is “Horses, asses, mules and hinnies; live” and heading No. 0201 is “Meat of bovine animals; fresh or chilled.”

⁶⁶ Merlinda D Ingco & L Alan Winters, “Introduction” in Merlinda D Ingco & L Alan Winters, eds, *Agriculture and the New Trade Agenda: Creating a Global Trading Environment for Development* (Cambridge: Cambridge University Press, 2004) 1 at 4.

⁶⁷ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization* Annex 1C, 1867 UNTS 299, 33 ILM 1197.

⁶⁸ *General Agreement on Trade in Services*, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization* Annex 1B, 1869 UNTS 183, 33 ILM 1167 [GATS].

⁶⁹ *Agreement on Agriculture*, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization* Annex 1A, 1867 UNTS 410.

⁷⁰ *Agreement on Technical Barriers to Trade*, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization* Annex 1A, 1868 UNTS 120 [TBT Agreement].

Agreement) builds on a GATT Standards Code that was signed by 32 of the then GATT parties in 1979 following the Tokyo round of GATT negotiations.⁷¹ It applies to technical standards and regulations, such as labeling requirements, to the extent that they are barriers to trade. In the last decade, evolving WTO jurisprudence on the TBT Agreement has emerged as an important area of WTO law for the trade-animal protection relationship, because it disciplines the use of technical regulations and consumer-oriented labeling related to the way animals were treated in the production of goods.⁷²

In addition, the *WTO Agreement on Sanitary and Phytosanitary Measures*⁷³ (SPS Agreement) sets out detailed rules concerning health and safety regulations. This thesis for the most part does not address the disputes and case law under the SPS Agreement. This is so despite the fact that in raw numbers the highest volume of case law dealing with animal products in WTO law is probably under the SPS Agreement. The SPS Agreement deals with food safety, and there have been trade disputes on safety measures adopted to restrict imports of, for example, hormone-treated beef, low-cost chicken meat, and live pigs.⁷⁴ But these disputes are of little interests from the point of view of animal

⁷¹ Arkady Kudryavtsev, “The TBT Agreement in Context” in Tracey Epps & Michael J Trebilcock, eds, *Research Handbook on the WTO and Technical Barriers to Trade* (Cheltenham: Edward Elgar, 2013) 17 at 19.

⁷² These cases, including the panel decision in *EC – Seal Products*, are discussed in Chapters 6 and 7.

⁷³ *Agreement on Sanitary and Phytosanitary Measures*, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization Annex 1A*, 1867 UNTS 493 (SPS Agreement).

⁷⁴ Charlotte Blattner, “An Assessment of Recent Trade Law Developments from an Animal Law Perspective: Trade Law as the Sheep in Wolf’s Clothing?” (2016) 22 *Animal L* 277 at 290; see also Clive JC Phillips, *The Animal Trade: Evolution, Ethics and Implications* (Wallingford and Boston: CABI, 2015) at 37-38 (on chicken import bans). See also the discussion in Section 6.4 below of WTO disputes that deal with the way animal-derived food is made and sold, but not in a way that has to do with the welfare of the animals.

protection, because animals feature in them only as products, with no consideration of the animals as beings with their own interests.

Specific provisions of these treaties (especially GATT and the TBT Agreement) that have been applied and interpreted in case law relevant to animal protection are summarized in Section 5.5 below.

5.4.2 The WTO Dispute Settlement Body

One of the most important new trade institutions that was created in 1995 is the WTO's dispute settlement body (DSB). As discussed in Section 5.3, GATT had developed, or improvised, a partly judicialized system for arbitrating disputes between the parties. That system was significantly reformed when the WTO was created.

The WTO covered agreements include a new treaty on dealing with disputes, the *Dispute Settlement Understanding*⁷⁵ (DSU). The changes from the GATT practice on dispute settlement are important. Members of the WTO accept compulsory and exclusive jurisdiction of the WTO DSB over all disputes arising under the covered agreements.⁷⁶ The DSU also established an Appellate Body to hear appeals from panel decisions.⁷⁷

The creation of the Appellate Body was one of the most significant innovations of the WTO dispute settlement system, and marked a more definitive move in the direction of judicialized, court-like resolution of disputes.⁷⁸ Decisions of panels (unless appealed)

⁷⁵ *Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401, 33 ILM 1226 (1994) [DSU].*

⁷⁶ *Ibid*, Art 1.

⁷⁷ *Ibid*, Art 17.

⁷⁸ Weiler, *supra* note 54.

and of the Appellate Body are adopted unless there is a consensus decision not to adopt.⁷⁹ This “reverse consensus” rule is the opposite of the GATT approach, where a positive consensus was required and any party could veto adoption. As a practical matter, the reverse consensus rule effectively makes it certain that DSB decisions will be adopted.

In a recent article looking back on twenty years of the WTO Appellate Body, Howse emphasizes that the Appellate Body has “creat[ed] itself as an independent, semi-autonomous judicial branch of the WTO system” and functions as an international trade court.⁸⁰ Other features of the dispute settlement system, including compulsory jurisdiction and binding decisions, also represent a move towards a “rule-of-law” ethos.⁸¹

Weiler, similarly, argues that the changes to dispute settlement represent a shift away from the diplomacy-infused GATT culture and towards judicialization and the rule of law.⁸² As Weiler contends, the WTO must deal with the simultaneous challenges of both “internal” and “external” legitimation, by which he means, respectively, legitimacy as judged by the trade insider community and legitimacy as judged by the outside world and by the various constituencies for whom the trade regime has “deep social and political consequences.”⁸³ Howse asserts that the Appellate Body “viewed itself as being, in some sense, accountable to those out in the world, stakeholders representing other values and interests than those given primacy by the trade policy insiders.”⁸⁴

⁷⁹ DSU Art 16.4, Art 17.14.

⁸⁰ Robert Howse, “The World Trade Organization 20 Years On: Global Governance by Judiciary” (2016) 27:1 EJIL 9 at 25.

⁸¹ *Ibid* at 20.

⁸² Weiler, *supra* note 54.

⁸³ *Ibid* at 193-195.

⁸⁴ Howse, *supra* note 80 at 26.

The DSB, and in particular the Appellate Body, have a critical role in interpreting and applying the sometimes opaque or deliberately vague language of the WTO covered agreements. This task also involves balancing the values prioritized by trade insiders, on the one hand, and other constituencies (including advocates of social justice, environmental stewardship, and animal protection) on the other.

Getting this balance right has been essential to preserving the legitimacy of WTO rulings and even the multilateral trade regulatory system itself. There is generally consensus among scholars that the Appellate Body has so far been successful in steering this course, and the dispute settlement mechanism enjoys a reputation as the most effective WTO institution.⁸⁵ The WTO dispute settlement panels and especially the Appellate Body are an important place for the articulation and refinement of norms in WTO law, in interaction and dialogue with other norms, including those of non-WTO international law.⁸⁶

5.5 Key Legal Provisions Relevant to Animal Protection

The WTO covered agreements are extensive. There are many provisions and agreements that could potentially be at issue in trade controversies that touch in some way on animal protection. But particular provisions of two of the agreements, GATT and

⁸⁵ *Ibid*; Geoffrey Shaffer, Manfred Elsig & Sergio Puig, “The Extensive (but Fragile) Authority of the WTO Appellate Body” (2016) 79 *L & Contemporary Problems* 237; David Unterhalter, “The Authority of an Institution: The Appellate Body under Review” in Gabrielle Marceau, ed, *A History of Law and Lawyers in the GATT / WTO* (Cambridge: Cambridge University Press, 2015) 466; Matsuo Matsushita, “The Dispute Settlement Mechanism at the WTO: The Appellate Body – Assessment and Problems” in Amrita Narlikar, Martin Daunton & Robert Stern, eds, *The Oxford Handbook on the World Trade Organization* (Oxford: Oxford University Press, 2012) 507.

⁸⁶ On the relationship between international trade law and norms of non-trade international law, see generally Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003).

the TBT Agreement, have turned out to play the most important role in GATT and WTO cases involving measures aimed at animal protection. In different ways, these treaty rules express the central dilemma of international trade disputes: the balance between the multilateral commitment to liberalized trade and nondiscrimination, on the one hand, and the ability to regulate in furtherance of nontrade policy objectives (including animal protection), on the other.⁸⁷

5.5.1 GATT

GATT sets out the core commitments of participants in the multilateral trading regime. Barriers to trade at the borders are either prohibited or allowed only in accordance with agreed limits. For the most part, tariffs are allowed (as long as they are within agreed-on levels), but non-tariff barriers are supposed to be removed. Existing tariffs are to be reduced through rounds of negotiation. Within national borders imported goods have to be treated in a nondiscriminatory way, so that states cannot get around their commitments to provide access at the border by imposing additional taxes or other disadvantageous treatment on imported goods once they are inside.

An essential companion of and companion to these disciplines is the principle that sovereign states retain their right to regulate on matters of public interest. GATT and WTO jurisprudence reflects an ongoing effort to achieve the right balance between these basic norms.

⁸⁷ I have previously written about landmark WTO environment cases as animal protection cases in Katie Sykes, “WTO Law, the Environment and Animal Welfare” in Werner Scholtz, ed, *Animal Welfare and International Environmental Law* (Cheltenham: Edward Elgar, 2019) 269.

5.5.1.1 Border Measures

Under Article II of GATT, the GATT parties (now WTO members) agree to be bound by tariffs set out in schedules to the agreement, which are updated reflecting the results of ongoing rounds of negotiation. Barriers other than tariffs imposed at the border such as outright bans or quotas on imports and exports, are prohibited under Article XI.

GATT's nondiscrimination rules concern the conditions that products are subject to when they are in commerce in the internal market within a country. While the rules on tariffs and non-tariff barriers discipline what can be done at the border, the Article I and III nondiscrimination rules prevent end-runs around those commitments by, for example, subjecting imports to an additional sales tax once they are inside the border, or subjecting them to materially more difficult internal marketing conditions.

5.5.1.2 Nondiscrimination

Nondiscrimination can be divided into two subsidiary principles. One is the MFN principle, introduced in Section 5.2.2 above: each party to the treaty agrees unconditionally to give all the other parties treatment at least as favourable as that which it extends to any other trading partner. As a behind-the-border nondiscrimination principle, MFN means that countries cannot, for example, treat imports from one country better than imports from another when it comes to internal taxes, regulations and conditions for the placement of the product on the internal market. Article I:1 of GATT establishes the MFN rule: any "advantage, favour, privilege or immunity" granted to products originating from or destined for another country, whether in the form of internal taxes and other charges or any kind of law or regulation that affects the sale of the

product, must be granted to all “like” products coming from or going to all other GATT contracting parties.

The companion nondiscrimination principle is national treatment (NT). The NT principle set out in Article III of GATT provides that internal taxes and regulations cannot be used in a protectionist manner, and WTO members cannot apply extra internal taxes to imports that are not also applied to similar domestic products. Imported goods imported from another WTO member must be accorded “treatment no less favourable than that accorded to like products of national origin.”

In short, NT requires WTO members to refrain from discriminating against other WTO members for the benefit of their domestic producers and industries, and MFN requires each WTO member not to discriminate between other WTO members, to disadvantage one in a way that benefits another. All the participants in the system commit to ensuring a level playing field.

These commitments could give rise to problematic limits on the freedom of domestic governments to regulate in pursuit of legitimate public policy objectives. An important factor that has increased the risk of trade rules impinging on regulatory sovereignty is the tradition of interpreting GATT’s nondiscrimination rules to mean that *de facto* or differential impact discrimination, as well as facial discrimination, is *prima facie* prohibited.⁸⁸ Therefore, the NT and MFN obligations could apply to a potentially

⁸⁸ The case law is somewhat unclear and divided on the question of whether a facially neutral measure without any protectionist purpose or motivation is a *prima facie* violation just because the impact on imports or exports happens to be different from the impact on domestic products (or, in the case of the MFN requirement, because the impact is different as between different countries). See discussion in Robert Howse, Joanna Langille & Katie Sykes, “Pluralism in Practice: Moral Legislation and the Law of the WTO After *Seal Products*” (2015) 48 *Geo Wash Int’l L Rev* 81 at 127-129, 131-134.

very extensive universe of regulations that make distinctions between products without deliberately targeting imports, but in a way that happens to affect imported products more than domestic ones, or to affect imports from one country more than imports from another.

The prohibition of *de facto* discrimination has been a consideration in the area of animal protection, where a WTO member might (for example) want to adopt relatively high welfare requirements for animal food production and require that products cannot be sold in its domestic market unless they comply with those standards. Imports from lower-welfare jurisdictions would be disproportionately affected by such a restriction, as compared to domestic goods produced in compliance with the local welfare standards. Although such a differential impact would not, at least not directly, arise from the fact that the imported goods are imported, but rather from the lower welfare standards under which they were produced, it would probably give rise to a *prima facie* violation of the GATT NT rule as it is currently interpreted.⁸⁹

5.5.1.3 The General Exceptions

Given the far-reaching scope of the nondiscrimination norms, there is a need for a counterbalancing principle that creates enough space in WTO law for members to pursue legitimate policy objectives. In GATT, that principle is set out in the general exceptions in Article XX. As Hoekman notes, “[d]eference to domestic regulation is built into the

⁸⁹ This is one of the reasons that animal advocates have seen trade law and the WTO as a threat to progress on animal welfare, especially in the earlier days of the WTO, as discussed in Section 2.2 above.

system,”⁹⁰ and GATT Article XX is one of the key places where this deference appears in the WTO covered agreements.

Article XX sets out an enumerated list of objectives in the furtherance of which states are permitted to adopt regulatory measures notwithstanding the other GATT rules. The following subsections are relevant to animal protection:

- Article XX(a): measures necessary to protect public morals;
- Article XX(b): measures necessary to protect human, animal or plant life or health; and
- Article XX(g): measures relating to the conservation of exhaustible natural resources.⁹¹

The Article XX exceptions are limited by the proviso in the text that introduces the list, which is referred to as the “chapeau.” The chapeau requires that such measures not be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”

This combination of provisions sets up what seems to be a somewhat logically peculiar framework: discrimination and restrictions on trade are or may be a *prima facie* violation of GATT rules, but they are permissible if they fit into one or more of the general exceptions – *but*, in turn, the exceptions are only available if the measure is

⁹⁰ Bernard Hoekman, “The World Trade Order: Global Governance by Judiciary?” (2016) 27:4 EJIL 1083 at 1085.

⁹¹ The Article XX(g) exception is available only ‘if such measures are made effective in conjunction with restrictions on domestic production or consumption.’

applied in a way that is not discriminatory (at least, not arbitrarily or unjustifiably discriminatory) or restrictive (at least, not stealthily restrictive).

The chapeau has been interpreted by the Appellate Body as limiting the availability of the exceptions to situations where they are used in good faith, reflecting a form of *abus de droit* principle.⁹² Compliance with the chapeau has been the decisive question in some important WTO animal cases, including *EC – Seal Products*.⁹³

5.5.2 The TBT Agreement

The TBT Agreement establishes rules about what WTO members are allowed to do with respect to technical rules that affect traded goods, especially labelling. In recent case law, it has emerged as an important source of law in trade matters concerning animals.

The TBT Agreement aims to reduce barriers to trade that arise from inconsistent technical standards internationally, and from the imposition of technical standards that are unnecessarily trade-restrictive.⁹⁴ The most important TBT Agreement provisions in the case law that is relevant to animal protection are Articles 2.1 and 2.2. These rules apply to “technical regulations” as defined in Annex 1.1 of the TBT Agreement: a document “which lays down product characteristics or their related processes and

⁹² *United States – Standards for Reformulated and Conventional Gasoline* (Complaint by Venezuela) (1996), WTO Doc WT/DS2/AB/R (Appellate Body Report) at 22. See discussion in Lorand Bartels, “The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction” (2015) 109 AJIL 95.

⁹³ Bartels, *ibid* at 96.

⁹⁴ Howse, Langille & Sykes, *supra* note 88 at 134-135.

production methods, including the applicable administrative provisions, with which compliance is mandatory.”

Whether a measure at issue in a WTO dispute is a technical regulation is a threshold question, and there is some uncertainty (and an evolving approach in the case law) on this question.⁹⁵ It does at least appear clear that these articles apply to many (maybe all) product labeling schemes; “labelling requirements” are expressly mentioned as an example of something that may be included in the term “technical regulation.”⁹⁶ These provisions may, therefore, apply to programs such as labeling schemes informing consumers about the animal welfare impact of food products, or requirements to label real animal fur as such and disclose what species it came from.

Article 2.1 of the TBT Agreement provides that in respect of technical regulations, WTO members “shall ensure that ... products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.” This provision establishes both MFN and NT obligations regarding technical regulations, but without a GATT Article XX-like exceptions clause in the text. The WTO case law has, however, interpreted the provision to mean that legitimate regulatory distinctions are permitted.⁹⁷

⁹⁵ *Ibid* at 134, 137-143; Tania Voon, Andrew Mitchell & Catherine Gascoigne, “Consumer Information, Consumer Preferences and Product Labels under the TBT Agreement” in Tracey Epps & Michael J Trebilcock, eds, *Research Handbook on the WTO and Technical Barriers to Trade* (Cheltenham: Edward Elgar, 2013) 454. The Appellate Body’s approach to the TBT Agreement in *EC – Seal Products* is discussed in detail in Chapter 7.

⁹⁶ TBT Agreement Annex 1.1.

⁹⁷ This case law is discussed in Chapter 7. See also Howse, Langille & Sykes, *supra* note 88 at 134-143.

Article 2.2 of the TBT Agreement requires members to ensure that technical regulations “are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade” and that technical regulations “shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.” Article 2.2 lists some examples of legitimate regulatory objectives, but, unlike the enumerated exceptions in GATT Article XX, it is not a closed list. Legitimate objectives include “protection of human health or safety, animal plant life or health, or the environment.”

It is probably evident from this brief summary that the TBT Agreement is quite similar in its structure to GATT. There is a prohibition on discriminating against other WTO members and creating unnecessary obstacles to trade, coupled with exceptions that provide space for regulating in the furtherance of legitimate policy objectives. The difference is that it applies to “technical regulations,” which may include measures to which GATT does not apply. The following chapters go into more detail on how the TBT Agreement has been interpreted and applied in animal protection cases. Chapter Six discusses the WTO Appellate Body’s interpretation of these provisions in the context of the third tuna-dolphin case, which dealt with the US regulatory requirements for labeling tuna as “dolphin safe.”⁹⁸ Chapter Seven looks in detail at the WTO panel and Appellate Body decisions on the TBT Agreement in *EC – Seal Products*, and what that decision says about the relationship between the TBT Agreement and GATT.⁹⁹

⁹⁸ *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (2012), WT/DS381/AB/R. See Section 6.2.1.4.

⁹⁹ See Sections 7.6.1.2 and 7.6.2.1.

5.5.3 Other Provisions: Sustainable Development and Agriculture

Some other provisions in the WTO covered agreements deserve mention here because they are potentially significant to the discussion of trade and animal protection.

The first paragraph of the preamble to the *Marrakesh Agreement Establishing the World Trade Organization* indicates that part of the overarching purpose of international trade and economic endeavours is “the optimal use of the world’s resources in accordance with the objective of sustainable development.”¹⁰⁰ The reference to sustainable development in the introductory text of WTO’s founding document – what amounts to its mission statement – may be a place in the WTO treaties for a connection to animal protection.

The connection is perhaps not immediately obvious, if sustainable development is thought of only as a question of balancing economic prosperity with environmental protection. But Rawles has argued that animal welfare should be recognized as a “pillar” of sustainable development, along with the economic, environmental and social justice pillars. Rawles argues that the real challenge of sustainable development is about articulating values, and the values of sustainability indispensably include animal welfare:

[Sustainability] is about articulating our vision, or visions, of an ethically decent society. At a minimum, this must be one in which *all* people, rather than just a minority, are enabled to achieve a basic quality of life; and one in which the non-human world is respected and looked after ... Part of this respect involves ... [acknowledging] that the living world is not just a set of resources for the benefit of one species... The idea of an ethically decent society is simply not

¹⁰⁰ *Marrakesh Agreement*, *supra* note 58, Preamble.

compatible with a society that systematically treats sentient animals in its care *merely as things*.¹⁰¹

Agriculture is a sector that obviously has a significant impact on animals and animal welfare. Animals are not expressly mentioned in the *Agreement on Agriculture*,¹⁰² but the preamble to the agreement states that members should pursue reforms of agricultural trade “having regard to non-trade concerns, including food security and the need to protect the environment.” Animal welfare is such a “non-trade concern” at least for some WTO members. In 2000, the EU brought a proposal to the WTO Committee on Agriculture on “Animal Welfare and Trade in Agriculture.”¹⁰³ The proposal notes that

There is an increasing awareness among consumers and producers about the effects that breeding and farming techniques may have on animals, on their health and welfare and, not least, on the environment. More and more, consumers claim their right to make informed choice between products, including products produced to different welfare standards. To enable them to make such a choice they want to be informed about how farm animals are kept, transported and slaughtered. The producers, on whom such demands are made, want a stable and coherent basis on which to provide such information.¹⁰⁴

The EU proposed addressing animal welfare as an emerging trade concern not just in the context of the agricultural trade discussions but “globally” and “in a consistent manner within the WTO.”¹⁰⁵ One suggestion was to pursue “multilateral agreements dealing with the protection of animal welfare” with a view to achieving “greater legal

¹⁰¹ Kate Rawles, “Sustainable Development and Animal Welfare: The Neglected Dimension” in Jacky Turner and Joyce D’Silva, eds, *Animals, Ethics and Trade: The Challenge of Animal Sentience* (London: Earthscan, 2006) 208 at 213 (emphasis in the original).

¹⁰² *Supra* note 69.

¹⁰³ WTO Committee on Agriculture Special Session, ‘European Communities Proposal: Animal Welfare and Trade in Agriculture’ (2000) WTO Document G/AG/NG/W/19.

¹⁰⁴ *Ibid* at 1.

¹⁰⁵ *Ibid* at 3.

clarity on the relationship between WTO rules and trade measures taken pursuant to provisions of multilateral animal welfare agreements.”¹⁰⁶ Although the EU’s proposal was not taken up, mainly because of opposition from developing country members,¹⁰⁷ the concerns raised about animal welfare in the WTO context remain and have only become more prominent in the years since it was put forward.

5.6 Theoretical Questions About the International Trade Regime

Classical economics sets out an elegant and persuasive case for liberalized trade as an instrument of economic welfare maximization, but international relations involve much more than just maximizing wealth, and the emergence of the multilateral trade governance framework implicates numerous other complex and challenging normative and political questions. Here I address three questions about the theoretical basis for international trade regulation. First, why should there be international regulation of international trade? Second, what is the relationship between international trade law and problems of distributive justice and economic inequality? Third, how does trade law limit the freedom of nation states to regulate in furtherance of their own domestic policy objectives?

These questions connect the traditional economic theories of trade to our current debates about economic globalization and the relationship between trade rules and non-economic values (one of which, importantly for the present analysis, is animal

¹⁰⁶ *Ibid.*

¹⁰⁷ A L Hobbs et al, “Ethics, Domestic Food Policy and Trade Law: Assessing the EU Animal Welfare Proposal to the WTO” (2002) 27 Food Policy 437 at 440.

protection). They are also relevant to understanding the nature of the WTO as an institution that brings global governance and the rule of law to international trade regulation, making it a place of extensive, ongoing interaction around the interpretation, application and contestation of legal norms – in other words, in interactional theory’s language, the site of a practice of legality.

5.6.1 Why International Regulation of Trade?

The first question is why we have a multilateral legal regime regulating international trade. The economic theory of comparative advantage, discussed above, supports the removal of trade barriers, but it is not a theoretical foundation for a regime of international trade law. The theory suggests that it is in each nation’s individual interest to open its own markets. This would be the case whether or not other nations do the same; the theory predicts that the nation will be better off if it focuses production where it has a comparative advantage and imports where it does not, although the advantages would logically be increased if other nations reciprocally reduced trade barriers and increased the efficiency of production.¹⁰⁸

Because comparative advantage says that unilateral elimination of trade barriers makes sense for every nation state individually, it does not explain why there should be a system of reciprocal international legal obligations whereby the community of nation states commits multilaterally to the reduction of barriers.¹⁰⁹ A nation’s decision on

¹⁰⁸ As Howse observes, “This insight [that liberalizing import restrictions would maximize wealth] did not depend on the policies of *other* countries being similarly liberal. Smith and Ricardo sought to show how the unilateral removal of import barriers would enhance national wealth. Thus, the central insight of Smith and Ricardo did not, as such, lead to bargained free trade or the creation of international trade *law*.” Robert Howse, “From Politics to Technocracy – And Back Again” (2002) 96:1 AJIL 94 at 94.

¹⁰⁹ Howse, *supra* note 29 at 94.

whether or not, purely as a matter of self-interest, it should follow the logic of comparative advantage and open up its own markets to imports is a self-interested, self-regarding decision, to the extent that such a concept makes sense for a collectivity.

To return to Benvenisti's metaphor, this kind of decision-making framework is appropriate for a nation understood as being like the owner of "a large estate separated from other properties by rivers and deserts."¹¹⁰ But we no longer live in such a world; we are now in the "densely packed high-rise,"¹¹¹ where states are more interdependent and where the effects of their actions are not isolated. The cascading disaster of competitive protectionism in the 1930s demonstrated the need for a cooperative, multilateral governance regime to contain such damaging impulses.

Modern trade law has additional, and even more complex, challenges to deal with in the relationship between trade rules and other aspects of global and domestic governance, including fairness to developing countries in the global trade system and the balance between trade liberalization and regulatory sovereignty. It would be almost unimaginable to deal with these complex governance problems without a sophisticated global institution to oversee them and provide the infrastructure for negotiating and addressing them.

¹¹⁰ Eyal Benvenisti, "Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders" (2013) 107:2 AJIL 295 at 295.

¹¹¹ *Ibid* at 295.

5.6.2 What is the Relationship between Trade and Distributive Justice?

The second important justificatory question for the international trade regime is whether it really makes people in general better off in a way that is fair and just. There has been criticism of economic globalization on this basis for as long as there has been economic globalization. Such criticisms have new prominence today in the popular backlash against free trade. However elegant and compelling comparative advantage may be as a theoretical demonstration of the benefits of trade liberalization, in the real world it is a more complex matter to evaluate its effects in increasing people's economic welfare, and especially in terms of distributive justice.

Freer trade may produce a net increase in *aggregate* economic welfare, but there are costs associated with taking away protection from domestic industries. The benefits and costs tend to be unevenly distributed. Specific industries and individual workers may be adversely affected by the loss of protection from foreign competition, even if there are diffusely dispersed beneficial effects to consumers and the economy overall.¹¹²

Many critics of globalization believe that liberalized trade is disproportionately harmful to developing countries, because it exposes them to global competition without the benefit of a period of protection that would enable domestic industries to establish themselves.¹¹³ Rodrik argues that classical economic theory presents a simple case for

¹¹² Joseph E Stiglitz, *Globalization and Its Discontents Revisited: Anti-Globalization in the Era of Trump* (New York: Norton, 2018); Lester, Mercurio & Davies, *supra* note 14 at 25. See also discussion in Trebilcock, Howse & Eliason, *supra* note 6 at 6-7.

¹¹³ See Lester, Mercurio & Davies, *ibid* at 26-27, 847; Michael S Michael, "Why Free Trade May Hurt Developing Countries" (1997) 5:2 *Rev Int'l Economics* 179; Ha-Joon Chang, *Bad Samaritans: The Myth of Free Trade and the Secret History of Capitalism* (New York: Bloomsbury, 2008).

the benefits of trade liberalization, while the real picture is more complex: sustainable prosperity and stability require markets embedded in a robust infrastructure of effective regulation.¹¹⁴ Joseph Stiglitz, a Nobel prize winner in economics and former chief economist of the World Bank, who is one of the most prominent critics of economic globalization, argues that globalization has exacerbated inequalities both within and between countries.¹¹⁵

The economic benefits and burdens of trade are not directly related to the relationship between animal protection and trade, but they form part of the background against which trade governance efforts have to be understood. For example, new PTAs (discussed in Chapter Eight) are often very controversial, because they may be thought to exploit developing countries or to damage legacy industries in developed ones. Efforts to mitigate these concerns have inspired trade lawmakers to pay more attention to the connections between trade and social policy, which is addressed in the next Section.

5.6.3 How Does Trade Law Constrain Regulatory Sovereignty?

The third point is the most directly relevant to the relationship between trade and animal protection. To the extent that sovereign states take on international legal obligations to reduce trade barriers and allow imported goods access to their markets, they also accept constraints on the choices they can make both in the pursuit of non-trade objectives. Therefore, trade disciplines can be, and arguably to some degree are

¹¹⁴ Rodrik, *supra* note 17; Margaret McMillan & Dani Rodrik, “Globalization, Structural Change, and Productivity Growth, with an Update on Africa” (2014) 63 *World Development* 11.

¹¹⁵ Stiglitz, *supra* note 112.

inherently, in some degree of tension with the pursuit of non-trade policy goals, including animal protection.

This tension has been a central focus of debates about international trade regulation for many years, and in a more visible way since the creation of the WTO in 1995. That period saw two important developments: the emergence of a strong framework of multilateral trade governance, and the rise of environmentalism as a policy priority internationally as well as domestically for many countries. The potential for trade law to hold back progress on protecting the environment, the apparent tension between trade values and environmental values, and the possibility for solutions that reflected both sets of values and even made them mutually reinforcing, were all prominent themes of the 1990s (and subsequent) debates about trade and the environment.¹¹⁶ Trebilcock describes the trade-environment relationship as still “one of the most controversial issues on the current trade policy agenda.”¹¹⁷

¹¹⁶ See Daniel C Esty, *Greening the GATT: Trade, Environment and the Future* (Washington: Institute for International Economics, 1994); Daniel C Esty, “Bridging the Trade-Environment Divide” (2001) 15 *J Econ Perspectives* 113; Jan McDonald, “Politics, Process and Principle: Mutual Supportiveness or Irreconcilable Differences in the Trade-Environment Linkage” (2007) 32:2 *UNSW L J* 524; Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law and the Environment* 3d ed, (Oxford: Oxford University Press, 2009) at 754; Trebilcock, *supra* note 5 at 167-177; Trebilcock, Howse & Eliason, *supra* note 5 at 656-657; Daniel Bodansky & Jennifer C Lawrence, “Trade and Environment” in Daniel Bethlehem et al, eds, *The Oxford Handbook of International Trade Law* (Oxford University Press, 2009) 506 at 506-7, 512-13; Gary Hufbauer & Meera Fickling, “Trade and the Environment” in Amrita Narlikar, Martin Daunton & Robert Stern, eds, *The Oxford Handbook on the World Trade Organization* (Oxford: Oxford University Press, 2012) 719; Laura Stuart, “Mutually Supportive Interpretation of WTO Agreements in Light of Multilateral Environmental Agreements” (2014) 12 *NZJPIL* 379; Ravi Soopramanien, “Never For-GATT: What Recent TBT Decisions Reveal About the Appellate Body’s Analysis of Environmental Regulation under the WTO Agreements” (2016) 16:1 *Sust Dev L&P* 4; Joel P Trachtman, “WTO Trade and Environment Jurisprudence: Avoiding Environmental Catastrophe” (2017) 58:2 *Harvard Int’l L J* 273.

¹¹⁷ Trebilcock, *supra* note 5 at 167.

Analogous controversies arise out of the relationship between international trade law and other important value-infused policy areas, including labour rights,¹¹⁸ human rights more generally,¹¹⁹ development,¹²⁰ and health and safety.¹²¹ This broader category of policy problems that are not directly about trade, but are implicated by trade law and policy, is sometimes referred to as the “trade and...” debate (trade and environment, trade and labour, and so on), or alternatively as “linkages” between trade and other global challenges.

The linkages debate raises problems of a different order from the controversies concerning the economic benefits and disadvantages of trade and how they are distributed. It is concerned with what may be lost or compromised in the way of non-

¹¹⁸ See Trebilcock, *ibid* at 178-185; Gregory Shaffer, “WTO Blue-Green Blues: The Impact of US Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO’s Future” (2000) 24 *Fordham Int’l L J* 608; Luke L Arnold, “Labour and the World Trade Organisation: Towards a Reconstruction of the Linkage Discourse (2005) 10:1 *Deakin L Rev* 83; Gabrielle Marceau, “Trade and Labour” in Daniel Bethlehem et al, eds, *The Oxford Handbook of International Trade Law* (Oxford University Press, 2009) 539; Drusilla K Brown, “Labour Standards and Human Rights” in Amrita Narlikar, Martin Daunton & Robert Stern, eds, *The Oxford Handbook on the World Trade Organization* (Oxford: Oxford University Press, 2012) 697; Hassan S M Razavi, “Labor Rights and Free Trade: Social Development Parallel to Economic Development” (2013) 21:2 *Willamette J Int’l L & Dispute Resolution* 79.

¹¹⁹ See Lorand Bartels, “Trade and Human Rights” in Daniel Bethlehem et al, eds, *The Oxford Handbook of International Trade Law* (Oxford University Press, 2009) 571; Gabrielle Marceau, “WTO Dispute Settlement and Human Rights” (2002) 13:4 *EJIL* 753; Wolfgang Benedek, “The World Trade Organization and Human Rights” in Wolfgang Benedek, Koen De Feyter & Fabrizio Marrella, eds, *Economic Globalisation and Human Rights* (Cambridge: Cambridge University Press, 2007) 137; David Kinley, *Civilising Globalisation: Human Rights and the Global Economy* (Cambridge: Cambridge University Press, 2009); Andrew Lang, *World Trade Law After Neoliberalism: Re-Imagining the Global Economic Order* (Oxford: Oxford University Press, 2011) at 104-131.

¹²⁰ See Bernard Hoekman, Aaditya Matoo & Philip English, eds, *Development, Trade and the WTO: A Handbook* (Washington: World Bank, 2002); Hunter Nottage, “Trade and Development” in Daniel Bethlehem et al, eds, *The Oxford Handbook of International Trade Law* (Oxford University Press, 2009) 481; Nicolas Lamp, “How Some Countries Became ‘Special’: Developing Countries and the Construction of Difference in Multilateral Trade Lawmaking” (2015) 18 *JIEL* 743.

¹²¹ See Trebilcock, *supra* note 5 at 149-166; Doaa Abdel-Motaal, “Reaching REACH: The Challenge for Chemicals Entering International Trade” (2009) 12:3 *JIEL* 643; Ching-Fu Lin, “Global Food Safety: Exploring Key Elements for an International Regulatory Strategy” (2011) 51:3 *Virginia J Int’l L* 637; Tania Voon, Andrew Mitchell & Catherine Gascoigne, “Consumer Information, Consumer Preferences and Product Labels under the TBT Agreement” in Tracey Epps & Michael J Trebilcock, eds, *Research Handbook on the WTO and Technical Barriers to Trade* (Cheltenham: Edward Elgar, 2013) 454.

economic values, whatever the results of trade liberalization in terms of economic welfare may be. As Joost Pauwelyn, one of the leading scholars of conflicts between trade and non-trade international norms, puts it, there is

more to life than money. The statistics show that trade liberalisation does increase welfare ... But at the same time, trade is but an instrument to achieve nobler goals: the prevention of war; raising standards of living and the creation of jobs, not just in the rich countries but also in the developing world; political freedom and respect for human rights; social protection and an equitable distribution of wealth; the fight against environmental degradation and the protection of public health; etc.¹²²

A quarter of a century after the creation of the WTO, the literature on linkages between trade and other policy areas is extensive and multifaceted. The interaction between trade disciplines and regulatory autonomy in the pursuit of non-trade policy goals is of great significance for the institutional legitimacy of the WTO and of the very idea of multilateral trade governance.

The linkages between animal protection and trade are a relatively new part of this discussion, but there is already an extensive literature on the question.¹²³ But it remains

¹²² Pauwelyn, *supra* note 86 at xi.

¹²³ See, e.g., Stuart Harrop & David Bowles, “Wildlife Management, the Multilateral Trade Regime, Morals and the Welfare of Animals” (1998) 1 J Int’l Wildlife L & Pol’y 64; Peter Stevenson, “The World Trade Organisation Rules: A Legal Analysis of Their Adverse Impact on Animal Welfare” (2002) 8 Animal L 107; Edward M Thomas, “Playing Chicken at the WTO: Defending an Animal Welfare-Based Trade Restriction under GATT’s Moral Exception” (2007) 34 BC Env’tl Aff L Rev 605; Laura Nielsen, *The WTO, Animals and PPMs* (Leiden: Brill, 2007); Peter L Fitzgerald, “‘Morality’ May Not Be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law” (2011) 14 J Int’l Wildlife L & Pol’y 85; Thomas Kelch, “The WTO Tuna Labeling Decision and Animal Law” (2012) 8 J Animal & Natural Resource L 121; Robert Howse & Joanna Langille, “Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values” (2012) 37:2 YJIL 367; Tamara Perišin, “Is the EU Seal Products Regulation a Sealed Deal? EU and WTO Challenges” (2013) 62:2 ICLQ 373; Alexia Herwig & Gregory Shaffer, “Editors’ Introduction: Trade, Animal Welfare, and Indigenous Communities: A Symposium on the WTO *EC – Seal Products Case*” (2014) 108 AJIL Unbound 282; Katie Sykes, “Sealing Animal Welfare into the GATT Exceptions” (2014) 13:3 World Trade Review 471; Howse, Langille & Sykes, *supra* note 88; Alexia Herwig, “Regulation of Seal Animal Welfare Risk, Public Morals and Inuit Culture Under WTO Law: Between *Techné*, *Oikos* and *Praxis*” (2015) 6:3 EJRR 382; Gregory Shaffer & David Pabian, “‘The WTO *EC – Seal*

the case that animal protection has so far been a marginal subject compared to the headline issues such as the environment and human rights. And prior to the *EC – Seal Products* decision, since there was no WTO jurisprudence expressly and primarily dealing with regulation to protect animal welfare, much of the discussion was necessarily speculative. Part of the purpose of this thesis is to bring animal protection more visibly and more fully into the “etc.” at the end of Pauwelyn’s list of “nobler goals” that the trade linkages debate is concerned with.

5.7 Trade Law and Practices of Legality

In Chapter Four, I argued that global animal law is currently at an early stage of development as law in part because there are limited opportunities for it to be articulated, interpreted and maintained through sustained interaction of a characteristically legal type – what Brunnée and Toope describe as a practice of legality.¹²⁴ Interactional theory posits that this is a necessary condition for authoritative and legitimate law to emerge.

By contrast with global animal law, international trade law is a much more mature, more institutionally robust area of international law. It has well established structures where interaction in a characteristically legal mode regularly takes place.¹²⁵

Products Decision: Animal Welfare, Indigenous Communities and Trade” (2015) 109 AJIL154; Pelin Serpin, “The Public Morals Exception After the WTO Seal Products Dispute: Has the Exception Swallowed the Rules?” 2016 Colum Bus L Rev 217; Katie Sykes, “Globalization and the Animal Turn: How International Trade Law Contributes to Global Norms of Animal Protection” (2016) 5 TEL 55; Alexia Herwig, “Too Much Zeal on Seals? Animal Welfare, Public Morals and Consumer Ethics at the Bar of the WTO” (2016) 15:1 World Trade Review 109; Blattner, *supra* note 74. See also the longer discussion of some of this scholarship in Chapter Two.

¹²⁴ See Section 4.6. See also the discussion of the idea of a practice of legality in Section 3.5.

¹²⁵ See Abdulmalik Altamimi, “An Interactional World Trade Law” (2016) 18:3 International Community L Rev 317; Abdulmalik Altamimi “The WTO Practice of Legality is Ensuring Transparency for Self-Enforcing Trade” (2018) 17:3 J Int’l Trade L & Pol’y 132.

The WTO's dispute settlement body is the most significant of these. Also important, although they are still new and much less institutionally established than the WTO, are the mechanisms for consultation, cooperation and enforcement under new PTAs, discussed in Chapter Eight.

The WTO DSB exhibits the characteristics of a practice of legality. It is a judicialized dispute settlement system that organizes itself in accordance with what Fuller would call the criteria of legality. In Howse's words, it adheres to a "rule-of-law" ethos.¹²⁶ The DSB, especially the Appellate Body, has established its independence from the policy agenda of WTO insiders, and has successfully navigated the need to uphold its own legitimacy both internally and externally. The discussion of major trade and animal protection cases in Chapter Six, and of *EC – Seal Products* in Chapter Seven, expands on how the DSB in those disputes has achieved a careful balance between trade and non-trade objectives, and has insisted on adherence to rule-of-law criteria like non-arbitrariness and transparency.

Understanding the WTO DSB as the site of a practice of legality adds insight into the importance of the WTO's engagement with animal welfare in *EC – Seal Products*. Certainly, it is surprising, and heartening, that an institution many observers thought of as an enemy to progress on animal protection has engaged with the problem in a sympathetic and positive way. But that is not what is most important about the decision. It is more significant that it adds to the development of global animal law in the specific way that only the interpretation and application of norms through interaction in a practice

¹²⁶ Robert Howse, "The World Trade Organization 20 Years On: Global Governance by Judiciary" (2016) 27:1 EJIL 9 at 20. See also discussion of the WTO dispute resolution system in Section 5.4.2.

of legality can – because it is precisely this kind of lawmaking through interaction that has been in short supply for global animal law so far.

5.8 Conclusion

This chapter has set out a basic account of how and why the international trade regime evolved, and of the main provisions of WTO law that are especially significant in the relationship between trade law and global animal law. This background information is presented mainly to set the stage for the more in-depth analysis of specific trade disputes and cases that follows in Chapters Six and Seven. A background explanation of the key treaty provisions and doctrines is required for that analysis to make sense.

In addition, I have proposed that international trade law is the site of specifically legal forms of interaction that are more relevant to the formation of global animal law than they might seem. International trade law is not about animal protection; animal protection is at most a peripheral “non-trade concern” that has a place in the category of “linkages” along with other policy objectives such as human rights, labour, and the environment. But international trade law does provide opportunities for shaping animal protection norms in the context of a practice of legality. From the perspective of interactional law, those opportunities have significant potential to support the development of global animal law as law.

Chapter 6 Animal Protection Controversies and International Trade Law

6.1 Introduction

Some of the most important cases and controversial disputes in the history of the international trade system have been about laws adopted – or proposed, but not adopted – to protect animals. This chapter is an overview of some of the key trade-animal conflicts that came up before the *EC – Seal Products* decision.

The chapter covers, first, the landmark GATT and WTO cases on dolphin and sea turtle protection. Although these disputes are usually considered “trade and environment” cases, I argue that they both illustrate and build links between animal welfare and the environment. Jurisprudentially, these cases are important precursors to *EC – Seal Products*.

The chapter then goes on to consider controversies about animal welfare and trade prior to *EC – Seal Products*. These are conflicts that have arisen when the EU, trying to uphold its own relatively strict animal welfare standards, sought to restrict imports of lower-welfare products. The products in question are fur from animals caught using cruel trapping methods, animal agriculture products from countries with lower standards of welfare for farmed animals, and cosmetic products tested on animals.

Because the dolphin and sea turtle by-catch disputes were litigated and resulted in decisions from the GATT and WTO dispute settlement systems, most of the legal analysis in this chapter focuses on those cases. The other controversies (fur, farmed animal welfare and cosmetics testing) can be described as disputes in the broad sense –

that is, disagreements between participants in the trade system about what was and was not allowed. But they did not result in formal proceedings or judicial decisions. The discussion therefore looks at the arguments and negotiations that took place between the parties involved about how to balance trade with the protection of animal welfare.

I argue that the disputes analyzed in this chapter are case studies in the formation of international legal norms, using the interactional theoretical framework of Brunnée and Toope.¹ The interaction between states, domestic lawmakers, trade institutions, NGOs and other participants in these controversies has resulted in the generation of norms based on shared understandings. While the normative overlapping consensus that emerges is limited in ways that can be frustrating for animal advocates, it is the kind of common ground that interactional theory says is needed as a foundation for binding law.

Furthermore, the scrutiny and discussion of these norms in the context of trade conflicts has begun a process of articulating them within a “practice of legality” in a way that exhibits the distinctive characteristics of *legal* norms. This type of interaction, according to Brunnée and Toope’s theory, is exactly what is required for norms to develop into international law.

6.2 The By-catch Cases

The first category of cases to be discussed involve efforts to limit by-catch of marine animals – dolphins and sea turtles – in commercial fishing. Such efforts have included trade measures targeting products from countries with different or lower

¹ The theoretical framework is set out in Chapter Three.

standards on by-catch. Conflicts over such measures began in the GATT period and continued after the creation of the WTO.

“By-catch” means unintentional capture of marine animals which are not the target of a commercial operation.² Fisheries by-catch is a serious challenge to the conservation of marine species. It has been described as “the single greatest threat to many populations of marine mammals in the United States and elsewhere.”³ Guidelines for by-catch reduction created in 2011 by the Food and Agriculture Organization of the United Nations refer to “growing concern that levels of fishing mortality as a result of bycatch and discards threaten the long-term sustainability of many fisheries and the maintenance of biodiversity in many areas.”⁴

The central problem in this cluster of trade disputes arises when one WTO member adopts legislation banning fishing methods that involve a high risk of by-catch, and at the same time also restricts trade in products from other countries that were fished using methods that are not as strict on reducing by-catch risk. This situation illustrates that domestic legislation alone is not enough to deal with transboundary animal protection problems, and that trade measures may be an effective, perhaps essential, way to make animal protection laws effective. Fishing takes place across and beyond national jurisdictional limits, and the marine animals that these measures seek to protect also straddle and migrate over international borders. The regulation of fisheries by-catch is

² Cameron S G Jefferies, *Marine Mammal Conservation and the Law of the Sea* (Oxford: Oxford University Press, 2016) at 125.

³ Andrew Read, Phebe Drinker & Simon Northridge, “Bycatch of Marine Mammals in US and Global Fisheries” (2006) 20:1 *Conservation Biology* 163 at 164.

⁴ Food and Agriculture Organization of the United Nations, *International Guidelines on Bycatch Management and Reduction of Discards* (Rome: Food and Agriculture Organization of the United Nations, 2011) at 2.

therefore what Bruce Wagman and Matthew Liebman categorize as a problem that calls for an international solution because it involves “international animals”:

Just as international problems require international solutions, so too do “international animals.” Geographic borders between nations are artificial human creations, produced by geopolitical shifts in power and cartography. Animals do not recognize or respect international boundaries, and their ranges may traverse these artificial constructs.⁵

Countries affected by trade measures aimed at reducing by-catch suffer disadvantages. Their products may be shut out of the market of the country that enacted the legislation, or the products may be seen as less desirable by consumers because they cannot be sold with a “safe” label. From their point of view, these initiatives can seem like an attempt to legislate extraterritorially, using trade penalties as a way for the legislating country to manipulate or pressure others into adopting its preferred standards.

The two key WTO disputes, each of which is really a series of connected disputes, concern dolphin by-catch in tuna fishing, and by-catch of endangered sea turtles in shrimp fishing.

6.2.1 Tuna and Dolphins

The tuna-dolphin disputes⁶ began before the creation of the WTO, when the

⁵ Bruce A Wagman & Matthew Liebman, *A Worldview of Animal Law* (Durham, NC: Carolina Academic Press, 2011) at 24. See also discussion in Section 4.2.

⁶ See Ted L McDorman, “The 1991 US-Mexico GATT Panel Report on Tuna and Dolphin: Implications for Trade and Environment Conflicts” (1992) 17 *NCJ Int’l & Com Reg* 461; Don Mayer & David Hoch, “International Environmental Protection and the GATT: The Tuna/Dolphin Controversy” (1993) 31 *Am Bus L J* 187; Thomas M Horwitz, “International Environmental Protection after the GATT Tuna Decision: A Proposal for a United States Reply” (1993) 25 *Case W Res J Int’l L* 55; Matthew Hunter Hurlock, “The GATT, US Law and the Environment: A Proposal to Amend the GATT in Light of the Tuna/Dolphin Decision” (1992) 92:8 *Columbia L Rev* 2098; Stephen Fleischer, “The Mexico-US Tuna-Dolphin Dispute in GATT: Exploring the Use of Trade Restrictions to Enforce Environmental Standards” (1993) 3 *Transnat’l L & Contemp Probs* 515; Benedict Kingsbury, “The Tuna-Dolphin Controversy, the World Trade Organization, and the Liberal Project to Reconceptualize International Law” (1994) 5 *Yb Int’l*

dispute settlement system under GATT was still relatively weak and could only issue non-binding decisions.⁷

When the tuna-dolphin saga began in the early 1990s, toward the end of the GATT period, two important developments were unfolding in global society. One was the growth of global environmental consciousness and a sense of a pressing need for action to protect nature and the environment.⁸ The second was the Uruguay Round of GATT negotiations that would eventually culminate in the remaking of the multilateral trade regime and the creation of the WTO.⁹ The tuna-dolphin disputes illustrate the tug of war between trade liberalization and environmental protection.

The tuna-dolphin disputes started with a fishing technique known as “setting on” dolphins. In the Eastern Tropical Pacific Ocean (ETP) – an area that extends from the coast of Southern California south to Chile and west to Hawaii¹⁰ – certain species of

Env L 1; Julie B Master, “International Trade Trumps Domestic Environmental Protection: Dolphins and Sea Turtles Are Sacrificed on the Altar of Free Trade” (1998) 12 Temp Int’l & Comp L J 433; Nina M Young, Wm Robert Irvin & Meredith L McLean, “The Flipper Phenomenon: Perspectives on the Panama Declaration and the ‘Dolphin Safe’ Label” (1997) 3:1 Ocean & Coastal L J 57; Carol J Miller & Jennifer L Croston, “WTO Scrutiny v Environmental Objectives: Assessment of the International Dolphin Conservation Program Act” (1999) 37 Am Bus L J 73; Thomas Kelch, “The WTO Tuna Labeling Decision and Animal Law” (2012) 8 J Animal & Natural Resource L 121; Katie Sykes, “WTO Law, the Environment and Animal Welfare” in Werner Scholtz, ed, *Animal Welfare and International Environmental Law* (Cheltenham: Edward Elgar, 2019) 269.

⁷ See discussion in Section 5.3 above.

⁸ Reflected, for example, in the *Rio Declaration on Environment and Development* adopted by the UN Conference on Environment and Development at Rio de Janeiro on June 13, 1992, UN Doc A/CONF.151/5/Rev.1, 31 ILM 874 [Rio Declaration], which declared the commitment of states “to cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem” (Principle 7). See also Daniel C Esty, *Greening the GATT* (Washington, DC: Institute for International Economics, 1994) at 9-15 (describing “rising environmental interest” in the early 1990s); Mayer & Hoch, *supra* note 6 at 187-188 (noting that in the 1980s global environmental problems were receiving more attention from policymakers, while at the same time international trade law emphasized lowering barriers to trade).

⁹ See discussion in Chapter Five.

¹⁰ Denis A O’Connell, “Tuna, Dolphins and Purse Seine Fishing in the Eastern Tropical Pacific: The Controversy Continues” (2005) 23 J Env’tl L 77 at 77.

dolphins are known to associate with large yellowfin tuna.¹¹ Fishermen in the region exploit this association by chasing and herding dolphins at the surface in order to locate tuna schools, which they then catch using large purse-seine nets, encircling the dolphins at the surface and then drawing in the top of the net to trap the fish below.¹² After fishermen have started to bring the net on board, the dolphins are released through a “back-down” procedure where the fishing vessel is reversed to let the dolphins out when the net is about halfway in.¹³ The association of dolphins and tuna only occurs in the ETP, so the “setting-on” method is not used in other fisheries.

Setting on dolphins combined with purse-seine fishing involves a number of different risks of harm and mortality to dolphins:

Sudden strong currents can collapse the net, trapping the dolphins inside. Dolphins sometimes panic at the sight of the boats and become entangled in the net’s sides. When setting the nets at night ... it is difficult for fishermen to see the dolphins or predict their movements, and dolphins can become entangled in the net as it is set. Additionally, nets lost or abandoned in rough weather ... can continue to trap dolphins as they float unattended through the ocean.¹⁴

In the 1980s, an American marine biologist went undercover as a cook on a Panamanian tuna vessel and documented the slaughter of dolphins from purse-seine tuna fishing; based on that evidence, the practice was described by one scholar as “brutal annihilation.”¹⁵

¹¹ National Oceanic and Atmospheric Association Southwest Fisheries Science Center, “The Tuna-Dolphin Issue,” online:

<<https://swfsc.noaa.gov/textblock.aspx?Division=PRD&ParentMenuId=228&id=1408>>.

¹² Jefferies, *supra* note 2 at 125; Mayer & Hoch, *supra* note 6 at 189.

¹³ O’Connell, *supra* note 10 at 80.

¹⁴ *Ibid.*

¹⁵ *Ibid* at 78.

US lawmakers adopted a strict approach on marine mammal by-catch under the *Marine Mammal Protection Act* of 1972¹⁶ (MMPA).¹⁷ The MMPA prohibits all incidental “taking” of marine mammals in commercial fishing – defined to include harassment, hunting, capture and killing – except by permit, with the aim of ensuring that the rate of mortality and serious injury in marine mammals approaches zero.¹⁸

But the MMPA moratorium only applies to American fishing vessels and to foreign vessels in American waters.¹⁹ Dolphin mortality caused by the US tuna fishing fleet reduced significantly in the 1980s as the US fleet shifted to the Western Pacific, where the “setting on” dolphins method is not used. Other countries’ fishing fleets moved into the gap. Mexico, Venezuela, Vanuatu and Colombia took over dominance of the tuna fishery in the ETP.²⁰

In the 1980s, the US amended the MMPA to ban imports of yellowfin tuna that did not meet US standards of marine mammal protection. The MMPA as amended provides that “[t]he Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards.”²¹ For yellowfin tuna fished in the ETP using purse seine nets, the exporting nation had to show that it had a program in place to reduce incidental taking of dolphins comparable to the US program, and that the average rate of

¹⁶ 16 USC §1361 et seq.

¹⁷ See discussion of the MMPA marine mammal management regime in Jefferies, *supra* note 2 at 58-61.

¹⁸ 16 USC §1371(a)(2).

¹⁹ Jefferies, *supra* note 2 at 59.

²⁰ O’Connell, *supra* note 10 at 82.

²¹ 16 USC §1371(a)(2).

dolphin by-catch was comparable to the average rate of incidental taking of dolphins by US fishing vessels.²² The MMPA also imposed requirements for imports from intermediary nations (defined as nations that import tuna and tuna products from nations subject to the US ban and also export those products to the US), embargoing all imports of tuna from those nations unless they prohibited imports of products covered by the US ban.²³

The embargo of yellowfin tuna under the MMPA, in turn, triggered a rule known as the Pelly Amendment (adopted in 1971 as an amendment to fisheries legislation predating the MMPA).²⁴ A certification under the Pelly amendment empowers the President to direct the Secretary of the Treasury to ban imports of *all* fish and fish products from a country that has been determined to be diminishing the effectiveness of an international fishery conservation program.

The US also adopted a “dolphin safe” labelling scheme. In 1991, the *Dolphin Protection Consumer Information Act*²⁵ (DPCIA) took effect. The DPCIA states that it is US policy to “eliminate the marine mammal mortality resulting from the intentional encirclement of dolphins and other marine mammals in tuna purse seine fisheries” and ensure that the market of the US does not act as an incentive to use fishing methods with

²² These provisions were in 16 USC §1371(a)(2)(B), which has subsequently been amended in accordance with the legal developments outlined here. See O’Connell, *supra* note 10 at 83. See also *ibid* at 83-84 for additional details of the requirements concerning dolphin mortality.

²³ 16 USC §1371(a)(2)(D).

²⁴ *Pelly Amendment to the Fishermen’s Protective Act of 1967*, 22 USC 22 § 1978 (2006). See discussion of the legislative history of the Pelly Amendment (named for Congressman Thomas M. Pelly (R-WA)) in Steve Charnovitz, “Encouraging Environmental Cooperation through the Pelly Amendment” (1994) 3:1 J Env & Dvlpmt 3 at 9-11.

²⁵ 16 USC §§1411-1418.

a high risk to dolphins.²⁶ It created a voluntary labeling program, under which tuna exported from or offered for sale in the US could be labeled as dolphin safe if it met certain conditions. Generally, tuna could not legally be marketed as dolphin safe if it contained tuna fished in the ETP using the purse-seine method. There was an exception to this general prohibition if certain statements were provided that no dolphins were intentionally encircled in the fishing trip.²⁷

The MMPA and the DPCIA effectively penalized ETP tuna fishing nations for not meeting US standards on dolphin protection, by limiting their access to the lucrative US market – or cutting it off completely. These measures are an example of what Charnovitz calls a “stick” to incentivize cooperation on environmental matters.²⁸ More precisely, Charnovitz categorizes domestic measures of this type as “external” sticks, not contained within an international environmental agreement or regime, but imposed separately.²⁹ In this case, the “stick” was used at least in part not to enforce international environmental law at all, but, rather, to enhance the efficacy of US domestic standards.³⁰

6.2.1.1 Tuna-Dolphin I: First GATT Panel Decision

Mexico, one of the countries affected by the MMPA embargo and the DPCIA dolphin-safe labelling rules, requested consultations under GATT and then proceeded to a

²⁶ 16 USC §§1411(2)-(3).

²⁷ 16 USC §1417(a); O’Connell, *supra* note 10 at 85.

²⁸ Charnovitz, *supra* note 24 at 7-8.

²⁹ *Ibid.* See also Howard F Chang, “An Economic Analysis of Trade Measures to Protect the Global Environment” (1995) 83 Geo L J 2.

³⁰ As McDorman observes, Mexico (which challenged the embargo under GATT) was “*not* in breach of any international treaties in its incidental taking of dolphin.” McDorman, *supra* note 6 at 464 (emphasis in the original). See also Charnovitz, *supra* note 24 at 7-9.

panel hearing. The panel issued its report in September 1991.³¹ This first tuna-dolphin report may be the most famous GATT decision,³² even though it was not adopted by the GATT parties and much of its legal analysis is at least questionable today.

Mexico wanted the panel to find that the US measures were both discriminatory measures and import restrictions prohibited under GATT. The panel agreed with Mexico that the US legislation was inconsistent with GATT.

The panel found that the import bans on certain yellowfin tuna and tuna products were quantitative restrictions on importation prohibited under Article XI of GATT.³³ The US had argued that these rules were internal regulations applied at the point of importation,³⁴ and therefore should be examined as internal measures under Article III (allowed as long as they are not discriminatory) and not as quantitative restrictions (which are *per se* impermissible).

The panel's view was that only measures "applied to the product as such"³⁵ should be considered internal regulations applied at the point of importation. Because the

³¹ *United States – Restrictions on Imports of Tuna* (1991), GATT Doc DS21/R - 39S/155 [*US-Tuna I*].

³² Esty notes that this GATT dispute "catapulted the previously arcane trade and environmental linkage onto center stage in American politics." Daniel C Esty, *Greening the GATT: Trade, Environment and the Future* (Washington, DC: Institute for International Economics, 1994) at 27.

³³ As discussed in Section 5.5.1.1, quotas and import bans (quantitative restrictions) are generally prohibited under GATT.

³⁴ A notation to GATT Article III, known as the Note Ad Article III, provides that any restriction covered by Article I (which includes bans), if it applies both to an imported and to "the like domestic product" and is applied to the imported product at the point of importation, "is nevertheless to be regarded" as an internal measure covered under Article III. This means that if a country decides to ban, say, sales of some types of guns inside its borders for public safety reasons, and applies the ban to the same type of gun at the border when they are imported, the import restriction is treated as an internal regulation.

³⁵ *US-Tuna I*, *supra* note 31 at para 5.14.

rules about fishing methods concerned the *way* the tuna was fished, but not differences in the *products themselves*, they were not in this category.

This was an important finding. Its logic – the idea that regulating the way something was produced was more difficult to defend under GATT – had a profound effect on the trade-environment relationship, and also the trade-animal protection relationship.

In international trade law terminology, these kinds of differences – that is, differences in the methods or processes of producing something, rather than the thing itself – are referred to as production and processing methods (PPMs). PPMs that do not result in a perceptible difference in the end product are called non-product related PPMs, or NPR-PPMs. The debate over NPR-PPMs was a high-profile and controversial one in trade law discourse for many years, and it remains live today. I argue below that it really should not be, since later WTO case law has effectively clarified that it is not *per se* prohibited for WTO members to differentiate between goods based on PPMs.³⁶ But the risk, or at least the perceived risk, that regulating PPMs will create trade law problems remains. This is an important and sensitive matter in environmental regulation, because the method of producing something can have significant externalized effects on the

³⁶ See Section 6.2.2.2.

environment that make no difference to the physical characteristics of the ultimate product.³⁷ The same is true of animal protection.³⁸

The second critically important aspect of the panel's decision was its analysis of justification under Article XX.³⁹

The key question here was whether trade measures aimed at affecting what happens outside the enacting country's borders – with extraterritorial effect – can be justified under the policy exceptions. The GATT panel's answer was that they cannot. As with the PPM issue, the panel's approach on this problem still has a somewhat zombie-like staying power in the discourse on trade and the environment (and trade and animal protection), even though the *US-Tuna I* decision has no precedential force and subsequent WTO decisions have moved a long way from its analysis.

The US argued that the measures it had adopted to protect dolphins in the ETP were justified under both Article XX(b) (necessary to protect animal life or health) and Article XX(g) (relating to conservation of exhaustible natural resources). The GATT

³⁷ For McDorman, the “principal implication” of the panel report is that “measures taken against environmentally-friendly products (tuna) because they were produced in an environmentally-unfriendly manner (unacceptable taking of dolphin) are inconsistent with the GATT. Countries cannot look behind a good to determine if the production or manufacturing process was environmentally-friendly.” McDorman, *supra* note 6 at 473. The description of tuna as an environmentally friendly product only underscores how far overfishing has gone since the early 1990s, but the legal analysis of the panel's finding still stands.

³⁸ Philippe Sands concluded in an opinion on EU cosmetic testing regulations for the British Union for the Abolition of Vivisection that “If a ban on the sale of animal-tested cosmetic products could be shown to be based on NPR-PPMs, a complaining Member would argue that the measure could not be examined under Article III:4 and should be examined instead under Article XI. This would subject the measure to the GATT's more absolute prohibition on quantitative restrictions.” Philippe Sands, *Opinion: In Re Proposed Prohibition of Sale of Animal-Tested Cosmetics and in Re the Rules of The World Trade Organisation* (2 November 2001, unpublished opinion, on file with author).

³⁹ See the discussion of the general exceptions under Article XX in Section 5.5.1.3.

panel disagreed. The panel’s view was that the Article XX(b) exception could be invoked to protect animal life and health only *within* US borders, not outside:

The Panel considered that if the broad interpretation of Article XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement.⁴⁰

If this were allowed, the panel reasoned, GATT “would then no longer constitute a multilateral framework for trade among all contracting parties” but would ensure free trade only “between a limited number of contracting parties with identical internal regulations.”⁴¹

Furthermore, Article XX(b) justified only measures “necessary” to protect animal life and health. The necessity requirement, the panel indicated, could not be met in these circumstances unless the US first tried and failed to find a negotiated multilateral solution to dolphin conservation:

The United States had not demonstrated to the Panel - as required of the party invoking an Article XX exception - that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular through the negotiation of international cooperative arrangements, which would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas.⁴²

On the Article XX(g) exception for conservation of natural resources, the panel again said that the US could not adopt trade measures triggered by conservation problems outside its own jurisdiction. As for the protection of animal life and health, “[t]he Panel

⁴⁰ *US-Tuna I*, *supra* note 31 at para 5.27.

⁴¹ *Ibid.*

⁴² *Ibid* at para 5.28.

considered that, if the extrajurisdictional interpretation of Article XX(g) suggested by the United States were accepted, each contracting party could unilaterally determine the conservation policies from which other contracting parties could not deviate without jeopardizing their rights [under GATT].”⁴³

Mexico had also argued that Article XX(g) did not apply because dolphins were not “exhaustible natural resources.”⁴⁴ Mexico’s position was that the term was not intended to cover living beings, but only natural resources “which once taken cannot be renewed,” such as petroleum, uranium and other fuels.⁴⁵ In the alternative, if Article XX(g) covered living beings then it could only include those that were demonstrably in danger of extinction – and the spotter, spinner and common dolphins in the ETP that were protected by the US measures were not in danger of extinction.⁴⁶ The panel did not address these arguments. Its decision rejecting the US position on Article XX(g) was based mainly on the problem of extra-jurisdictional effect. Another problem was that the US rules for permitting tuna imports operated in an unpredictable way. There was a cap on incidental dolphin take of 1.25 time the average take by *US* vessels, which meant Mexico could not know in advance whether it was meeting US standards.⁴⁷

The panel decided that the possibility of an embargo on all fish and fish products under the Pelly Amendment was *not* a violation of GATT, because a statutory provision

⁴³ *Ibid* at para 5.32.

⁴⁴ *Ibid* at para 3.43.

⁴⁵ *Ibid*.

⁴⁶ *Ibid* at para 3.44.

⁴⁷ *Ibid* at para 5.33.

that only authorized, and did not require, the imposition of an embargo was not inconsistent with GATT.⁴⁸

The panel also found that the criteria for legal “dolphin-safe” labelling under the DPCIA were not a violation of GATT, because they did not restrict trade in Mexican tuna: tuna products could “be sold freely both with and without the ‘Dolphin Safe’ label,” and any advantage resulting from access to the label came from “the free choice by consumers to give preference” to tuna labeled dolphin safe, rather than from government action.⁴⁹

6.2.1.2 Tuna-Dolphin II: Second GATT Panel Decision

In 1994, a second GATT panel ruled on the US dolphin by-catch regime. This time the panel was dealing with a challenge by the EEC (the predecessor of the EU) and the Netherlands to the US rules that restricted imports from intermediary countries.⁵⁰

In the interim, the *US-Tuna I* panel report had attracted a lot of criticism from the environmental movement. The panel’s analytical approach exemplified the somewhat technocratic and insular frame of reference of the GATT world, and the difficulty of reconciling it with ascendant global environmental values. The US arguments before the panel emphasized the increasingly high profile of the interaction between trade and the environment, and pushed for recognition that its dolphin-protection initiatives were

⁴⁸ *Ibid* at para 5.20-5.21.

⁴⁹ *Ibid* at para 5.42.

⁵⁰ *United States – Restrictions on Imports of Tuna* (1994), GATT Doc DS29//R [*US-Tuna II*].

categorically different from the economic protectionism that trade law traditionally sought to constrain:

The United States argued that the issues involved in this dispute would become even more important over time, in light of the fact that environmental issues were increasingly recognized as global in nature, including transboundary effects and effects on the global environment. More and more, actions in one part of the world would have significance for other parts of the world. In this respect, this dispute was not a typical trade dispute. This was not an instance, for example, where one contracting party was concerned about actions by another party to protect its market ... Indeed, all sides agreed that the United States restrictions on tuna imports were based on conservation concerns shared by governments, including the parties to this dispute, non-governmental organizations, and private citizens around the world.⁵¹

The second panel did acknowledge the importance of sustainability and protecting the environment, in a more explicit way than the *US-Tuna I* panel had done. It noted that “the objective of sustainable development, which includes the protection and preservation of the environment, has been widely recognized by the contracting parties to the General Agreement.”⁵² The issue was “not the validity of the environmental objectives of the United States to protect and conserve dolphins,” but “whether, in the pursuit of its environmental objectives, the United States could impose trade embargoes to secure changes in the policies which other contracting parties pursued within their own jurisdiction.”⁵³ Thus, an interpretation of Article XX(g) that encompassed the protection and conservation of animals (something later hailed as a landmark development in international trade law when the WTO Appellate Body confirmed that interpretation in

⁵¹ *Ibid* at para 3.11.

⁵² *Ibid* at para 5.26.

⁵³ *Ibid*.

the *US-Shrimp* case⁵⁴) was recognized before *US-Shrimp* by the GATT dispute settlement system.

The second panel also did address the question of whether living creatures like dolphins – including species not at risk of extinction – could be an “exhaustible natural resource” within the meaning of Article XX(g). (Recall that the *US-Tuna I* panel had not made a decision on this point.) The *US-Tuna II* panel did think that policies to conserve living creatures could come within Article XX(g). The panel noted that “dolphin stocks could potentially be exhausted, and that the basis of a policy to conserve them did not depend on whether at present their stocks were depleted.”⁵⁵

Keeping in mind that the *US-Tuna I* report was not adopted by the GATT parties and was not binding on this panel, it was open to the *US-Tuna II* panel to take a different approach to interpreting the treaty even though the dispute raised essentially the same questions. And the panel did, to some extent, depart from the *US-Tuna I* panel on the matter of extra-territorial effects of legislation and the application of the Article XX policy exceptions. The panel recognized that the text of Article XX(g) “does not spell out any limitation on the location of the exhaustible natural resources to be conserved,”⁵⁶ and that “the policy to conserve dolphins in the eastern tropical Pacific Ocean, which the United States pursued within its jurisdiction over its nationals and vessels, fell within the range of policies covered by Article XX (g).”⁵⁷ In other words, a policy was not

⁵⁴ *United States – Import of Certain Shrimp and Shrimp Products* (1998), WT/DS58/AB/R (Appellate Body Report [*US-Shrimp*]). See discussion in Section 6.2.2.2.

⁵⁵ *US-Tuna II*, *supra* note 50 at para 5.13.

⁵⁶ *Ibid* at para 5.15.

⁵⁷ *Ibid* at para 5.20.

automatically outside the scope of Article XX(g) just because it had to do with protecting creatures outside the domestic jurisdiction of the US.

The panel found, however, that this particular policy operated in a way that was not permitted under GATT because it could only be effective if ETP fishing nations – countries other than the US – changed *their* rules on dolphin conservation. The question was whether the policies covered by Article XX(g) could “include measures taken so as to force other countries to change their policies with respect to persons or things within their own jurisdictions, and requiring such changes in order to be effective,”⁵⁸ and the panel decided that it could not. In so ruling, it closely echoed the logic of the first panel:

If ... Article XX were interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired. Under such an interpretation the General Agreement could no longer serve as a multilateral framework for trade among contracting parties.⁵⁹

The panel’s language and analysis are almost identical to the *US-Tuna I* panel’s approach. The panel’s reasoning on why the embargo was not justified under Article XX(b) (protection of animal life and health) was substantially similar to that under Article XX(g).⁶⁰

Like the first GATT panel report, the *US-Tuna II* decision was not adopted by the GATT contracting parties.

⁵⁸ *Ibid* at para 5.25.

⁵⁹ *Ibid* at para 5.26.

⁶⁰ *Ibid* at paras 5.38-5.39.

6.2.1.3 The International Dolphin Conservation Program and the IDCPA

Meanwhile, as the tuna-dolphin disputes were proceeding through the GATT dispute settlement system, there were parallel developments in both international efforts to address the tuna-dolphin issue and in related US domestic laws. The US was motivated to seek an internationally negotiated approach in part by the decisions of the GATT panels against it. Although the rulings were not adopted and not binding, they could still be taken as statements that the US was failing to comply with its international treaty commitments.⁶¹

The international initiative was driven by the Inter-American Tropical Tuna Commission (IATTC), an international advisory board responsible for conserving and managing tuna fisheries in the ETP.⁶² The IATTC members involved in ETP tuna fishing negotiated a multilateral approach under a voluntary Agreement for the Conservation of Dolphins (also known as the La Jolla Agreement), concluded in 1992.⁶³ The La Jolla Agreement set maximum limits on dolphin mortality and provided for observer coverage on tuna fishing vessels.

In 1995, the La Jolla Agreement was formalized under the Panama Declaration.⁶⁴ The US agreed to remove the embargo in return for the ETP fishing nations' commitment to a treaty on dolphin protection, the *Agreement on the International Dolphin*

⁶¹ Miller & Croston, *supra* note 6 at 75; O'Connell, *supra* note 10 at 87 (the account here mistakenly identifies the GATT panel as a WTO panel).

⁶² O'Connell, *ibid* at 86.

⁶³ Agreement reached in June 1992 between Colombia, Costa Rica, Ecuador, Mexico, Nicaragua, Panama, the United States, Vanuatu and Venezuela.

⁶⁴ *Declaration of Panama*, Oct 4, 1995.

*Conservation Program (AIDCP).*⁶⁵ The AIDCP was a compromise between the tough US unilateral stance on dolphin protection and more lenient rules negotiated with the ETP fishing countries. The US Congress implemented this agreement into domestic law in the *International Dolphin Conservation Program Act (IDCPA)*, which was passed in 1997 and came into effect in 1999.⁶⁶

Reflecting the AIDCP compromise, new rules under the IDCPA allowed tuna fished in the ETP tuna to be labeled dolphin safe even if it *had* been caught using the setting-on method, subject to certain conditions. The captain of the ship had to provide written certification that tuna were not fished using a purse-seine net intentionally deployed to encircle dolphins, or if an approved observer on the vessel for the entire trip had certified that the ship did not use a purse-seine net intentionally to encircle dolphins.⁶⁷ Implementing regulations adopted under the IDCPA further relaxed the standards, permitting access to the dolphin-safe label if an on-board observer stated that no dolphins were killed or seriously harmed.⁶⁸

The changes were controversial, with some environmental organizations seeing them as an indefensible retreat on meaningful dolphin protection. Environmentalists argued that the rules did nothing to address the stress caused to dolphins by encirclement

⁶⁵ *Agreement on the International Dolphin Conservation Program*, May 21, 1998. See discussion in Rachel C Hampton, "Of Dolphins and Tuna: the Evolution to an International Agreement" (1998) 10 *Fordham Envtl L J* 99.

⁶⁶ *International Dolphin Conservation Program Act of 1997*, Pub. L. No. 105-42. See discussion in Miller & Croston, *supra* note 6.

⁶⁷ O'Connell, *supra* note 10 at 90, explains the amendments and provides then-current references to the relevant clauses in the DPCIA. The provisions have since been amended again in response to the WTO litigation described in Section 6.2.1.4.

⁶⁸ O'Connell, *ibid* at 91-93 describes the process of development of these administrative rules.

techniques (as distinct from adverse effects on populations).⁶⁹ The conflict led to litigation, with environmental groups suing US authorities and arguing that the regulations departed from the legislative intention of Congress.⁷⁰ As a result of the litigation, some stricter requirements were reinstated, with the end result that access to the dolphin-safe label under US domestic legislation ended up being different from and less easily obtained than envisioned under the AIDCP.⁷¹

Despite the efforts to reach a multilateral solution to the problem, a basic conflict remained between the AIDCP and the US legislation on dolphin-safe labelling. The US approach reflected policymakers' concerns about harm to dolphins in the broad sense, including individual stress, injury and mortality, and the desire of consumers to know whether they were buying tuna fished in ways that caused that kind of harm, but it still lacked buy-in and support from the ETP fishing nations.

6.2.1.4 Tuna-Dolphin III: WTO Decision⁷²

This conflict eventually led to another trade dispute over the US rules and regulations under the DPCIA that set the conditions for access to the US dolphin-safe labelling scheme. By this time, the GATT had been replaced by the WTO and its less arbitration-like, more court-like dispute settlement system.⁷³ The next tuna-dolphin dispute also came through the WTO system several years after the landmark *US-Shrimp*

⁶⁹ *Ibid* at 88.

⁷⁰ *Brower v Evans*, 257 F2d 1058 (9th Cir 2001); *Earth Island Institute v. Hogarth*, 494 F 3d 757 (9th Cir 2007).

⁷¹ As outlined in the WTO panel decision on the dolphin-safe labelling scheme: *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (2011), WT/DS381/R (Panel Report) [*US-Tuna III* Panel Report] at paras 2.34-2.41.

⁷² The discussion here builds on my analysis in Sykes, *supra* note 6.

⁷³ See discussion in Section 5.4.2.

Appellate Body decision, which is discussed in Section 6.2.2. *US-Shrimp* was the harbinger of a more progressive, open-textured approach to trade and environment conflicts at the WTO. But the advent of the WTO also meant new trade agreements and new trade liberalization rules, over and above those in the GATT. In the third tuna-dolphin case, the key treaty was the TBT Agreement.⁷⁴

The GATT *US-Tuna I* panel had addressed the GATT-compatibility of the US dolphin-safe labeling scheme. The panel said that if tuna products could be legally imported into and sold in the US without the label, there was no GATT problem. Any advantages the label conferred were a matter of consumer choice, not government-granted advantage. The TBT Agreement added new, cumulative restrictions for regulatory labelling schemes. Rules establishing criteria for labels and marks are the type of technical regulations that the TBT Agreement was intended to address.⁷⁵ It would be possible for the dolphin-safe labelling regime to be GATT-compliant but still violate WTO rules by reason of failing to conform with the TBT Agreement.

The preamble of the TBT Agreement states WTO members' desire "to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade."⁷⁶ The preamble also recognizes that WTO members should not be prevented from taking measures

⁷⁴ *Agreement on Technical Barriers to Trade*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization Annex 1A, 1868 UNTS 120 [TBT Agreement].

⁷⁵ The TBT Agreement sets out trade disciplines with respect to both "technical regulations" and "standards," both of which categories include rules or guidelines that deal with "terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method." TBT Agreement, *ibid*, Annex I.

⁷⁶ *Ibid*, preamble.

necessary to protect human, animal or plant life or health, or the environment, at levels they deem appropriate, provided that such measures “are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.”⁷⁷

When the third tuna-dolphin case came to the WTO, the TBT Agreement had been in force for more than a decade, but there was relatively little case law interpreting it. The Appellate Body had tended to resolve disputes under GATT rather than the TBT Agreement – as Jason Houston-McMillan argues, because GATT was “more familiar territory.”⁷⁸

But in 2011 and 2012 the body of WTO law interpreting and applying the TBT Agreement expanded significantly. In 2012, the Appellate Body issued three reports dealing with disputes under the TBT Agreement (following prior panel reports in each of the cases in 2011⁷⁹), all of which concerned US regulatory schemes: one on country-of-origin labeling rules for meat,⁸⁰ one on health warnings on clove cigarettes,⁸¹ and the decision on Mexico’s claims concerning the dolphin-safe tuna labeling regime.⁸² These

⁷⁷ *Ibid.*

⁷⁸ Jason Houston-McMillan, “The Legitimate Regulatory Distinction Test: Incomplete and Inadequate for the Particular Purposes of the TBT Agreement” (2016) 15 World Trade Rev 543 at 545.

⁷⁹ For an analysis of the panel reports in these three cases, see Robert Howse & Philip I Levy, “The TBT Panels: US-Cloves, US-Tuna, US-COOL” (2103) 12 World Trade Rev 327.

⁸⁰ *United States – Certain Country of Origin Labelling (COOL) Requirements* (2011), WT/DS384/R, WT/DS386/R (Panel Report), as modified by *United States – Certain Country of Origin Labelling (COOL) Requirements* (2012), WT/DS384/AB/R, WT/DS386/AB/R, and WT/DS384/AB/R, WT/DS386/AB/R (Appellate Body Reports) [*US-COOL*].

⁸¹ *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (2011), WT/DS406/R (Panel Report), as modified by *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (2012), WT/DS406/AB/R (Appellate Body Report).

⁸² *US-Tuna III* Panel Report, *supra* note 71, as modified by *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (2012), WT/DS381/AB/R (Appellate Body Report) [*US-Tuna III* AB Report] [together, *US-Tuna III*].

cases, known as the TBT “trilogy,”⁸³ established a framework for balancing the two principles reflected in the preamble: technical regulations should not create unnecessary obstacles to trade, but WTO members should still be able to use them for legitimate regulatory purposes.⁸⁴

The US rules on which tuna could be labeled “dolphin safe” were complex. They were set out in the DPCIA and associated regulations, as modified following the GATT disputes, the negotiation of the AIDCP, and litigation by environmental groups.

The rules were different depending on the geographical area where the fishing took place, the type of fishing vessel, and the fishing method. For large purse-seine vessels in the ETP, there had to be both a certification that no purse seine net was intentionally deployed on or used to encircle dolphins during the fishing trip, and that no dolphins were killed or seriously injured.⁸⁵ By contrast, the AIDCP regime allowed tuna to be considered dolphin-safe with certification that dolphins were not killed or seriously injured during the fishing trip. In other words, tuna caught in the ETP using purse-seine encircling of dolphins could not, by definition, be dolphin-safe under the US legislation.

⁸³ Robert Howse, “Introduction” in Tracey Epps & Michael J Trebilcock, eds, *Research Handbook on the WTO and Technical Barriers to Trade* (Cheltenham: Edward Elgar, 2013) 1 at 1; Robert Howse, Joanna Langille & Katie Sykes, “Pluralism in Practice: Moral Legislation and the Law of the WTO After *Seal Products*” (2015) 48:1 *Geo Wash Int’l L Rev* 81 at 129.

⁸⁴ Houston-McMillan, *supra* note 78 at 544; Michael J Trebilcock, “Foreword” in Tracey Epps & Michael J Trebilcock, eds, *Research Handbook on the WTO and Technical Barriers to Trade* (Cheltenham: Edward Elgar, 2013) ix at x-xi (“The TBT Agreement ... attempts to walk a fine and highly contestable line between recognizing the importance of domestic policy space and autonomy for Member countries to regulate these issues of fundamental concern to many of their citizens, while at the same time discouraging Member countries from adopting product regulations or standards ostensibly on health, safety or environmental grounds, but that are in fact disguised forms of protectionism for domestic industries, or that gratuitously or excessively burden international trade”).

⁸⁵ *US-Tuna III* Appellate Body Report, *supra* note 82 at para 174.

It could, however, meet the definition of dolphin-safe under the more lenient AIDCP approach, as long as dolphins were not killed or seriously injured.

The most important TBT Agreement provisions at issue in *US-Tuna III* were Articles 2.1 and 2.2. As discussed in Chapter Five,⁸⁶ Article 2.1 establishes a non-discrimination norm similar to the national treatment and most-favoured nation rules under GATT, and Article 2.2 prohibits the use of technical regulations to create unnecessary obstacles to trade. Article 2.2 provides that technical regulations “shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create,” and gives a non-exhaustive list of legitimate objectives that includes animal or plant life or health.

Mexico argued that the US rules discriminated against its tuna exports. Because the Mexican tuna fishing industry was based on purse-seine fishing in the ETP, it could not use the dolphin-safe label. Mexico argued that it had “maintained a sound and environmentally sustainable method for fishing for tuna and participated in all multilateral initiatives to protect dolphins while fishing for tuna,” but was prohibited from using the dolphin-safe label while other fisheries that had “not adopted comparable measures to protect dolphins” could use it.⁸⁷ Although the US had lifted the embargo on Mexican tuna, it had “found a new way to prevent Mexican tuna from competing in the US market.”⁸⁸ Mexico emphasized that fishing outside the ETP “results in the killing of

⁸⁶ See Section 5.5.2.

⁸⁷ *US-Tuna III* Panel Report, *supra* note 71 at para 4.2.

⁸⁸ *Ibid* at para 4.1.

many dolphins and other cetaceans” and argued that it made no sense to impose such tight regulations only targeting tuna caught in the ETP.⁸⁹

A threshold question was whether the dolphin-safe labelling regime was a “technical regulation” within the meaning of the TBT Agreement, or a “standard,” which is still subject to TBT commitments but not to the more stringent requirements of Articles 2.1 and 2.2. The definitions of a “technical regulation” and of a “standard” are set out in Annex I of the TBT Agreement. The key distinction for purposes of this analysis is that a regulation is something “with which compliance is mandatory,” whereas standards include “rules, guidelines or characteristics ... with which compliance is not mandatory.”⁹⁰ Here – as the GATT *US-Tuna I* panel had pointed out – the dolphin-safe was not “mandatory” in the sense that it was legal to sell tuna in the US without it.

But the WTO Appellate Body (upholding the panel’s decision on this point) considered the regulations “mandatory” for purposes of Annex I of the TBT Agreement, based on a consideration of the overall nature of the labeling scheme. It was a formal and comprehensive scheme for regulating the use of the term “dolphin safe,” consisting of “legislative and regulatory acts of the US federal authorities,” prescribing “in a broad and exhaustive manner the conditions that apply for making any assertion on a tuna product as to its ‘dolphin-safety,’” and setting out enforcement mechanisms for penalizing illegal use of the label.⁹¹

⁸⁹ *Ibid* at para 4.9.

⁹⁰ TBT Agreement, *supra* note 74, Annex I, Articles 1-2.

⁹¹ *US-Tuna III* Appellate Body Report, *supra* note 82 at para 199, para 194.

This finding was an expansive interpretation of the term “technical regulation” as defined in the agreement. On an ordinary understanding of what “mandatory” means (an understanding that the GATT *US-Tuna I* panel appeared to subscribe to), the dolphin-safe labeling scheme was not mandatory.⁹²

Since the labeling scheme was found to be a technical regulation, Articles 2.1 and 2.2 did apply. With respect to Article 2.1, the Appellate Body applied a two-part test. First, it looked at whether the measure modified the conditions of competition to the detriment of Mexican tuna products. If so, it went on to ask whether the detrimental impact stemmed “exclusively from a legitimate regulatory distinction.”⁹³

The text of Article 2.1 does not set out express policy exceptions (in the manner of the Article XX exceptions to the GATT non-discrimination norms), but this criterion of “stemming exclusively from a legitimate regulatory distinction” has been read in by the Appellate Body as an interpretation of Article 2.1 in light of the purpose and principles of the TBT Agreement. That is, it reflects the balance between trade liberalization and regulatory sovereignty expressed in the preamble.

The Appellate Body found that the US dolphin-safe labelling regime did not stem exclusively from a legitimate regulatory distinction. The problem was that it was not “calibrated” to a distinctive risk to dolphins specific to purse-seine fishing in the ETP.⁹⁴ There were adverse effects on dolphins from other fishing methods in other fisheries. The US scheme “*fully* addressed” the risks from setting on dolphins in the ETP, but for

⁹² See discussion in Howse, Langille & Sykes, *supra* note 83 at 138.

⁹³ *US-Tuna III* Appellate Body Report, *supra* note 82 at paras 298-299.

⁹⁴ *Ibid* at para 297.

risks to dolphins that come from fishing methods other than setting on dolphins outside the ETP, it was more lenient.⁹⁵ As a result, the disadvantage to Mexican products did not arise exclusively from a legitimate regulatory distinction because it was not “even-handed in the relevant respects.”⁹⁶

On Article 2.2 of the TBT Agreement, however, the Appellate Body overruled the panel and found that the dolphin-safe labeling scheme was necessary to fulfil a legitimate objective. That objective was the protection of animal life and health.

What is especially significant about the Article 2.2 analysis from the point of view of animal protection is the consideration it gives to protection of individual animals from harm, including distress, as distinct from adverse effects on dolphin populations.

The legislative history of the DPCIA amendments indicates that US lawmakers were not concerned only that dolphin populations would be reduced by by-catch, but also that chasing and encirclement were also distressing and harmful to dolphins even if they were not killed or seriously injured during the set.⁹⁷ This category of adverse effects is described in the panel report as “unobserved consequences.”⁹⁸ During the panel proceedings, the panel asked the US to clarify whether its objective was a certain maximum level of dolphin mortality or conservation of dolphin populations. The US responded that its objective was to protect dolphins from “adverse effects” – not just mortality or population decline.⁹⁹ Those adverse effects meant not just the death of a

⁹⁵ *Ibid* (emphasis in the original).

⁹⁶ *Ibid*.

⁹⁷ See discussion in Section 6.2.1.3.

⁹⁸ *US-Tuna III* Panel Report, *supra* note 71 at para 7.484.

⁹⁹ *Ibid* at para 7.485.

dolphin or injury during the encirclement but also “stress resulting from chase and capture,”¹⁰⁰ including separation of dolphin calves from their mothers.¹⁰¹

In the panel report, the adverse effects on dolphins are discussed in the context of population-level harms: distress from chase and capture may damage the animals’ health, leading to death over the longer term (thus, unobserved during the fishing trip) and ultimately to reduction of the overall dolphin population. But, as the US stressed before the panel, the purpose of the dolphin-safe labeling scheme was to give consumers confidence that the tuna they purchased was not fished in a manner harmful to dolphins – not just to dolphin populations but to individual dolphins.¹⁰² The wellbeing of individual animals as well as conservation of population levels, was part of the concern motivating the legislation and the challenged trade measures.

The Appellate Body’s decision that the labeling scheme was not more trade-restrictive than necessary to achieve its objective thus suggests that reducing harm to animals independent of population-level threats can be a “legitimate objective” and an aspect of “animal life and health” within the meaning of the TBT Agreement. It even suggests that protecting animals from emotional or psychological harm (such as would be caused by the separation of mothers and calves) – not just physical harm – is also a cognizable objective.

Trebilcock, Howse and Eliason see the *US-Tuna III* decision as a significant development and a precursor of *EC-Seals* in allowing space for animal welfare as a

¹⁰⁰ *Ibid* at para 7.496.

¹⁰¹ *Ibid* at paras 7.496 – 7.499.

¹⁰² *Ibid* at paras 7.479-7.480; 7.492.

recognized policy objective in WTO law. As they argue, the panel clearly indicated that the concept of animal life or health in the TBT Agreement extends to “animal welfare as an intrinsic good,”¹⁰³ an interpretation that was confirmed by the Appellate Body. Kelch shares this assessment of the importance of the decision:

This is a significant statement since the previous WTO and GATT cases dealing with animal issues can all be seen ... as environmental cases dealing with the protection of species of animals that are threatened or endangered. The WTO is now recognizing that it is a legitimate objective of member states to protect not only endangered or threatened animals with their regulations, but also to protect individual animals or species that are not threatened or endangered.¹⁰⁴

In 2013, following the Appellate Body decision on the dolphin-safe labelling scheme, the US made changes to the rules in order to bring them into compliance with the WTO ruling. The WTO dispute settlement system includes a compliance oversight mechanism. The complainant can return to dispute settlement if it is not satisfied that the steps taken by the respondent have done enough to bring the measures complained of into compliance. In the third tuna-dolphin dispute, there were two compliance proceedings. In the first, the Appellate Body found that detrimental impact on Mexican tuna under the modified US regime still did not stem exclusively from a legitimate regulatory distinction, and also that it violated non-discrimination obligations under GATT.¹⁰⁵ The

¹⁰³ Michael Trebilcock, Robert Howse & Antonia Eliason, *The Regulation of International Trade*, 4th ed (London: Routledge, 2013) at 664.

¹⁰⁴ Kelch, *supra* note 6 at 131.

¹⁰⁵ *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico* (2015), WT/DS381/AB/RW (Appellate Body Report). For a critical discussion of the panel and Appellate Body decisions in this proceeding, arguing that at both levels the DSB allowed Mexico to open up issues beyond compliance with the original Appellate Body ruling, see Robert Howse, “The Tuna/Dolphin Appellate Body 21.5 Ruling: A decision that could threaten the integrity and efficiency of WTO dispute settlement” *International Economic Law and Policy Blog* (November 24, 2015), online: <<https://worldtradelaw.typepad.com/ielpblog/2015/11/the-tunadolphin-appellate-body-215-ruling-a-decision-that-could-threaten-the-integrity-and-efficiency-of-wto-dispute-settl.html>>.

US changed the rules again in 2016, and once again Mexico pursued compliance proceedings, but this time the Appellate Body ruled that the labelling regime was consistent with WTO law.¹⁰⁶

The amended rules continued to require that tuna fished in the ETP large purse-seine fishery have certification from the ship's captain and an observer that the tuna was fished without encirclement of dolphins, and that no dolphins were killed or seriously harmed. In other words, tuna fished in the ETP by setting on dolphins still was not permitted to be labelled dolphin safe. The changes that were made to comply with the WTO ruling all related to tuna fished using the purse seine method *outside* the ETP, adding some certification requirements for those products.¹⁰⁷

What this means is that complying with the WTO ruling did not require the US to change its dolphin-safe labeling rules with respect to the ETP large purse-seine fishery (the rules that affected Mexican tuna exports) at all. A requirement to be even-handed cuts both ways; it can be met by being uniformly more lenient or uniformly stricter. In this case the US made its rules more even-handed by imposing tougher requirements on non-ETP tuna.

Although the encounter between trade rules and animal protection is often thought of as creating pressure to water down animal-protective regulations, in the end the long-running dispute over dolphin by-catch has actually had the opposite effect, allowing the

¹⁰⁶ *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by the United States* (2018) WT/DS381/AB/RW/USA and *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Second Recourse to Article 21.5 of the DSU by Mexico* (2018) WT/DS381/AB/RW2 (Appellate Body Report).

¹⁰⁷ *Ibid* at paras 5.11-5.13.

US to keep a stricter dolphin-safe labeling regime than the one negotiated by ETP fishing nations under the AIDCP, while requiring it to do more to address harm to dolphins from tuna fisheries beyond the ETP.

The final Appellate Body decision on compliance is very recent (December 2018), so it is too early to be certain how Mexico may alter its fishing methods in order to sell tuna in the US market under the dolphin-safe label. Reuters reports that a Mexican trade official stated on a local radio program that she did not think the industry would modify its fishing methods “because it’s a sustainable, responsible method.”¹⁰⁸ What the final WTO ruling does confirm is that the US can, consistent with its WTO obligations, refuse to permit tuna caught using dolphin encirclement to be labeled dolphin safe – provided that it also addresses other risks and harms to dolphins in a reasonably non-arbitrary and consistent way.

6.2.2 Shrimp and Sea Turtles

The second significant trade case involving by-catch is the landmark *US-Shrimp* WTO Appellate Body decision.¹⁰⁹ It would be difficult to overstate the importance of *US-Shrimp* as a watershed in the relationship between trade and the environment, and

¹⁰⁸ Tom Miles, “Mexico loses 10-year battle over US tuna labelling” *Reuters* (14 December 2018), online: <https://www.reuters.com/article/us-usa-mexico-wto/mexico-loses-10-year-wto-battle-over-u-s-tuna-labeling-idUSKBN1OD233?utm_campaign=trueAnthem%3A+Trending+Content&utm_content=5c14917c04d301169810b28d&utm_medium=trueAnthem&utm_source=twitter&fbclid=IwAR3KIZsfyLfmYouXnpsXhezuEtgSZ6TFGCr-AwsBN-xUmaUxwaAHfTZ5dg>.

¹⁰⁹ *US-Shrimp*, *supra* note 54. See Susan L Sakmar, “Free Trade and Sea Turtles: The International and Domestic Implication of the Shrimp-Turtles Case” (1999) 10 *Colo J Int’l Env’t L & Pol’y* 345; Arthur E Appleton, “Shrimp/Turtle: Untangling the Nets” (1999) 2 *J Int’l Econ L* 477; John H Jackson, “Comments on *Shrimp/Turtle* and the Product/Process Distinction” (2000) 11:2 *EJIL* 303; Robert Howse, “The Appellate Body Rulings in the *Shrimp-Turtle* Case: A New Legal Baseline for the Trade and Environment Debate” (2002) 27:2 *Columbia J Env’t L* 491.

also in the evolution of the new WTO dispute settlement system. Philippe Sands classed the WTO Appellate Body report in the *US-Shrimp* case alongside the case concerning Spain's request to extradite former Chilean dictator Augusto Pinochet to be tried for human rights violations as "transformational," a case that "challenges some of the most basic assumptions that have dominated international legal relations for much of the past century and beyond," and one that demonstrates "how new actors, new rules, and new international courts are transforming the landscape of international law."¹¹⁰ Howse has argued, in an overview of twenty years of WTO Appellate Body jurisprudence, that no decision is more significant than *US-Shrimp* "for marking the evolution of the Appellate Body as a judicial system independent of, and operating at a distance from, the WTO as an institution and from the ideological and policy orientations that tend to drive it."¹¹¹

This case confirmed that the new WTO dispute settlement system had moved trade-environment conflicts out of the purview of the "trade policy elite" or "insider network," the "specialized policy elite insulated from, and not particularly interested in, the larger political and social conflicts of the age,"¹¹² to an adjudicative body that is more open to the perspectives of environmentalists and other non-trade communities.

6.2.2.1 Sea Turtle Conservation and TEDs

Sea turtles are charismatic, threatened, highly migratory marine animals. Susan Sakmar describes sea turtles as "natural wonders" that live up to eighty years, can weigh

¹¹⁰ Philippe Sands, "Turtles and Torturers: The Transformation of International Law" (2001) 33:2 NYU J Int'l L & Pol 527 at 527.

¹¹¹ Robert Howse, "The World Trade Organization 20 Years On: Global Governance by Judiciary" 27:1 EJIL 9 at 36.

¹¹² Robert Howse, "From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trade Regime" (2002) 96 AJIL 94 at 98. Howse describes the "trade policy elite" as the "insider network" of the GATT system (*ibid* at 99, 103, 104, 108, 109, 112).

as much as 1400 pounds, and “swim vast distances during their life spans, with females returning to the beach of their birth to nest.”¹¹³ There are seven recognized sea turtle species (green, loggerhead, flatback, hawksbill, leatherback, olive ridley and Kemp’s ridley).¹¹⁴ All sea turtle species except the flatback (which lives only in Northern Australia, Southern Indonesia, and Southern Papua New Guinea) are found throughout the ocean and migrate over long ranges.¹¹⁵ Sea turtles are under threat from a number of human activities. Since the 1990s, fisheries by-catch, especially from shrimp fishing, has been recognized as “a foremost threat to many sea turtle populations.”¹¹⁶ Turtles get entangled in fishing nets, they cannot surface to breathe, and they drown.

Beginning in the 1980s, marine scientists have developed a technology to allow sea turtles to escape from fishing nets and reduce turtle by-catch: the turtle excluder device, or TED. A TED is essentially a “turtle escape hatch” inserted into a shrimp trawl net.¹¹⁷ The basic design is an oval frame with bars inserted into the top or bottom of the trawl net. The target shrimp are small enough to go through the bars and be caught in the mesh bag at the end of the net. The TED stops larger animals, including turtles, from entering the back of the net. The turtles can then swim either up or down to an opening in the net and escape.¹¹⁸ TEDs are an especially important tool for sea turtle conservation

¹¹³ Sakmar, *supra* note 109 at 346-347.

¹¹⁴ *Ibid* at 347.

¹¹⁵ SEE Turtles, “Flatback Turtles” online: <https://www.seeturtles.org/flatback-turtle>.

¹¹⁶ C Josh Donlan *et al*, “Using Expert Opinion Surveys to Rank Threats to Endangered Species: A Case Study with Sea Turtles” (2010) 24:6 *Conservation Biology* 1586 at 1586.

¹¹⁷ Lekelia D Jenkins, “The Evolution of a Trading Zone: A Case Study of the Turtle Excluder Device” (2010) 41:1 *Studies in History and Philosophy of Science* 75 at 75.

¹¹⁸ National Atmospheric and Oceanic Administration, “Sea Turtle Protection and Shrimp Fisheries,” online: http://sero.nmfs.noaa.gov/protected_resources/sea_turtle_protection_and_shrimp_fisheries/.

because they reduce mortality in adult sea turtles, whereas other conservation measures that focus on turtle nests and hatchlings can have less impact.¹¹⁹

In the US, beginning in 1987, regulations under the *Endangered Species Act of 1973*¹²⁰ required all shrimp trawlers to use TEDs in all fishing nets.¹²¹ As was the case with tuna fishing and dolphin by-catch, US regulators and the domestic industry saw the necessity of doing something to address imports of shrimp from other countries that did not require similar protections. In 1989, Congress passed Section 609 of US Public Law 101-162, which encourages negotiation with foreign countries towards treaties to protect sea turtles. Section 609(b) restricts imports of shrimp unless the President has provided specified certifications to Congress. The required certification must attest either that the harvesting nation has adopted a program governing the incidental capture of sea turtles in its commercial shrimp fishery comparable to the program in effect in the United States and has an incidental take rate comparable to that of the United States, or that the fishing environment in the harvesting nation does not pose a threat of the incidental taking of sea turtles.¹²² The authority to make these certifications is delegated to the Department of State.

The Department of Commerce published guidelines in 1991 and 1993 on the application of Section 609(b). Environmentalists criticized the revised guidelines for focusing on only a few shrimp-exporting countries, thus not providing enough protection for turtles, and a coalition of environmental groups sued the government at the US Court

¹¹⁹ Sakmar, *supra* note 109 at 348.

¹²⁰ 16 USC § 1531 et seq.

¹²¹ *Ibid* at 349. The current regulations are *Gear Requirements for Shrimp Trawlers*, 50 CFR 223.206(d)(2).

¹²² Pub L No 101-162, § 609(b)(2)(A)-(C); Sakmar, *ibid* at 349.

of International Trade.¹²³ The Court ruled that the guidelines were too narrow and had to cover all shrimp-harvesting nations. After that, new guidelines were published in 1996. The new rules applied to all shrimp-exporting countries, but they had a loophole. Shrimp imports were conditioned on provision of a declaration “that the shrimp or shrimp product in question was harvested in a country with regulations comparable to those adopted in the United States” or, alternatively, “that the *particular shipment of shrimp* had been harvested in a manner that did not adversely affect sea turtles.”¹²⁴

Environmental groups sued again.¹²⁵ The deficiency in the guidelines, they argued, was that exporting nations could fit TEDs to just a “handful” of shrimping vessels in order to export the shrimp from those vessels to the US, while continuing to harm sea turtles with the rest of their (non-TED-equipped) fleet.¹²⁶ The Court of International Trade agreed, ruling that the embargo in Section 609(b)(2) required “the requirement of TEDs on all vessels of a harvesting nation at all times.”¹²⁷ For a country to be eligible for certification and avoid the embargo, its entire commercial shrimp fishery had to be subject to regulations to protect turtles comparable to those in the US, which essentially meant that TEDs must always be required, unless the country fished shrimp in waters where turtles were unaffected, such as colder areas where turtles are not found.

In 1996, India, Malaysia, Pakistan and Thailand, all nations whose shrimp and shrimp products were embargoed under Section 609(b)(2), requested consultations with

¹²³ *Earth Island Institute v Christopher*, 890 F Supp 1085 (Ct Int’l Trade 1995).

¹²⁴ Sakmar, *supra* note 109 at 356 (emphasis added).

¹²⁵ *Earth Island Institute v Christopher*, 942 F Supp 597 (Ct Int’l Trade 1996).

¹²⁶ *Ibid* at 600.

¹²⁷ *Ibid* at 605.

the US in accordance with the WTO dispute settlement rules. The dispute went to a WTO panel, which, in 1998, ruled in favour of the complainants.¹²⁸

The reasons for the panel's conclusion are familiar from the tuna-dolphin GATT decisions. The US, the panel said, could not have a trade embargo which effectively required other WTO members to adopt the same policies it had adopted if they wanted to access its market. The language of the decision quite closely tracks that of the GATT tuna-dolphin rulings:

if an interpretation of ... Article XX were to be followed which would allow a Member to adopt measures conditioning access to its market for a given product upon the adoption by exporting Members of certain policies, including conservation policies, GATT 1994 and the WTO Agreement could no longer serve as a multilateral framework for trade among Members as the security and predictability of trade relations under those agreements would be threatened.¹²⁹

The panel acknowledged the importance of protecting sea turtles and the efficacy of TEDs as part of a turtle conservation strategy. But it considered that the best way to advance turtle protection would be “to reach cooperative agreements on integrated conservation strategies, covering, *inter alia*, the design, implementation and use of TEDs while taking into account the specific conditions in the different geographical areas concerned.”¹³⁰

¹²⁸ *United States – Import of Certain Shrimp and Shrimp Products* (1998) WT/DS58/R (Panel Report) [*US-Shrimp* Panel Report].

¹²⁹ *Ibid* at para 7.46. The panel went on to quote (and found support for its approach in) the *US-Tuna II* GATT panel decision; *supra* note 50 at para 5.26 (see discussion in Section 6.2.1.2 above).

¹³⁰ *Ibid* at para 9.1.

6.2.2.2 The US-Shrimp Appellate Body Report

The US appealed the panel decision to the Appellate Body. The result was a technical win for the complainants. The Appellate Body determined that certain aspects of the way Section 609(b) was applied did not comply with the requirements of the Article XX chapeau. In substance, however, the Appellate Body decision was more of a victory for the US, and for proponents of a more liberal approach to environmental exceptions in WTO law. Appleton notes that when the WTO Dispute Settlement Body debated and voted to adopt the Appellate Body's report, "[i]n an unusual reversal of form the appellees, who prevailed, were critical of the decision, while the losing party, the appellant, welcomed the decision and urged its adoption."¹³¹ That kind of result is no longer so very unusual in WTO law. As discussed in Chapter Seven, the outcome in *EC – Seal Products* followed a similar pattern.

The Appellate Body report departs significantly from the Panel's analysis, and it stands for a fundamentally different approach to resolving trade-environment conflicts.

Three points about the Appellate Body's analysis are especially important. First, the Appellate Body determined that the US embargo was provisionally justified under Article XX(g) of GATT (measures relating to the conservation of exhaustible natural resources), rejecting the complainants' argument that this terminology applied only to non-living resources like minerals.

The complainants argued that "exhaustible natural resources" means minerals, and excludes living things that can reproduce. The Appellate Body disagreed. It noted

¹³¹ Appleton, *supra* note 109 at 478.

that living creatures could be both “renewable” and “exhaustible,” referring to scientific evidence that “living species ... are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities.”¹³²

The Appellate Body’s interpretation of Article XX(g) was based in part on taking into account non-trade international legal instruments and other expressions of internationally shared concerns and values. The Appellate Body stated that the language of GATT 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.”¹³³

The WTO side agreement that creates and governs the dispute settlement system, the DSU, provides that the WTO treaties should be interpreted “in accordance with customary rules of interpretation of public international law.”¹³⁴ In prior case law, the Appellate Body had determined that the treaty interpretation principles set out in the *Vienna Convention on the Law of Treaties*¹³⁵ have the status of customary international law, and are therefore part of the customary rules required to be considered under the DSU.¹³⁶ Article 31(3)(c) of the *Vienna Convention* provides that treaties are to be interpreted in light of “relevant principles of international law applicable in the relations between the parties.” Based on these authorities, the Appellate Body in *US-Shrimp*

¹³² *US-Shrimp* Appellate Body Report, *supra* note 54 at para 128.

¹³³ *Ibid* at para 129.

¹³⁴ *Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization*, Annex 2, 1869 UNTS 401, 33 ILM 1226 (1994) [DSU], Art 3.2

¹³⁵ (1969) 1155 UNTS 331.

¹³⁶ *United States – Standards for Reformulated and Conventional Gasoline* (1996) WT/DS4/AB/R (Appellate Body Report) at 17.

looked to non-WTO public international law for “interpretive guidance, as appropriate, from the general principles of international law.”¹³⁷

The meaning of the text of the WTO treaties, interpreted in accordance with these principles, was “not static but evolutionary,” and informed by “modern international conventions and declarations.”¹³⁸ The Appellate Body report references numerous treaties and international instruments concerning the environment, including the *UN Convention on the Law of the Sea*,¹³⁹ the *Convention on Biological Diversity*,¹⁴⁰ the Rio Declaration,¹⁴¹ and the UN plan of action on sustainable development, Agenda 21.¹⁴²

Interpreted in this light, the Appellate Body found, Article XX(g) is understood to cover measures adopted for the protection of biological diversity and endangered species. In its reasons the Appellate Body also took note of the direction in the *Marrakesh Agreement Establishing the World Trade Organization* that optimal use of the world’s resources should be made in accordance with the objective of sustainable development seeking to protect and preserve the environment,¹⁴³ and of the creation of the Committee on Trade and Environment by WTO members in 1995.¹⁴⁴

The second important point is that the Appellate Body in *US-Shrimp* rejected the idea, which was central to both the panel’s analysis and the GATT tuna-dolphin

¹³⁷ *US-Shrimp* Appellate Body Report, *supra* note 54 at para 158.

¹³⁸ *Ibid* at para 130.

¹³⁹ Dec 10, 1982, 1833 UNTS 397, entered into force 1 November 1994.

¹⁴⁰ 5 June 1992, 1760 UNTS 79 (29 December 1993).

¹⁴¹ *Supra* note 8.

¹⁴² Adopted by the United Nations Conference on Environment and Development, 14 June 1992, UN Doc A/CONF.151/26/Rev.1 [Agenda 21].

¹⁴³ 1876 UNTS 493, 33 ILM 1144 (1994) (Preamble); *US-Shrimp* Appellate Body Report, *supra* note 109 at paras 129, 153.

¹⁴⁴ *Ibid* at paras 154-155.

decisions, that so-called “extra-territorial” trade measures categorically cannot be justified under the GATT policy exceptions. The US embargo was designed to be a “stick” (in Charnovitz’s terminology) to incentivize other countries to require the use of TEDs.¹⁴⁵ The Appellate Body permitted the US to use that stick. It considered that the legislation was “directly connected with the policy of conserving sea turtles” and was “not disproportionately wide in its scope and reach” in relation to that policy objective.¹⁴⁶

The Appellate Body avoided directly confronting the question of extraterritoriality, stating “[w]e do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g).”¹⁴⁷ What it did say was that if a jurisdictional limit existed, the US embargo did not violate it, because “in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States.”¹⁴⁸

As a practical matter, the Appellate Body’s reasoning means that there probably is no jurisdictional limit or prohibition on extra-territoriality – at least, not one that would matter very much. WTO members do generally choose to adopt rules and laws that have extra-jurisdictional effect precisely because there is a nexus of some kind to their own territories. In the case of migratory endangered species, the animals themselves, because they physically move across borders, can be the connection. (And, as *EC – Seal Products*

¹⁴⁵ *US-Shrimp* Appellate Body Report, *supra* note 54 at para 140.

¹⁴⁶ *Ibid* at paras 140-141.

¹⁴⁷ *Ibid* at para 133.

¹⁴⁸ *Ibid*.

subsequently confirmed, the moral concerns of citizens within a WTO member's territory can also be a sufficient nexus.¹⁴⁹⁾

Accordingly, the Appellate Body indicated that neither “extra-territorial” nor “unilateral” measures are categorically excluded from justification under Article XX, because to exclude them categorically would verge on rendering the Article XX exceptions meaningless:

The Panel, in effect, constructed an *a priori* test that purports to define a category of measures which, *ratione materiae*, fall outside the justifying protection of Article XX's chapeau. ... It appears to us, however, that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX ... It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies ... prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. *Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile*, a result abhorrent to the principles of interpretation we are bound to apply.¹⁵⁰

This does not mean that the extra-territorial / unilateral approach does not raise difficulties under GATT, but the difficulty concerns applying requirements in a fair and non-arbitrary way – a chapeau question. Under the Article XX chapeau, the Appellate Body did find that a WTO member cannot require other members to adopt its preferred policy without taking into account differences between the different contexts.¹⁵¹ This is very different, however, from saying that such a measure categorically cannot be justified under Article XX. One of the most important consequences is that (as in *US-Tuna III*),

¹⁴⁹ See discussion in Chapter Seven.

¹⁵⁰ *US-Shrimp* Appellate Body Report, *supra* note 54 at para 121 (emphasis added). See discussion of this passage in Jackson, *supra* note 109 at 306 and in Howse, *supra* note 112 at 111.

¹⁵¹ *US-Shrimp* Appellate Body Report, *ibid* at para 164; see also discussion below.

the remedy for a chapeau problem may to adopt a stricter policy across the board, rather than having to water down or abandon the policy.

The third and final point of significance to note in the *US-Shrimp* decision concerns the acceptance of *amicus curiae* briefs from NGOs. In the wake of the GATT tuna-dolphin decisions, and because of the high-profile nature of the sea turtle dispute, non-governmental environmental organizations wished to submit arguments to the panel. The panel received two *amicus curiae* briefs, one of them a joint submission from the Center for Marine Conservation and the Center for International Environmental Law, and the second a brief from the World Wide Fund for Nature.¹⁵² The panel did not accept these submissions from non-parties. It interpreted the DSU as permitting it to request supplemental information, but not allowing it to accept non-party submissions it had not asked for.¹⁵³

The Appellate Body disagreed, finding that the DSU did permit WTO tribunals to accept unrequested information and submissions from NGOs.¹⁵⁴ This determination is notable as one more instance of the opening up of WTO adjudication to perspectives and arguments from outside the world of trade insiders. NGO submissions in important WTO cases are now standard practice. Because animals have virtually no representation in domestic political systems¹⁵⁵ or in interstate relations, this mechanism for giving voice to

¹⁵² *Ibid* at para 99.

¹⁵³ *US-Shrimp* Panel Report, *supra* note 128 at paras 7.7-7.8.

¹⁵⁴ *US-Shrimp* Appellate Body Report, *supra* note 54 at para 109.

¹⁵⁵ In some countries, political parties advocating for animals have achieved a minor presence in the democratic process. The Party for the Animals in the Netherlands currently holds five seats. There are also political parties for animal rights or animal protection in a number of other countries, including many European countries, Taiwan, the US, Australia and Canada. See Party for the Animals, “International Movement,” online: <https://www.partyfortheanimals.com/international-movement>.

animal concerns in trade disputes may be especially important for animal advocacy organizations.

One more point to touch on about the Appellate Body decision in *US-Shrimp* concerns PPMs.¹⁵⁶ The Appellate Body did not expressly address whether trade measures that distinguish between products based on PPMs can be WTO compliant. By implication, however, its analysis seriously undermines the argument that they cannot. The embargo that was challenged in *US-Shrimp* did exactly that, and it is clear from the Appellate Body decision that it was legitimate and justifiable for the US to treat shrimp from countries with adequate sea turtle protection programs in place differently from shrimp from countries without such programs (despite there being no difference in the final product), provided that it did so fairly. The concern about a clash between WTO law and PPMs, whether environmental or animal-welfare based, should have been laid to rest by *US-Shrimp*.¹⁵⁷

Ultimately, the Appellate Body determined that Section 609(b) was not consistent with GATT. This is where the technical win for the complainants comes in. The decision turned on the Article XX chapeau. The chapeau prohibits application in a manner which constitutes “arbitrary or unjustifiable discrimination between countries where the same conditions prevail” or a “disguised restriction on international trade.” The Appellate Body found flaws in these respects in the way that Section 609(b) was applied and enforced.

¹⁵⁶ See discussion in Section 6.2.1.

¹⁵⁷ See also Steve Charnovitz, “The Law of Environmental “PPMs” in the WTO: Debunking the Myth of Illegality” (2002) 27 YJIL 59 at 59-60, 63.

First, in effect US government officials would only certify shrimp-exporting countries if there was a regulatory program in place requiring the use of TEDs that was essentially the same as the rules in the US.¹⁵⁸ This practice failed to take into account different conditions that might occur in the other WTO countries, and failed to “inquire into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.”¹⁵⁹

A second indication of unjustifiable discrimination was that the US had not engaged in “serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles” before enforcing its embargo on the complainants.¹⁶⁰ A multilateral, cooperative approach would be an effective way to protect sea turtles and in keeping with the emphasis on globally cooperative solutions in the international environmental instruments that the Appellate Body had looked at interpretive supplements, such as the Rio Declaration and Agenda 21.¹⁶¹ As Howse emphasizes, however, this finding did not imply a free-standing obligation to negotiate,¹⁶² but reflected requirements of fairness and even-handed treatment. The US had concluded a regional convention on the protection and conservation of sea turtles with Brazil, Costa Rica, Mexico, Nicaragua and Venezuela,¹⁶³ and the fact that it had negotiated the issue seriously “with some, but not all” WTO members amounted to unjustified discrimination.

¹⁵⁸ *Ibid* at paras 162-163.

¹⁵⁹ *Ibid* at paras 164-165.

¹⁶⁰ *Ibid* at para 166.

¹⁶¹ *Ibid* at paras 166-170.

¹⁶² Howse, *supra* note 109 at 508-509.

¹⁶³ *US-Shrimp* Appellate Body Report, *supra* note 54 at paras 169-172.

The Appellate Body also found that, because Section 609(b) imposed a “single, rigid and unbending requirement” that countries applying for certification adopt essentially the same regulatory program as the US, there was “little or no flexibility in how officials [made] the determination for certification” and this lack of flexibility amounted to arbitrary discrimination.¹⁶⁴ Furthermore, there were defects in terms of procedural fairness in the way certification decisions were made. There was no “transparent, predictable” process or “formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it” in the process.¹⁶⁵

6.2.2.3 Compliance Proceedings

In response to the Appellate Body ruling, the US revised the guidelines for certification under Section 609, but it did not remove the embargo. The new guidelines permitted shrimp-exporting countries to be certified even if they did not require the use of TEDs, provided that they demonstrated that they had adopted and were enforcing a “comparably effective” turtle conservation program.¹⁶⁶ The new guidelines also required officials to take into account demonstrated differences in the shrimp fishing conditions between the country applying for certification and the US.¹⁶⁷

Malaysia complained that the revised regime still failed to comply with WTO law. A panel determined that the US was now applying Section 609 in a way that no longer

¹⁶⁴ *Ibid* at para 177.

¹⁶⁵ *Ibid* at para 180.

¹⁶⁶ *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia* (2001) WT/DS58/AB/RW (Appellate Body Report) [*US-Shrimp Article 21.5 Appellate Body Report*] at para 6.

¹⁶⁷ *Ibid*.

constituted a “means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail,”¹⁶⁸ and the Appellate Body upheld that decision.¹⁶⁹

The Appellate Body confirmed the panel’s finding that the US had made good-faith efforts to negotiate a multilateral approach to turtle protection and conservation that included Malaysia in a manner that was fair as compared to its negotiations on the matter with other WTO members. This was sufficient to satisfy the requirements of the chapeau.¹⁷⁰

The Appellate Body also upheld the panel’s determination that the new guidelines requiring countries seeking certification have a sea turtle conservation and protection program comparable in effectiveness to that of the US were flexible enough to comply with the chapeau.¹⁷¹ It rejected Malaysia’s argument that the new guidelines discriminated arbitrarily or unjustifiably because they conditioned access to the US market on compliance with policies unilaterally prescribed by the US.¹⁷² Indeed, the Appellate Body underlined that its statement in its decision on the merits in *US-Shrimp* that this may in fact be a common aspect of measures covered by Article XX was “a principle that was central to [its] ruling.”¹⁷³

¹⁶⁸ *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia* (2001), WT/DS58/RW (Panel Report).

¹⁶⁹ *US-Shrimp* Article 21.5 Appellate Body Report, *supra* note 166. See Louise de la Fayette, “United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 of the DSU by Malaysia” (2002) 96(3) AJIL 685.

¹⁷⁰ *US-Shrimp* Appellate Body Report, *ibid* at paras 115-134.

¹⁷¹ *Ibid* at para 144.

¹⁷² *Ibid* at paras 136-138.

¹⁷³ *Ibid* at para 138.

Because of the move in the first *US-Shrimp* Appellate Body report to be more open to receiving submissions from non-parties, there was now a window available for animal protection NGOs to provide submissions in the compliance proceeding and contribute to the final chapter of this dispute. Two related animal welfare organizations, the American Humane Society and Humane Society International, submitted a joint brief directly to the Appellate Body in the Article 21.5 dispute (and also provided the brief to the US, which submitted it as an attachment to its own submission).¹⁷⁴

Leah Butler's empirical study of *amicus* submissions by NGOs at the WTO indicates that the effects NGOs achieved by making *amicus* submissions in *US-Shrimp* dispute included: representing interests that are not represented by WTO member states; bringing the concerns of the NGO to a global audience; and providing expertise on scientific and technical information.¹⁷⁵ All of these effects are important ways that NGOs, including those that advocate for animals, can have some influence on the process of norm creation and dissemination that takes place in connection with WTO disputes. The interests of animals are chronically under-represented politically and by governments in the international system. Concerns about animal protection are rising in prominence in global discourse, and animal protection NGOs are capitalizing on opportunities to express them in international fora. And animal protection NGOs are often in a position to provide evidence and research about the situation of animals that may not be fully reflected in the materials submitted by the disputing WTO members.

¹⁷⁴ *Ibid* at para 75.

¹⁷⁵ Leah Butler, "Effects and Outcomes of *Amicus Curiae* Briefs at the WTO: An Assessment of NGO Experiences" (2006) online: <https://nature.berkeley.edu/classes/es196/projects/2006final/butler.pdf>.

6.2.3 The By-catch Cases as Animal Protection Cases

Both *US-Shrimp* and the tuna-dolphin series of cases are famous controversies, widely known and discussed beyond trade law and international law circles, that are typically thought of as “trade and environment” conflicts. But there is another aspect of these conflicts that is, in my view, under-analyzed: they are also “trade and animal protection” cases.

To be sure, both the tuna-dolphin and shrimp-turtle disputes can be classified under the species conservation sub-heading of animal protection, where animal protection overlaps with environmentalism. But in both cases the by-catch prevention efforts of the US were not just about conservation in the narrowest or most anthropocentric sense of conserving the supply of a species for its usefulness to humans. Rather, dolphins and sea turtles are charismatic animals that policymakers and the public wanted to protect in part for their own sake.

Doctrinally, these cases, especially *US-Tuna III*, suggest that there are not hard divisions but rather conceptual links between “conservation of natural resources,” “animal life and health,” and animal welfare. It is now (after *EC – Seal Products*) clear that domestic measures based on concerns about animal welfare can fit into the category of public morals Article XX(a) of GATT, and animal welfare can be a valid basis for justifying trade effects even where there is no problem of species conservation. The *US-Tuna III* ruling anticipated this outcome by indicating that individual animal wellbeing is included in “animal life and health” in the TBT Agreement and GATT Article XX(b). The old assumption that conservation was covered by international trade law policy

exceptions while welfare was not no longer holds. Indeed, the WTO case law suggests commonalities between the categories and the regulatory objectives they cover. For example, both animal welfare legislation and laws to protect biodiversity reflect moral concerns about destroying and harming individual animals, which are connected to understanding of animal sentience and recognition of the intrinsic moral significance of animals.

6.3 Fur

Global norms concerning the morality of using animal fur for clothing and other consumer items are evolving. Fur has for a long time attracted criticism as an unnecessary luxury that causes animal suffering. Harrop notes that “controversy relating to the moral issue of wearing fur, not for utilitarian purposes but for the sake of cosmetic adornment, plagues this subject.”¹⁷⁶ There are some indications that moral objection to luxury furs is gaining traction and becoming more of a mainstream position. For example, several leading fashion houses, including Chanel and Versace, have announced that they will no longer use fur,¹⁷⁷ and a number of American cities have adopted municipal bans on the sale of fur.¹⁷⁸

Yet certainly there is no global consensus about the morality of fur. Fur has cultural importance for communities where its production and use have traditionally been

¹⁷⁶ Stuart R Harrop, “The International Regulation of Animal Welfare and Conservation Issues through Standards Dealing with the Trapping of Wild Mammals” (2000) 12:3 JEL 333 at 335.

¹⁷⁷ Animal Justice Canada, “Why 2019 Will Spell the Death of the Fur Industry” (1 January 2019), online: <https://www.animaljustice.ca/blog/why-2019-will-spell-the-death-of-the-fur-industry>.

¹⁷⁸ *Ibid.*

part of the economy and way of life, including Indigenous communities.¹⁷⁹ The environmentalist and animal rights movement of opposition to hunting for fur is enmeshed in struggles over cultural imperialism and Indigenous rights.¹⁸⁰ Notwithstanding these profound and difficult conflicts, however, there has been some gradual progress towards internationally accepted parameters and basic standards concerning the welfare of animals hunted for fur.¹⁸¹

Trade in fur has a long history,¹⁸² and the emergence of transnational legal norms in fur hunting is intertwined with global trade and international trade law. The *EC – Seal Products* case is the most recent example of the interplay between fur, morality, regulation and trade. Before *EC – Seal Products*, the most important controversy was over efforts to stop the use of leghold traps.¹⁸³ Although the regulation of trapping standards is analytically separate from the controversy over the morality of cosmetic fur use (since the standards for trapping apply to animals trapped for any purpose), as Harrop points out, in practice the debates are inextricably connected: “the legislation, politics and

¹⁷⁹ Wearing fur has especially important (and was once a matter of survival) for human populations in cold climates, benefiting from “the unparalleled insulating qualities” of the pelts of fur-bearing mammals. Harrop, *supra* note 176 at 334.

¹⁸⁰ Tamari Kitossa, “Same Difference: Biocentric Imperialism and the Assault on Indigenous Culture and Hunting” (2000) 28:2 *Environments* 23.

¹⁸¹ Fur farming accounts for about 85% of fur production (Clive JC Phillips, *The Animal Trade: Evolution, Ethics and Implications* (Wallingford: CABI, 2015) at 71). It is an industry with a disturbing animal welfare record. Fur farming is outside the scope of this discussion because (so far at least) there have not been significant disputes involving international trade law and the regulation of fur farms.

¹⁸² Phillips, *ibid* at 70-71, tracing the history of the fur trade back 1000 years to the use of rivers in Siberia to establish trading posts for furs.

¹⁸³ See also Gary Miller, “Exporting Morality with Trade Restrictions: The Wrong Path to Animal Rights” (2008-2009) 34 *Brook J Int’l L* 999, for a discussion of US legislation banning the importation and marketing of dog and cat fur. Like the US, the EU has banned sales and imports of cat and dog fur (EC, *Regulation 1523/2007 of the European Parliament and of the Council banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur*, [2007] OJ, L343/50).

the ensuing debates all arise primarily out of the original fur controversy” and have to do mainly with the welfare of animals trapped for fur.¹⁸⁴

Harrop writes that Europeans probably first developed the iron leghold trap in the sixteenth century, combining their own technology with what they learned from the sophisticated trapping and snaring methods of North American Indigenous peoples.¹⁸⁵ A leghold trap is a trap designed to capture an animal by the leg or foot. They are cheap, portable trapping devices, so convenient for humans to use, but the convenience comes at a high price in animal suffering.¹⁸⁶ These traps “snap tightly shut on the animals’ limbs, crushing or lacerating them so that the animals are left to bleed to death.”¹⁸⁷ Trapped animals “may suffer for several days before the trapper returns and face death by freezing, dehydration, predation or starvation.”¹⁸⁸ Animals trying to escape from the trap may “chew or pull their own limbs off or attack the trap, breaking teeth and rupturing gums.”¹⁸⁹

In response to widespread public objection to the use of these devices, the EC (the predecessor of the EU) began considering a prohibition on them in the mid-1980s.¹⁹⁰ In 1991, the EC adopted a regulation banning the use of steel-jawed leghold traps in its territory (the Leghold Trap Regulation).¹⁹¹ This prohibition became effective on January

¹⁸⁴ Harrop, *supra* note 176 at 335.

¹⁸⁵ *Ibid* at 334.

¹⁸⁶ André Nollkaemper, “The Legality of Moral Crusades Disguised in Trade Laws: An Analysis of the EC Ban on Furs from Animals Taken by Leghold Traps” (1996) 8 J Env’tl L 237 at 238.

¹⁸⁷ Gillian Dale, “The European Union’s Steel Leghold Trap Ban: Animal Cruelty in Conflict with International Trade” (1996) 7 Colo J Int’l Env’tl L & Pol’y 441 at 441.

¹⁸⁸ *Ibid*.

¹⁸⁹ *Ibid*.

¹⁹⁰ Stuart Harrop & David Bowles, “Wildlife Management, the Multilateral Trade Regime, Morals and the Welfare of Animals” (1998) 1:1 J Int’l Wildlife L & Pol’y 64 at 74.

¹⁹¹ EC, *Council Regulation (EEC) No 3254/91 of 4 November 1991 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of*

1, 1995.¹⁹² The Leghold Trap Regulation also banned the introduction into EC territory of any furs or goods incorporating pelts from thirteen listed species (beaver, otter, coyote, wolf, lynx, bobcat, sable, raccoon, muskrat, fisher, badger, marten and ermine) unless the European Commission determined that the country of origin either had prohibited the use of the leghold trap, or used trapping methods for the listed species that met “internationally agreed humane trapping standards.”¹⁹³ The EC’s aim was “induce changes in [fur] exporting countries,” either by way of changes in their domestic laws or through multilateral agreement.¹⁹⁴

The import ban under the Leghold Trap Regulation was originally supposed to come into force at the beginning of 1995, at the same time as the internal ban on the use of leghold traps.¹⁹⁵ Concerns that the regulation might violate GATT rules “if it accorded different treatment to fur from animals caught by means other than the use of the leghold trap and fur from animals whose capture involved the use of that trap” led the EC to review its position and suspend application of the ban to the three main fur exporters: Russia, the US and Canada.¹⁹⁶

certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards, [1991] OJ, L308/1, Art 2.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*, Article 3.1; see also the more detailed summary of the Leghold Trap Regulation in Nollkaemper, *supra* note 186 at 240-241.

¹⁹⁴ Nollkaemper, *ibid* at 241.

¹⁹⁵ Leghold Trap Regulation, *supra* note 191, Article 3.1.

¹⁹⁶ Peter Stevenson, “The World Trade Organisation Rules: A Legal Analysis of Their Adverse Impact on Animal Welfare” (2002) 8 *Animal Law* 107 at 119; see also Stewart R Harrop, “The Agreements on International Humane Trapping Standards – Background, Critique and the Texts” (1998) 1 *J Int’l Wildlife L & Pol’y* 387 at 389.

The EC negotiated with the three countries and concluded two treaties on agreed humane trapping standards: one with Canada and the Russian Federation¹⁹⁷ and a separate agreement with the US.¹⁹⁸

These treaties proclaim the parties' commitment to improving the welfare of trapped animals,¹⁹⁹ and set out standards (substantially identical between the two agreements²⁰⁰) on which trapping methods will be deemed to be humane, based on consideration of whether the welfare of the animals is "maintained at a sufficient level, although it is acknowledged that in certain situations with killing traps there will be a short period of time during which the level of welfare may be poor."²⁰¹ The agreements require "conventional" steel-jawed leghold traps to be phased out over time (the phase-out periods differ between the two agreements).

Restraining trapping methods, which are designed not to kill the animal immediately but to keep it immobile until a human gets to it, are allowed as long as the traps used are certified as meeting the standards annexed to the agreements. The standards take into account the length of time that the animal is conscious and trapped, and indicators of poor welfare such as self-mutilation, fractures, spinal cord injuries, fractures of the teeth exposing the pulp cavity, and eye injuries.²⁰² This means that the

¹⁹⁷ EC, *Agreement on International Humane Trapping Standards between the European Community, Canada and the Russian Federation*, [1998] OJ, L 42/43 [AIHTS].

¹⁹⁸ EC, *International Agreement in the form of an Agreed Minute between the European Community and the United States of America on humane trapping standards*, [1998] OJ, L 219/26 [Standards].

¹⁹⁹ AIHTS, *supra* note 197, Preamble; Standards, *ibid*, Art 1.1.

²⁰⁰ Harrop notes that "[t]he 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." Harrop, *supra* note 196 at 391.

²⁰¹ AIHTS *supra* note 197 Annex I Art 1.3.1; Standards, *supra* note 198, Art 1.3.1.

²⁰² See AIHTS, *ibid*, Annex I Art 2.

agreements still allow the use of what would ordinarily be called leghold traps (that is, traps that work in the same way as the traditional leghold trap), as long as the traps have been certified as meeting the humane trapping standards. The adverse effect on animal welfare can be mitigated by design features such as padding and lamination. Even with such modifications, however, this is of course a painful and terrifying way for an animal to die.

The agreements on humane trapping standards have been criticized as “much weaker than the original E.U. regulation,”²⁰³ potentially locking in “lowest common denominator requirements” and holding back or halting progress (even nationally) on better welfare standards in trapping.²⁰⁴ They certainly represent a significant compromise compared to the EU’s original position. On the other hand, the agreement of multilateral standards on humane trapping is an important landmark in international regulation of animal welfare. Before these treaties, “there were no provisions in international law (beyond the regional) designed to deal solely with the issue of animal suffering.”²⁰⁵ (As discussed in Chapter Seven, there have been European treaties on animal welfare since 1968, but they are regional agreements.²⁰⁶) These agreements are the product of “changing attitudes” about the treatment of animals and “set the scene, potentially, for the wider international regulation of animal welfare.”²⁰⁷

The EU’s dilemma concerning the Leghold Trap Regulation and its import ban was similar to the quandary of the US in the by-catch cases. A ban on a practice that

²⁰³ Stevenson, *supra* note 196 at 119.

²⁰⁴ Harrop, *supra* note 196 at 394.

²⁰⁵ Harrop, *supra* note 176 at 336.

²⁰⁶ See discussion in Section 7.3 below.

²⁰⁷ *Ibid.*

harms animals within the enacting state's territory is not very effective if the practice is displaced outside its borders (or already happened mainly outside its borders, as in the case of trapping fur animals), and there may even be a degree of contribution to or complicity in the practice if the products can still be sold to consumers in the state that put the ban in place. Using trade restrictions to solve this problem engages the same fundamental question underlying the tuna-dolphin and shrimp-turtle disputes: to what extent can countries "pursue policies to protect ... animals ... located in the territory of other countries," while at the same time signing up to "a legal system that protects states' sovereign rights to determine for themselves whether or not to protect such values"²⁰⁸?

In the case of the Leghold Trap Regulation, which did not result in a formal dispute at the WTO, the navigation between these two competing principles was worked out through a form of settlement. It is an imperfect compromise that provides less protection for animals than the EU originally aimed for, but, at the same time, it does contribute something to the evolution of internationally agreed baseline standards about what is morally acceptable in the treatment of animals.

6.4 Farmed Animal Welfare

By far the majority of sentient animals that humans use – by far the majority of sentient animals that humans have any interaction with – are farmed animals used for food (and, to a lesser extent, for other products such as wool and fur).²⁰⁹ The quality of

²⁰⁸ Nollkaemper, *supra* note 193 at 237. Nollkaemper describes the persistence of both principles in the practice of states as "seemingly schizophrenic."

²⁰⁹ David J Wolfson & Mariann Sullivan, "Foxes in the Hen House: Animals, Agri-business, and the Law: A Modern American Fable" in Cass R Sunstein & Martha C Nussbaum, eds, *Animal Rights: Current Debates and New Directions* (Oxford: Oxford University Press, 2004) 205 at 206.

these animals' lives is completely in the control of their human owners and caretakers from birth, throughout their lives, up to and including their death. Different countries have different levels of welfare protection for farmed animals. Indeed, some countries, including the US and Canada, effectively have no regulations at all that apply to farmed animal welfare specifically.²¹⁰ Divergence in national welfare standards leads to a tension between the desire to ensure that higher standards are not diluted or undermined by imports from lower welfare countries, and the obligation not to discriminate against products from other WTO members.²¹¹

So far there has not been a WTO case concerning farmed animal welfare standards. Some important WTO disputes have addressed measures that regulate the way farmed animals are raised and how the products derived from them are marketed. *EC-Hormones* concerns EU regulations aimed at curtailing the use of synthetic hormones in raising beef cattle.²¹² The *US-COOL* case concerns regulations that meat products be labelled to indicate their country of origin.²¹³ These matters may well be indirectly related to animal welfare: administering hormones to cattle to promote growth can affect their level of welfare or at least be associated with relatively intensive, lower-welfare methods of meat production, and country-of-origin labelling gives consumers information

²¹⁰ Although generally applicable laws that prohibit causing “unnecessary suffering” to animals (or similar provisions) apply to farming as to other interactions with animals, as a practical matter legal exemptions for common farming practices and enforcement challenges mean that regulation is all but nonexistent. See Wolfson & Sullivan, *ibid* (regarding the US) and Katie Sykes, “Rethinking the Application of Canadian Criminal Law to Factory Farming” in Peter Sankoff, Vaughan Black & Katie Sykes, eds, *Canadian Perspective on Animals and the Law* (Toronto: Irwin Law, 2015) 33 (regarding Canada).

²¹¹ Harald Grethe, “High Animal Welfare Standards in the EU and International Trade – How to Prevent Potential ‘Low Animal Welfare Havens’?” (2006) 32 *Food Pol’y* 315.

²¹² *European Communities – Measures Affecting Livestock and Meat (Hormones)* (1998), WT/DS26, 48/AB/R (Appellate Body Report).

²¹³ *US-COOL*, *supra* note 80.

that they may be interested in in part because the origin of a product tells them something about the welfare conditions that the animals are likely to have been raised in. But since the cases focus on human health and safety and on consumer information, and do not address animal welfare or animal protection directly, they are only peripherally connected to the discussion here.

Although there has not yet been a WTO case directly addressing welfare standards for farmed animals, the potential for a dispute has been apparent for some time. Perhaps the most obvious place where a dispute could arise is the difference in welfare standards between the EU and many of its trading partners. The EU has relatively high standards of animal welfare generally, including for farmed animals. Article 13 of the *Treaty on the Functioning of the European Union* recognizes animals as sentient beings, and requires regard to be given to animal welfare in formulating certain EU policies.²¹⁴ The EU has enacted an extensive corpus of legislation and regulations laying down specific requirements for farmed animal welfare both overall and in a wide variety of specific contexts.²¹⁵

Two laws that have prompted discussion of their interaction with WTO rules are the EU's legislation on egg-laying hens and on broiler chickens. The Egg-Laying Hen Directive phased out battery cages for egg-laying hens over a period of thirteen years, and

²¹⁴ *Consolidated Version of the Treaty on the Functioning of the European Union*, [2008] OJ, C 115/47. See also discussion in Section 7.3 below.

²¹⁵ A summary of EU animal welfare provisions is set out in European Commission, *Communication from the Commission to the European Parliament, The Council and European Economic and Social Committee on the European Union Strategy for the Protection and Welfare of Animals 2012-2015* [2015] COM/2012/6 final/2 [*Strategy*] at 2-3. See also discussion of the EU's animal welfare strategy in Section 7.3.

outlawed them completely beginning in 2012.²¹⁶ The Broiler Chicken Directive set out welfare requirements including maximum stocking densities, for chickens raised for meat.²¹⁷

The Egg-Laying Hen Directive and the Broiler Chicken Directive regulate welfare conditions inside the EU, but do not impose import restrictions on eggs or chicken meat from other jurisdictions. When the Broiler Chicken Directive was proposed by the European Parliament in 2006, the proposal included an amendment concerning imports of chicken from outside the EU: “Imports of chicken from third countries, which come from holdings that do not observe rules on the welfare of chickens for meat production equivalent to those effective in the E.U., should also be regulated and, where appropriate, prohibited.”²¹⁸ Similarly, the egg industry in Europe saw lower-cost, lower-welfare imports as a threat to its survival. An unsigned article in the UK industry publication *Poultry World* in 2003 calculated the cost differential of producing eggs in accordance with the EU rules once fully in effect in 2012, and argued “[t]hat is enough to enable eggs from third countries, without meeting any of these welfare and food safety standards, to undercut those produced in the UK” and that the domestic industry could only survive if “meaningful animal welfare measures are built into the WTO agreement, or if tariffs are kept at a level to compensate for the EU’s costs for going it alone on legislation.”²¹⁹

²¹⁶ EC, *Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens*, [1999] OJ, L 203/53.

²¹⁷ EC, *Council Directive 2007/43/EC of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production*, [2007] OJ, L 182/19 (Egg-Laying Hen Directive).

²¹⁸ EC, *Legislative Resolution on the Proposal for a Council Directive Laying Down Minimum Rules for the Protection of Chickens Kept for Meat Production*, Eur Parl Doc P6_TA (2006), amend 8 (“Broiler Chicken Directive”).

²¹⁹ Anonymous, “Fight for EU Egg Survival” (2003) 15:2 *Poultry World* 13 at 13.

The Broiler Chicken Directive calls for a report from the European Commission by 2009 on “the possible introduction of a specific harmonised mandatory labelling scheme for chicken meat, meat products and preparations based on compliance with animal welfare standards.”²²⁰ The Directive provides that the report “shall consider ... compliance of such a labelling scheme with World Trade Organisation Rules.”²²¹

The report produced by the Commission in 2009 takes a cautious approach, proposing that a voluntary labelling scheme would be permitted under WTO law if “proportionate and open to third party producers,” whereas a mandatory scheme “would face more controversy in the WTO framework.”²²² The feasibility study that this recommendation was based on pointed out that no WTO case to that point had recognized animal welfare as a legitimate basis for restricting trade. The study concluded that “it is not possible to predict whether a ... mandatory animal welfare labelling scheme could be successfully challenged and, thus, become incompatible with WTO law.”²²³ At present, the EU has adopted a compulsory welfare labelling scheme for eggs, but does not plan to introduce additional mandatory labelling rules.²²⁴ The lack of an associated rule

²²⁰ Broiler Chicken Directive, *supra* note 217, Art 5.

²²¹ *Ibid.*

²²² European Commission, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* (October 28, 2009), online: <https://ec.europa.eu/food/sites/food/files/animals/docs/aw_other_aspects_labelling_report_en.pdf> at 7.

²²³ European Commission Directorate General for Health and Consumer Protection, *Feasibility study on animal welfare labelling and establishing a Community Reference Centre for Animal Protection and Welfare Part I: Animal Welfare Labelling* (January 2009), online: <https://ec.europa.eu/food/sites/food/files/animals/docs/aw_other_aspects_labelling_feasibility_study_report_part1.pdf> at 34. This distinction between mandatory and voluntary labelling schemes, and the greater confidence that a voluntary scheme would survive WTO scrutiny, is undermined by the WTO Appellate Body’s later determination in *US-Tuna III* that the opt-in dolphin-safe labelling scheme was “mandatory” for purposes of the TBT Agreement because it was a formal and comprehensive scheme for regulating the use of the term, with penalties and enforcement mechanisms for unauthorized use. See discussion in Section 6.2.1.4 above.

²²⁴ European Commission, “Labelling related to animal welfare” online: <https://ec.europa.eu/food/animals/welfare/other_aspects/labelling_en>.

restricting imports, or a labelling requirement, may have watered down the effectiveness of the Broiler Chicken Directive, but even aside from this concern it has been criticized as a weak rule that “has simply provided industrial broiler production with a cloak of legislative respectability, while failing to impose any significant welfare requirements on the industry.”²²⁵

As WTO jurisprudence has evolved, it has become more apparent that it is possible to craft animal welfare-based measures, whether labelling schemes or import restrictions, that can withstand WTO scrutiny. Before the adoption of the Broiler Chicken Directive, Edward Thomas argued that welfare-based import restrictions (as proposed by the European Parliament) could be found consistent with WTO law if carefully designed.²²⁶ Thomas points out that WTO adjudicators had by that time already moved away from GATT panels’ strict approach concerning PPMs and extra-jurisdictional effects, and proposed that the public morals exception under Article XX(a) of GATT could apply to a measure adopted to improve animal welfare.²²⁷

Thomas proposes that one important component of creating a WTO-proof measure would be to “attempt to negotiate bilateral or multilateral agreements with nations that export chicken to the European Union,” arguing that this would be “an important step toward showing that the import ban is ‘necessary’ due to the exhaustion of other alternatives, and that the ban is not a protectionist measure.”²²⁸ As noted in the

²²⁵ Peter Stevenson, “European and International Legislation: A Way Forward for the Protection of Farm Animals?” in Peter Sankoff & Steven White, eds, *Animal Law in Australasia* (Sydney: Federation Press, 2009) 307 at 312.

²²⁶ Edward M Thomas, “Playing Chicken at the WTO: Defending an Animal Welfare-Based Trade Restriction Under GATT’s Moral Exception” (2007) 34 BC Env’tl Aff L Rev 605.

²²⁷ *Ibid.*

²²⁸ *Ibid* at 632.

discussion of *US-Shrimp* above, negotiation (or attempted negotiation) of internationally agreed approaches is in fact not a free-standing requirement under WTO precedent.²²⁹ But WTO case law does tend to encourage and look favourably upon such efforts, and they can be an indication that a policy is being applied fairly and without the unjustifiable discrimination or arbitrariness that would implicate the Article XX chapeau. Thomas also suggests that an import ban could be upheld if paired with a reasonably flexible certification process for exporting countries to gain access to the European market if their standards of animal welfare are comparable.²³⁰

Concerns about WTO compatibility have held EU lawmakers back from going as far as they might have on animal welfare legislation, arguably to a greater extent than the law actually requires. The EU has made efforts to address the question through negotiation and law reform at the WTO. In 2000, it submitted a proposal at the WTO Committee on Agriculture to negotiate new multilateral agreements in the WTO context to deal with the protection of animal welfare.²³¹ The proposal highlighted concerns about the effect of animal agriculture on the health and welfare of animals and on the environment. The EU suggested that the protection of animal welfare could be dealt with through subsidiary multilateral agreements on animal welfare that clarified the relationship between animal welfare standards and WTO rules.²³² Since then, the EU

²²⁹ See discussion in Sections 6.2.2.2 and 6.2.2.3 above.

²³⁰ *Ibid* at 633.

²³¹ WTO Committee on Agriculture Special Session, “European Communities Proposal: Animal Welfare and Trade in Agriculture” (2000) WTO Document G/AG/NG/W/19. See discussion in Section 5.5.3.

²³² *Ibid* at 3.

has focused instead on including provisions relating to animal welfare in its non-WTO trade agreements. These initiatives are discussed in Chapter Eight.²³³

6.5 Cosmetics Testing

As is the case for fur, there is disagreement about whether the use of animals for research on cosmetic products is ever morally justified. Research on animals for medical research and to test the safety and efficacy of pharmaceuticals is different; for these purposes, the mainstream consensus probably is that using animals for testing is justifiable, but should be regulated so as not to cause more suffering than necessary. But cosmetics are much less important than life-saving medical procedures or drugs. Complete rejection of cosmetics testing on animals has spread in a manner similar to the rejection of fur.²³⁴

The EU and some EU member states were early adopters of the position against cosmetic testing. But, once again, concerns about compliance with WTO obligations and the risk of WTO litigation caused the EU to move more slowly and less boldly than it might otherwise have done.

In 1993, the EU adopted a Directive that amended its existing regulatory regime for marketing cosmetic products, with a view to ending the sale of animal-tested products.²³⁵ The 1993 Cosmetics Directive banned marketing of cosmetics products

²³³ See Section 8.7.

²³⁴ One country, San Marino (a small independent microstate surrounded by northeastern Italy) abolished all animal experimentation, including for medical purposes, in 2007. Bruce A Wagman & Matthew Liebman, *A Worldview of Animal Law* (Durham: Carolina Academic Press, 2011) at 187-188.

²³⁵ EC, *Council Directive 93/35/EEC of 14 June 1993 Amending for the Sixth Time Directive 76/768/EEC on the Approximation of the Laws of the Member States Relating to Cosmetic Products*, [1993] OJ, L 151/32 [1993 Cosmetics Directive].

containing ingredients tested on animals. The ban was supposed to come into force in 1998, but the 1993 Cosmetics Directive provided for a delay in implementation if there had been “insufficient progress in developing satisfactory methods to replace animal testing.”²³⁶

Since the marketing ban would have applied equally to domestic and imported products, implementing it would have meant a risk of trade tensions and possibly WTO litigation with countries that export cosmetics products to the EU. The EU “became wary of GATT rules, fearing that the rules prevented it from distinguishing in its marketing rules between cosmetics tested on animals and those not so tested, because such a distinction revolves around PPMs.”²³⁷ It delayed implementing the marketing ban and considered replacing it with abolition only of the practice of testing cosmetics on animals within EU territory, even though, as Stevenson argues,

only to ban the testing of cosmetics on animals within the E.U. (rather than, as first intended, the marketing of such cosmetics) is to significantly dilute the original directive as multi-national cosmetics companies may well simply do their animal testing outside the E.U. and then import the products for sale within the E.U.²³⁸

By the late 1990s, following the *US-Shrimp* decision, there was a solid basis in WTO jurisprudence to defend such a measure and less reason to fear that the GATT-era PPM analysis would be relevant.²³⁹

²³⁶ *Ibid*, Art 3.

²³⁷ Stevenson, *supra* note 196 at 119-120

²³⁸ *Ibid* at 120.

²³⁹ Sands, Cosmetics Opinion, *supra* note 38 at para 89 (concluding that “the current state of WTO law enables the EU to advance cogent and persuasive arguments that it could, consistently with the WTO obligations of the European Communities and its member states, adopt a ban on the sale in the EU of cosmetics that have been tested on animals after a specified date in the future”).

The EU revisited the issue in 2003, when it adopted a new Directive²⁴⁰ that applied both to animal testing within the EU and to marketing imported animal-tested products. It required member states to abolish animal experiments on cosmetics (either the ingredients going into the products or the finished products) inside their territories.²⁴¹ It also required member states to prohibit the marketing of cosmetic products where the final formulation had been tested on animals or where ingredients or combinations of ingredients had been tested on animals, whether the testing happened inside or outside the EU.²⁴² These prohibitions were phased in over ten years, with different deadlines for different types of test.²⁴³

The 2003 Directive was fully implemented as of 2013. However, there does remain a loophole for so-called “dual purpose” products or ingredients that are used both in cosmetics and in other contexts (pharmaceutical, detergents, food) where animal testing is still allowed.²⁴⁴ Potential noncompliance with WTO rules no longer seems to be a serious concern, given that the legislation has an important purpose and does not protect domestic industry or create different rules for products from different countries.²⁴⁵

²⁴⁰ EC, *Directive 2003/15/EC of the European Parliament and of the Council (27 February 2003) amending Council Directive 76/768/EEC on the approximation of the laws of the Member States relating to cosmetic products*, 2003 OJ, L 66/26 [2003 Cosmetics Directive].

²⁴¹ *Ibid.*, Art 2.

²⁴² *Ibid.*

²⁴³ See summary of the timelines in Jennifer Klein, “EU Cosmetics Directive and the Ban on Animal Testing: Compliance, Challenges and the GATT as a Potential Barrier to Animal Welfare” (2012) 21 *Transnat’l L & Contemp Probs* 251 at 258-261.

²⁴⁴ Kristian Fischer, “Animal Testing and Marketing Bans of the EU Cosmetics Legislation” (2013), 6 *EJRR* 613.

²⁴⁵ See discussion in Klein, *supra* note 243 at 268-272 (concluding that a challenge under GATT could succeed at least temporarily, until alternatives to animal testing are in place so that concerns over human health effects are reduced, but that it is unlikely that the WTO would invalidate the 2003 Directive completely).

In 2018, the European Parliament passed (by 620 votes to 14, with 18 abstentions) a non-binding resolution calling for negotiation of a UN treaty banning cosmetic animal testing worldwide.²⁴⁶

6.6 The Emergence of Animal Protection Norms and Trade Law as a Practice of Legality

The history of animal protection disputes and controversies that intersect with international trade law shows that critics of the trade system have good reason for arguing that it has held back progress on animal protection, and that apprehension about trade disputes has discouraged bold moves on animal-protective policy.²⁴⁷ GATT panel decisions that prioritized trade over animal protection efforts have cast a long shadow, even though those reports were not adopted and even though WTO Appellate Body jurisprudence has taken a significantly different approach. WTO law today is more hospitable to animal protection measures. The WTO dispute settlement system does still insist on requirements of even-handedness, procedural fairness and transparency, limiting the room that domestic legislators have to move in what is already a difficult area where finding acceptable compromises among stakeholders can be challenging.

²⁴⁶ European Parliament, “Testing cosmetics on animals: MEPs call for worldwide ban” (3 May 2018), online: <<http://www.europarl.europa.eu/news/en/press-room/20180426IPR02613/testing-cosmetics-on-animals-meps-call-for-worldwide-ban>>.

²⁴⁷ Iyan Ofor, “Chilling Effect of Trade on European animal protection policy, resulting from “the EU’s political unwillingness to face potential disputes and its failure to take into account evolving interpretation of World Trade Organisation law which is now much more favourable toward the protection of animal welfare through trade measures.” Iyan Ofor, “Chilling Effect of Trade on Animal Welfare” *Eurogroup for Animals* (23 August 2017), online: <<http://www.eurogroupforanimals.org/chilling-effect-trade-animal-welfare>>.

But to see the effect of the trade system on animal protection initiatives as only a hindrance to their development is to miss much of its significance, in particular when it comes to the dissemination of animal protection norms internationally. Viewed through the lens of Brunnée and Toope's interactional theory, the interplay between animal protection and trade is an example of the formation of new international legal norms in progress – although the direction of progress is not (and is never) inevitably and always forward – characterized by the development of norms based on shared understandings and the articulation of those norms in a distinctively legal form through a practice of legality.

6.6.1 Norms and Shared Understandings

The international trade system – not just the WTO as an institution, but the overarching system in which states interact, negotiate and debate with one another over trade and trade-related matters – can be thought of as a “community of practice,” as Brunnée and Toope use the term, “in which state and non-state actors participate in international law and policy processes.”²⁴⁸ Through interaction in this community of practice, international norms of animal protection are being proposed, contested, and even (to a more limited extent) agreed on. This process has put animal protection on the international law and policy agenda. The efforts of NGOs and scholars proposing declarations of rights for animals, international treaties for animal protection and the like are important, because they help to expand what might be envisioned for global animal law, but they have not had much practical effect. The trade community of practice,

²⁴⁸ Jutta Brunnée & Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010) at 70.

however, has gone some way in translating that work of norm entrepreneurship into common ground on which legal norms could be built.

Sometimes the results have been more symbolically significant than genuinely beneficial to animals. The conclusion of two international treaties on humane trapping standards meant little meaningful change in the kinds of traps used in the US, Russia and Canada. But it is certainly important that the dispute over leghold traps led to the conclusion of the first international treaties (at least, the first ones not limited to European countries) concerned expressly and only with reaching a consensus on animal welfare standards. This milestone is the direct result of the influence of the trade system and the desire to avoid a trade dispute.

In some cases, the cross-fertilization of animal welfare norms between nations may (even if in limited ways) meaningfully advance animal protection. The use of trade measures by the US to support its efforts to protect dolphins and sea turtles has contributed to the acceptance of TED technology around the world and raised doubts about the continued viability of dolphin encirclement as a fishing method. The EU's moves to disseminate higher farmed animal welfare through bilateral and preferential agreements, like the trade agreement with Chile, have resulted in some legislative progress.

These are not resounding victories, and they do not go as far as animal advocates might wish. But they do look very much like evolving norms based on shared understandings, generated through interaction in a particular social context: the context of interacting as trading partners and participants in the international legal system (including

the international trade law arm of it). Norms based on shared understandings reflect overlapping consensus, and that usually means compromise. They are likely to be watered down from the strongest or the most progressive expression of the normative position. Criticisms about the lowest common denominator being locked in place²⁴⁹ are not unfounded. But interactional theory suggests that something like the lowest common denominator, or at least a baseline position that is genuinely reciprocal rather than imposed, is a prerequisite for the emergence of binding international law.

Indeed, Brunnée and Toope suggest that international law-makers “may have to be modest in their aspirations if a sustainable community of legal practice is to emerge,” and that meaningful international law “may have to track what little common ground there is.”²⁵⁰ This is a trade-off between the bolder ideals of lawmakers and the creation of a robust foundation of shared understandings. Interactional theory indicates that a true global animal law that commands fidelity will not develop without a foundation in shared understandings, very possibly at the cost of curtailed aspirations and limited common ground. Concerning animal protection, even the emergence of common ground around the idea that animal welfare and the intrinsic value individual animals are serious matters for international discussion is an important, and new, development.

A notable feature of the evolution of shared understandings about animal protection in the trade context is the cross-pollination of ideas between epistemic communities and norm entrepreneurs. The pre-WTO GATT system was characterized by a siloed epistemic community of trade specialists, the community that Howse describes as

²⁴⁹ See note 204 above and surrounding text.

²⁵⁰ *Ibid* at 71.

the “trade policy elite” or the “insider network,” that (consistent with its normative orientation) prioritized trade liberalization and was not very cognizant of perspectives from outside the community. As Harrop and Bowles argue, the segregation of trade from other issues reflected – and to an appreciable extent still reflects – separation of responsibility for different mandates within domestic bureaucracies:

These conflicts [between trade and other values] are compounded by contradictory priorities within the boundaries of individual states. For instance, government officials representing a trade portfolio could have mandates and instructions which conflict with those given to officials with conservation or environment portfolios, leading to department-specific policies being decided in virtual isolation. Trade has historically been seen as more important than environmental or animal welfare issues. Thus, there may be a tendency for trade and environment delegates to operate on separate, unconnected issues, at best, in a state of dynamic tension without attempting to solve these cross-sectoral challenges through a multidisciplinary approach.²⁵¹

Howse argues that the institutional transformation from the GATT to the WTO opened up cross-pollination between the trade epistemic community and global civil society, as the “impermeability and homogeneity” of the insider network began to be “compromised” by the infiltration of a new generation of trade professionals with training in public international law, environmentalism or development studies, and by the participation of NGOs in trade law-making.²⁵² What Howse saw emerging from this interaction was a process of truly democratic international law-making:

As the various constituencies confront each other directly, new ideas will percolate, and we will witness the beginnings of a genuine transnational democratic deliberation-not above, or autonomous from,

²⁵¹ Harrop & Bowles, *supra* note 190 at 66.

²⁵² Howse, *supra* note 112 at 117.

deliberation within domestic polities, but deeply intertwined with the domestic and the local.²⁵³

6.6.2 WTO Jurisprudence as a Practice of Legality

If interaction in the trade community of practice is generating new norms concerning animal protection, based on a foundation of shared understandings, then we can say that this process is creating the underpinnings for what could become true global animal law. But interactional theory tells us that this is only a necessary, not a sufficient, condition for the emergence of international law, which can only arise “when shared understandings come to be intertwined with distinctive internal qualities of law and practices of legality.”²⁵⁴

WTO DSB jurisprudence is a “practice of legality,” in precisely the sense in which Brunnée and Toope use the term, that has articulated animal-protective norms in distinctively legal terms. This process that can be seen happening in the *US-Shrimp* and *US-Tuna III* decisions, and was further developed in *EC – Seal Products* (discussed in the next chapter).

The DSB, especially the Appellate Body, is institutionally built to engage in a practice of legality. An important feature of the change from the GATT arbitral system to the WTO dispute settlement mechanism is that disputes became comparatively “juridified.”²⁵⁵

²⁵³ *Ibid.*

²⁵⁴ Brunnée & Toope, *supra* note 248 at 56.

²⁵⁵ Joseph H H Weiler, “The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement” (2003) 35 *J World Trade* 191 at 191; see also Howse, *supra* note 112.

The Appellate Body's approach to delineating the parameters of policy exceptions within the constraints of WTO treaty obligations adheres to the criteria of legality that Fuller and Brunnée and Toope identify. In the context of animal-protection trade cases, this discourse recognizes the legitimacy of animal protection as a policy objective, while weaving animal protective norms into the distinctive characteristics, constraints and vocabulary of law.

The Appellate Body has recognized that WTO members can legitimately pursue animal protection policies. They can do so in ways that have an effect on other members' access to their markets, and they can do so with the avowed aim of changing standards of animal protection outside their own borders. To be able to do this in a way that conforms with WTO law, however, members must observe the requirements of the Article XX chapeau (and chapeau-like implied obligations under the TBT Agreement) not to discriminate arbitrarily or unjustifiably and not to disguise protectionism as legitimate policy. In this connection, the Appellate Body has emphasized the importance of extending substantially equal opportunities (for certification as not being subject to the shrimp embargo in *US-Shrimp*, for eligibility for the dolphin-safe label) to all similarly situated trade partners, a requirement that reflects Fuller's criterion of generality: there must be rules of general application, not just *ad hoc* determinations that vary with each case.²⁵⁶ The Appellate Body criticized the process of making certification decisions in *US-Shrimp* because it lacked transparency and because applicants were not sure what was

²⁵⁶ See the discussion of Fuller's criteria in Section 3.4.3.

required of them or how they could put their arguments to the decisionmakers; in other words, it failed on Fuller's criteria of promulgation and clarity.

The Appellate Body's focus on the chapeau in both cases also foregrounds the way the law is *applied*, reflecting Fuller's criterion of congruence between declared rules and official action; even if legislation is, on paper, appropriately calibrated to furthering a legitimate goal in a way that complies with WTO law, the DSB will scrutinize the way it is applied by officials to ensure that official practice does not taint the legal framework with unfairness.

In short, the Appellate Body's jurisprudence underlines that animal protection norms have a place in trade law, but only if they are articulated and applied in a way that conforms with a system governed by the rule of law.

6.7 Conclusion

This overview of trade controversies concerning animal protection before *EC – Seal Products* has shown that animal protection norms have been proposed, debated and to some extent agreed on in the international trade arena. The limited normative consensus that has survived this process is much less ambitious than some of the moves proposed by the states that have acted as norm entrepreneurs in this area (the EU and to a lesser extent the US), and by animal advocates and animal-protection NGOs. In this sense, the trade controversies examined here can be seen as examples of trade law holding back progress on animal protection. But the analytical lens of interactional international law suggests a different conclusion: this is the beginning of the difficult and contested process of generating norms based on shared understandings that could become

the foundation for binding international law. The WTO dispute settlement system has contributed to articulating and circumscribing these norms in a distinctively legal way.

In the disputes covered in this chapter, we can see animal protection starting to find a place as a recognized value in international trade law. The *EC – Seal Products* case, discussed in the next chapter, was a significant next step in the construction of global norms of animal protection through a process of legal interaction in the international trade regime.

Chapter 7 EC – Seal Products

7.1 Introduction

This Chapter examines the *EC – Seal Products*¹ case through the lens of interactional theory, as a landmark moment in the development or construction of animal protection norms in WTO law.

WTO law is economic law, but the values at stake in the seals case are deeper and more sacrosanct than just money. The clash over sealing implicates a number of different values, sometimes overlapping and sometimes competing: the ethical treatment of animals, the special significance of an iconic and appealing species, and the struggle of small coastal communities to keep their identity and their traditions alive. And there is an even more challenging aspect of the conflict: its implications for Inuit peoples who have hunted seals for centuries, and who see the restriction of trade in seal products as an attack on their traditions and an act of cultural imperialism.

This conflict began long before the *EC – Seal Products* case at the WTO, and the WTO decision has not (of course) resolved it. But the WTO dispute has brought the struggle over sealing into the formal structure of international adjudication, and that has had a significant effect on the evolution of shared international norms concerning seal welfare and animal protection more generally.

¹ *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products* (Complaints by Canada and Norway) (2013), WTO Docs WT/DS400/R, WT/DS401/R, WT/DS400/R/Add1, WT/DS401/R/Add1 [*EC – Seal Products* Panel Report] and *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products (Complaints by Canada and Norway)* (2014) WT/DS401/AB/R [*EC – Seal Products* Appellate Body Report] [together, *EC – Seal Products*].

Nikolas Selheim’s comprehensive study of the seal hunt very effectively explains the clash of values and cultures involved in this dispute.² On the one hand, as Selheim observes, seals are iconically “cute,” beloved, and adorable, and for many urbanites it is “truly unthinkable to hunt a seal.”³ In this sense, seals stand for our recognition of the intrinsic value of animals, and of the ethical significance of animals as sentient beings. On the other hand, for seal hunting communities, seals are seen as so essential an economic resource that the EU, because of its actions against seal hunting, “is considered an adversary to the continuation of livelihoods in these communities.”⁴ Selheim writes that in the Canadian Arctic and Northern Newfoundland “it is advisable not to use the term “European Union” or “EU.”⁵ From one point of view, the seal case is about the prohibition of the unthinkable. And from the other, that prohibition is so outrageous that it is best not to speak of it.

Such contested territory may not seem like a promising place to look for the emergence of consensus-based norms, or “shared understandings” in the terminology of interactional theory.⁶ But, without meaning to minimize the deep divisions that still exist over *EC – Seal Products*, I argue here that the WTO DSB has made important progress in identifying common ground – even if it is narrow – on animal protection. Further, the dispute settlement process produces an articulation of this area of consensus as the foundation of *legal* norms (in the specific sense of interactional theory) partly through the

² Nikolas Selheim, *The Seal Hunt: Cultures, Economies and Legal Regimes* (Leiden & Boston: Brill Nijhoff, 2018).

³ *Ibid* at 1.

⁴ *Ibid* at 271.

⁵ *Ibid*.

⁶ See Section 3.3 above on the argument that binding legal norms are based in shared understandings.

important work of identifying what is required for compliance with the criteria of legality.

EC – Seal Products is an important case in WTO law on many core doctrinal matters, among them the relationship between the TBT Agreement and the GATT, the nature of discrimination under the GATT MFN and NT principles, and the scope and meaning of the public morals policy exception.⁷ Not surprisingly for a case that developed the law in significant ways on these systemic questions, it has inspired a large amount of scholarly commentary.⁸ My analysis here covers some of the same territory that other scholars have addressed, but my particular focus is on what *EC – Seal Products* means for the development of international legal principles concerning animal protection. I evaluate that question using the analytical framework of interactional theory.

This chapter begins with a detailed description of the EU legislation that was challenged in *EC – Seal Products*, including the exceptions to the overall ban on trade in

⁷ For background on these treaty provisions and trade law doctrines, see Chapters Five and Six.

⁸ For example: Robert Howse & Joanna Langille, “Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values” (2012) 37:2 YJIL 367 (2012); Robert Howse, Joanna Langille & Katie Sykes, “Pluralism in Practice: Moral Legislation and the Law of the WTO After *Seal Products*” (2015) 48 Geo Wash Int’l L Rev 81; Laura Nielsen & Maria-Alejandra Calle, “Systemic Implications of the EU-Seal Products Case” (2013) 8 Asian J WTO & Int’l Health L & Pol’y 41; Tamara Perišin, “Is The EU Seal Products Regulation a Sealed Deal? EU and WTO Challenges” (2013) 62:2 Int’l & Comp L Q’ly 372; Gabrielle Marceau, “A Comment on the Appellate Body Report in *EC – Seal Products* in the Context of the Trade and Environment Debate” (2014) 23(3) RECIEL 318; Pietros Mavroidis, “Sealed with a Doubt: EU, Seals and the WTO” (2015) 3 EJRR 388; Gregory Shaffer & David Pabian, “The WTO *EC – Seal Products* Decision: Animal Welfare, Indigenous Communities and Trade” (2015) 109 AJIL 154; Pelin Serpin, “The Public Morals Exception After the WTO Seal Products Dispute: Has the Exception Swallowed the Rules?” (2016) 2016:1 Colum Bus L Rev 217; Alexia Herwig, “Regulation of Seal Animal Welfare Risk, Public Morals and Inuit Culture Under WTO Law: Between *Techné*, *Oikos* and *Praxis*” (2015) 6:3 EJRR 382; Alexia Herwig, “Too Much Zeal on Seals? Animal Welfare, Public Morals and Consumer Ethics at the Bar of the WTO” (2016) 15:1 World Trade Review 109; Robert Howse, “A Comment and an Epilogue (Symposium on the EU-Seal Products Case)” (2015) 3 EJRR 418; Katie Sykes, “Globalization and the Animal Turn: How International Trade Law Contributes to Global Norms of Animal Protection” (2016) 5 TEL 55; Charlotte Blattner, “An Assessment of Recent Trade Law Developments from the Animal Law Perspective: Trade Law as the Sheep in Wolf’s Clothing?” (2016) 22 Animal L 277.

seal products, the most important of which is the exception for seal caught by traditional Inuit hunting. Next, it explains the landscape of animal protection laws in Europe, an important part of the background to the EU's action on seal hunting. Section 7.4 is an overview of the characteristics of seal hunts in the three jurisdictions that are implicated in this dispute: Canada, Norway and Greenland. Section 7.5 provides a history of the genesis and development of the EU legislation. This background material helps to contextualize the WTO dispute and to explain the values, traditions and beliefs that were at stake on both sides.

In Section 7.6, I summarize the decisions of the WTO panel and Appellate Body in the *EC – Seal Products* case. Section 7.7 explains the amendments to the EU legislation made after the Appellate Body's decision.

Section 7.8 discusses Inuit traditional seal hunting, and argues that the EU's attempt to assign it to a separate category, beyond the scope of the ban on seal products and the animal welfare concerns that it reflects, is an example of what Will Kymlicka and Sue Donaldson call a "strategy of avoidance": a way of eliding conflicts between animal rights and Indigenous people's rights that is inherently unstable and ultimately not sustainable.⁹

In Section 7.9, I consider the significance of the *EC – Seal Products* decision for norms of animal protection in the context of WTO law. This section applies Brunnée and Toope's interactional framework to what happened in *EC – Seal Products*. I look at

⁹ See Will Kymlicka & Sue Donaldson, "Animal Rights and Aboriginal Rights" in Peter Sankoff, Vaughan Black & Katie Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin, 2015) 159 (and discussion in Section 7.8).

where the formation of norms around animal protection, based on a process of social interaction, stands after this case. And I analyze the panel and Appellate Body reports as manifestations of a practice of legality that contributes to the construction of potential legal norms from a basis in shared understandings, exhibiting the distinctive characteristics of law.

7.2 The EU Seals Measure

The *EC – Seal Products* case was a WTO challenge to rules adopted by the EU in 2009 and 2010 that banned sales and imports of seal products. The rules consist of a regulation, together with implementing legislation that specifies how the regulation is to be applied, and, subsequently, some modifications that were put in place after the WTO ruling. The whole complex of rules is referred to here as the “Seals Measure.”

7.2.1 The 2009 Seals Regulation

In 2009, the EU adopted a regulation that prohibits products made from seals from being placed on the market in the EU, and also prohibits imports of seal products from outside the EU (the Seals Regulation).¹⁰ This general ban has exceptions. The first and most significant exception is for products resulting from traditional subsistence hunting by Inuit and other Indigenous peoples.¹¹ This will be referred to here as the Indigenous Exception.

¹⁰ EC, *Commission Regulation (EC) 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products* [2009] OJ, L 286/36 [the “Seals Regulation”].

¹¹ *Ibid*, Art 3(1).

The second exception is for occasional, non-commercial imports of personal goods belonging to travellers and their family members (the Travel Exception).¹² The third is for by-products of regulated seal culls “conducted for the sole purpose of sustainable management of marine resources” (the Marine Management Exception).¹³

7.2.2 The 2010 Original Implementing Regulation

In 2010, the EU adopted an implementing regulation that set out rules for implementing the Seals Regulation, including specific criteria for products to be eligible for the three exceptions (the Original Implementing Regulation).¹⁴ The Seals Regulation was later amended, in 2015, reflecting the outcome of the WTO dispute and so as to bring the measure into compliance with WTO rules; at the same time, the Original Implementing Regulation was repealed.¹⁵ Also in 2015, the European Commission adopted a new implementing regulation designed to comply with the WTO ruling.¹⁶

In the rest of this section, I set out a detailed description of the Seals Measure as it stood in 2010, after the adoption of the Original Implementing Regulation. This the regulatory regime that was evaluated by the WTO in *EC – Seal Products*. In Section 7.7,

¹² *Ibid*, Art 3(2)(a).

¹³ *Ibid*, Art 3(2)(b).

¹⁴ EC, *Commission Regulation (EU) No 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products*, [2010] OJ L 216/1 [the “Original Implementing Regulation”].

¹⁵ EC, *Regulation (EU) 2015/1775 of the European Parliament and of the Council of 6 October 2015 amending Regulation (EC) No 1007/2009 on trade in seal products and repealing Commission Regulation (EU) No 737/2010*, [2015] OJ L 262/1 [the “Amended Seals Regulation”].

¹⁶ EC, *Commission Implementing Regulation (EU) 2015/1850 of 13 October 2015 laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products*, [2015] OL 271/1 [the “New Implementing Regulation”].

I describe changes that were made to the Seals Measure after the *EC – Seal Products* rulings, in order to bring it into compliance with WTO law.

7.2.3 The Exceptions

7.2.3.1 The Indigenous Exception

The most important exemption from the overall ban on seal products was the Indigenous Exception. The rationale for the exception was that the “fundamental economic and social interests of Inuit communities engaged in the hunting of seals as a means to ensure their subsistence should not be adversely affected.”¹⁷ Recognizing the seal hunt as “an integral part of the culture and identity” of Inuit peoples protected by the United Nations Declaration on the Rights of Indigenous Peoples, the EU determined that products of traditional subsistence hunts by Inuit people should still have access to the market despite the general ban.¹⁸

“Inuit” was defined in the Seals Regulation as “indigenous members of the Inuit homeland, namely those arctic and subarctic areas where, presently or traditionally, Inuit have aboriginal rights and interests, recognised by Inuit as being members of their people.”¹⁹ It included specific communities: Inupiat, Yupik (Alaska), Inuit, Inuvialuit (Canada), Kalaallit (Greenland) and Yupik (Russia).²⁰

¹⁷ Seals Regulation, *supra* note 10, Preamble para 14.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, Art 2(4).

²⁰ *Ibid.* This definition mirrors that in Article 6(1) of the *Inuit Circumpolar Charter*, online: <https://web.archive.org/web/20161115211401/https://www.inuitcircumpolar.com/icc-charter.html> (“‘Inuit’ means indigenous members of the Inuit homeland recognized by Inuit as being members of their people and shall include the Inupiat, Yupik (Alaska), Inuit, Inuvialuit (Canada), Kalaallit (Greenland) and Yupik (Russia)”).

The Original Implementing Regulation established the specific rules for this exemption. The preamble stated that seal products should be permitted to be placed on the market if they came from “hunts traditionally conducted by Inuit and other indigenous communities and which contribute to their subsistence ... where such hunts are part of the cultural heritage of the community and where the seal products are at least partly used, consumed or processed within the communities according to their traditions.”²¹

The conditions for the Indigenous Exception were as follows:

- The products had to result from hunts by Inuit or other indigenous communities that “have a tradition of seal hunting in the community and in the geographical region.”²² “Other indigenous communities” meant communities descended from the inhabitants of their country or region at the time of conquest or colonization who retain their own social, economic, cultural and political institutions.²³
- The seal products had to result from hunting the products of which were “at least partly used, consumed or processed within the communities according to their traditions,”²⁴ and
- The products had to come from hunts that “contribute to the subsistence of the community.”²⁵

²¹ Original Implementing Regulation, *supra* note 14, Preamble para 3.

²² *Ibid*, Art 3(1)(a).

²³ *Ibid*, Art 2(1).

²⁴ *Ibid*, Art 3(1)(b).

²⁵ *Ibid*, Art 3(1)(c).

The kind of seal hunting that made products eligible for the Indigenous Exception had to be for subsistence and cultural purposes, as distinct from commercial motivations. But products from such hunts, provided that they met the criteria of the exemption, could be sold and marketed for profit as commercial products without losing exempt status. There was also no hard limit on the quantity of seal products that could enter the stream of commerce. This space in the Indigenous Exception to allow in products from hunts with a partly commercial character was to become an important issue in the WTO case.

7.2.3.2 The Travel Exception

The Travel Exception was available for people traveling into the EU bringing seal products (for example, clothing, meat or nutritional supplements) for their own use rather than resale. It applied to seal products brought into the EU for the personal use of travelers or their families, if any of the following applied:

- The seal products were worn by the travelers or brought in with their personal luggage,²⁶
- The traveler was moving his or her personal residence to the EU and brought the products in along with his or her personal property,²⁷ or
- The products were purchased in a third country and imported at a later date, as long as the imported products were accompanied by documentation showing that they were bought in the third country.²⁸ So, for example, an EU resident could buy a souvenir or an item for personal

²⁶ *Ibid*, Art 4(1).

²⁷ *Ibid*, Art 4(2).

²⁸ *Ibid*, Art 4(3).

use made out of seal while on vacation, and ship it home separately with the required documentation.

The Travel Exception was a narrow exemption, limited to products that were not brought into the stream of commerce inside the EU.²⁹

7.2.3.3 The Marine Management Exception

The Marine Management Exception permitted occasional sales of products from seals culled as part of regulated, ecosystem-based seal population management. If seals were killed for population management purposes, this exception meant that they did not have to be discarded and go to waste if they could be sold.³⁰ The conditions for this exception were:

- The products must come from a hunt “conducted under a national or regional natural resources management plan which uses scientific population models of marine resources and applies the ecosystem-based approach,”³¹
- The hunt must not go over the total allowable catch set under the management plan,³² and
- The products must be “placed on the market in a non-systematic way on a non-profit basis.”³³

²⁹ Howse & Langille, *supra* note 8 at 385.

³⁰ See discussion (referencing the EU’s submissions on this point before the WTO panel) in Nielsen & Calle, *supra* note 8 at 46.

³¹ Original Implementing Regulation, *supra* note 14, Art 4(1)(a).

³² *Ibid*, Art 4(1)(b).

³³ *Ibid*, Art 4(1)(c).

Both the Travel Exception and the Marine Management Exception restricted imports (in the case of the Travel Exception) and sales (in the case of the Marine Management Exception) in a non-commercial, not-for-profit context. Although these exceptions did not set numerical limits on the quantity of eligible seal products, they are inherently limited to allowing in only a small number of products. There are only so many items that travelers will bring in with them for personal use, or that will result from regulated seal population management.

The Seals Regulation and the Original Implementing Regulation both came into effect on August 20, 2010.

7.3 Animal Protection Law and Pro-Animal Values in the EU

The EU decided to ban seal products because of public concerns about animal suffering in the seal hunt. The preamble of the Seals Regulation notes that seals “are sentient beings that can experience pain, distress, fear and other forms of suffering,”³⁴ and that seal hunting “has led to expressions of serious concerns by members of the public and governments” about the suffering involved.³⁵

This legislative response to animal suffering is in line with an established tradition in EU law of fairly progressive legislation for animal protection, as well as recognition of animals as sentient and morally significant beings. An “extensive body of law governs the treatment of different classes of animals,” and legislation on animal welfare “has

³⁴ Seals Regulation, *supra* note 10, Preamble para 1.

³⁵ *Ibid*, Preamble para 4.

mitigated much of the harshness with which especially farm animals used to be treated.”³⁶ European nations and lawmaking institutions have adopted a number of instruments concerning animal protection.

The first European animal protection treaties date from the 1960s, under the Council of Europe. The Council of Europe, which is distinct from the EU, is an international organization with 47 member states. 28 of the current members are the EU member states.³⁷ The Council describes itself as “a forum for examining common social problems”³⁸ for its members, with a primary focus on human rights.

Council of Europe member states have concluded six animal protection treaties: five dealing with animal welfare in contexts including farming, slaughter and research, and one dealing with wildlife protection.³⁹ The first of these treaties is the 1968 *Convention for the Protection of Animals during International Transport*.⁴⁰ It is probably the first international treaty dealing with animal welfare.⁴¹ When this treaty was adopted,

³⁶ Bart Driessen, “Fundamental Animal Rights in European Law” (2017) 23(3) *European Public L* 547 at 551. See also the discussion of EU animal welfare standards in Section 6.4 above.

³⁷ Council of Europe, “Who We Are,” online: <https://www.coe.int/en/web/about-us/who-we-are>.

³⁸ Elaine L Hughes & Christiane Meyer, “Animal Welfare Law in Canada and Europe” (2000) 6 *Animal L* 23 at 42. The treaties are: the *European Convention for the Protection of Animals During International Transport*, Eur TS 65 (1968) as amended by *Additional Protocol* Eur TS 103; the *European Convention for the Protection of Animals Kept for Farming Purposes*, Eur TS 87 (1976) and *Protocol of Amendment*, Eur TS 145; the *European Convention for the Protection of Animals for Slaughter*, Eur TS 102 (1979); the *Convention on the Conservation of European Wildlife and Natural Habitats*, Eur TS 104 (1979); the *European Convention for the Protection of Vertebrate Animals Used for Experimental and Other Scientific Purposes*, Eur TS 123 (1986) and *Protocol of Amendment*, Eur TS 170; and the *European Convention for the Protection of Pet Animals*, Eur TS 125 (1987).

³⁹ Hughes & Meyer, *ibid* at 43.

⁴⁰ *European Convention for the Protection of Animals During International Transport*, *supra* note 38. A revised version of this Convention (CETS 193) was opened for signature on 6 November 2003 and entered into force on 14 March 2006. As of April 10, 2019, 19 Council of Europe member states have signed and 13 have ratified the treaty (see chart of signatures and ratifications available at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=193&CM=1&DF=&CL=ENG>).

⁴¹ As discussed in Chapter Six, the 1998 agreements on humane trapping standards have been called the first example of truly international (not just regional) law on animal welfare. See Section 6.4 above.

one commentator said that for the first time the protection of animals had been recognized as “a matter which can be subject to international regulation.”⁴²

In more recent history, the EU has enacted an extensive array of animal protection instruments. The EU is an integrated supranational political and lawmaking institution, with the power to adopt regulations that automatically become enforceable as law in the EU member states, as well as Directives that the member states are then legally bound to enact as domestic law.⁴³

Recognition of animal sentience and a commitment to reflecting animal protection in policy initiatives are built into the constitutive law of the EU. A protocol concerning animal welfare was adopted in the 1997 *Treaty of Amsterdam*,⁴⁴ which amended the *Consolidated Treaty on European Union*.⁴⁵ The relevant provision, the *Protocol on Protection and Welfare of Animals*,⁴⁶ states:

THE HIGH CONTRACTING PARTIES,

DESIRING to ensure improved protection and respect for the welfare of animals as sentient beings,

HAVE AGREED UPON the following provision which shall be annexed to the Treaty establishing the European Community,

⁴² Per von Holstein, “Protection of Animals by Means of International Law, with Special Reference to the Convention for the Protection of Animals during International Transport” (1969) 18 Int'l & Comp L Q'ly 771 at 771.

⁴³ Hughes & Meyer, *supra* note 38 at 43.

⁴⁴ *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts*, 2 October 1997, [1997] OJ C 340/110, 37 ILM 56 (entered into force 1 May 1999).

⁴⁵ [2010] OJ C 83/13.

⁴⁶ *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Protocol annexed to the Treaty of the European Community - Protocol on protection and welfare of animals*, 1997 OJ C 340 [Amsterdam Protocol].

In formulating and implementing the Community's agriculture, transport, internal market and research policies, the Community and the Member States shall pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

In 2007, Article 13 of the Lisbon Treaty added this provision to the *Treaty on the Functioning of the European Union*.⁴⁷

Much of the EU legal architecture for animal welfare is concerned with farm animals, and is part of the legal framework for the Common Agricultural Policy.⁴⁸ These laws include a Directive concerning multiple aspects of farm animal welfare,⁴⁹ Directives establishing minimum animal welfare standards for specific animals, including pigs,⁵⁰ broiler chickens (chickens used for meat)⁵¹ and egg-laying hens,⁵² Directives on the use

⁴⁷ *Consolidated Version of the Treaty on the Functioning of the European Union*, [2008] OJ C 115/47.

⁴⁸ See also the discussion of the EU's policy and laws on farmed animal welfare in Section 6.4 above.

⁴⁹ EC, *Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes*, [1998] OJ L221/23.

⁵⁰ EC, *Council Directive 2008/120/EC of 18 December 2008 laying down minimum standards for the protection of pigs*, [2009] OJ L 47/5. This Directive establishes minimum space requirements for pigs and prohibits keeping sows alone in very small gestation or farrowing crates.

⁵¹ EC, *Council Directive 2007/43/EC of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production* [2007] OJ L 182/19. This Directive regulates conditions including maximum stocking densities for broiler chickens. See discussion in Section 6.4.

⁵² EC, *Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens*, [1999] OJ L 203/53. This Directive requires phasing out of highly intensive "battery" farming of egg-laying hens. See discussion in Section 6.4.

of animals in research,⁵³ a regulation on the protection of animals during transportation,⁵⁴ and legislation aimed at minimizing pain and suffering during animal slaughter.⁵⁵

In 2012, the EU released its most recent strategy document, the EU Strategy on Animal Welfare for the period 2012-2015 (the *Strategy*).⁵⁶ The *Strategy* announced the European Commission's plan "to consider the need for a revised EU legislative framework based on a holistic approach,"⁵⁷ consolidating responses rather than adopting specific legislation to address specific problems. Observing that in recent years the EU had spent "on average 70 million Euros per year to support farm animal welfare," the *Strategy* aimed to improve the effectiveness of this investment in improving animal welfare outcomes.⁵⁸ The *Strategy* reported that, according to an EU-wide survey, animal welfare "is a significant issue for 64% of the population."⁵⁹ One aspect of the *Strategy* is

⁵³ EC, *Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes*, 2010 OJ L 276. See also EC, *Directive 2003/15/EC of the European Parliament and of the Council (27 February 2003) amending Council Directive 76/768/EEC on the approximation of the laws of the Member States relating to cosmetic products*, 2003 OJ L 66/26. EU law now prohibits testing cosmetic products on animals. See discussion in Section 6.5.

⁵⁴ EC, *Council Regulation (EC) 1/2005 of 22 December 2004, on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97*, [2005] OJ L 3/1. This Regulation limits long journeys for animals (including in transportation to slaughter) and requires regular feeding and watering during transportation.

⁵⁵ EC, *Council Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing*, [1993] OJ L 340/21; EC, *Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing* [2009] OJ L 303/1. These rules require slaughter methods that minimize pain and distress to the animals, including stunning before killing (subject to religious exemptions).

⁵⁶ EC, *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the European Union Strategy for the Protection and Welfare of Animals 2012-2015* (Brussels: EC, 2012) [*Strategy*].

⁵⁷ *Ibid* at 6.

⁵⁸ *Ibid* at 3-4.

⁵⁹ *Ibid* at 5.

international cooperation: a “level playing field on animal welfare is important at [the] international level to ensure global competitiveness of EU operators.”⁶⁰

The European Parliament passed a non-binding resolution in 2016 calling on the European Commission to draw up a “new and ambitious” animal welfare strategy for 2016-2020.⁶¹ So far this has not happened, but the Commission stated in late 2018 that it plans to revise and update its animal welfare strategy.⁶²

In 2018, the European Court of Auditors published the results of its assessment of the impact and implementation of the EU *Strategy*.⁶³ The report begins with the observation that the EU “has some of the world’s highest regulatory animal welfare standards, which include general requirements on the rearing, transport and slaughter of farm animals and specific requirements for certain species.”⁶⁴ It is a strategic goal of the European Court of Auditors to “examine performance in areas where EU action matters to citizens,”⁶⁵ and the report notes that animal welfare “is an important issue for EU citizens.”⁶⁶

Overall, this audit concluded that there had been good progress on animal welfare, although there were still weaknesses in applying minimum standards set out in EU legislation, as well as in compliance and coordination.

⁶⁰ *Ibid* at 10.

⁶¹ EC, *European Parliament resolution of 26 November 2015 on a new animal welfare strategy for 2016-2020* [2015] 2015/2957(RSP).

⁶² Peter Teffer, “EU to review animal welfare strategy” (14 November 2012) *EU Observer*, online: <https://euobserver.com/environment/143374>.

⁶³ European Court of Auditors, *Special Report: Animal welfare in the EU: closing the gap between ambitious goals and practical implementation* (European Union, 2018).

⁶⁴ *Ibid* at 5.

⁶⁵ *Ibid* at 19.

⁶⁶ *Ibid* at 47.

Some of the EU member states also have relatively strong domestic animal protection laws. Germany amended its constitution in 2002 to add a reference to protecting animals. As amended, Article 20(a) provides that “the state shall protect the natural foundations of life *and animals* by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.”⁶⁷ Austria’s federal animal protection statute refers to the ethical significance or intrinsic value of animals, stating that its aim is to protect “the life and well-being of animals based on man’s special responsibility for the animal as a fellow creature.”⁶⁸

The federal animal welfare statute of Switzerland protects “the dignity and welfare of animals.”⁶⁹ “Dignity” is defined as follows:

Inherent worth of the animal that has to be respected when dealing with it. If any strain imposed on the animal cannot be justified by overriding interests, this constitutes a disregard for the animal’s dignity. Strain is deemed to be present in particular if pain, suffering or harm is inflicted on the animal, if it is exposed to anxiety or humiliation, if there is major interference with its appearance or its abilities or if it is excessively instrumentalised.⁷⁰

The UK generally takes legal protection of animals seriously. This was highlighted recently as the UK prepares to exit from the EU. The legislation that provides for devolution of laws and regulations from the EU to domestic authorities, the

⁶⁷ *Basic Law for the Federal Republic of Germany*, 23 May 1949, online: <https://www.refworld.org/docid/4e64d9a02.html>, Article 20a (emphasis added to show the text added by amendment); see also Claudia E Haupt, “The Nature and Effects of Constitutional State Objectives: Assessing the German Basic Law’s Animal Protection Clause” (2010) 16 *Animal L* 213.

⁶⁸ *Federal Act on the Protection of Animals (Animal Protection Act – TSchG)*, 1 January 2005, BGBl. I Nr. 118/2004, §1. English text available at https://www.ris.bka.gv.at/Dokumente/ErV/ERV_2004_1_118/ERV_2004_1_118.pdf.

⁶⁹ *Tierschutzgesetz [TSchG] (Animal Welfare Act)*, 6 December 2005, JR 455, Art 1. English text online: <https://www.globalanimallaw.org/downloads/database/national/switzerland/Tierschutzgesetz-2005-EN-2011.pdf>.

⁷⁰ *Ibid*, Art 3(a). See discussion in Will Kymlicka, “Social Membership: Animal Law Beyond the Property/Personhood Impasse” (2017) 40:1 *Dalhousie L J* 123 at 128-129.

European Union (Withdrawal) Act 2018,⁷¹ did not include a proposed amendment that would have provided for transition of the principle of animal sentience recognized in Article 13 of the Lisbon Treaty.⁷² As a result, concerns were expressed that UK law following withdrawal from the EU would not adequately reflect the sentience of animals or provide for animal protection. The government issued a statement confirming that it would continue to recognize animal sentience and would strengthen protections for animals following exit from the EU.⁷³

Europe is not a paradise for animals. Animals are exploited, and suffer, in high numbers there, as they do elsewhere in the world. The EU *Strategy* estimated that about two billion birds and three hundred million mammals were used for farming purposes, and about 12 million a year were used for research.⁷⁴ Nevertheless, it is evident from this brief survey of European animal protection law that both substantive legal protections for animals and the institutional framework for coordination, oversight, evaluation and continuous improvement of animal protection law are robust by global standards. Animal welfare is a matter of concern to the public in Europe. European institutions, as well as domestic legislators and authorities in at least some EU member states, take the legal protection of animals seriously. They devote resources, both money and institutional work, to supporting it.

⁷¹ *European Union (Withdrawal) Act 2018* (UK), c 16.

⁷² Andrew Griffin, “Animal sentience: What is really going on with the controversial Brexit amendment”, *The Independent* (23 November 2017), online: <https://www.independent.co.uk/environment/animal-sentience-brexit-vote-caroline-lucas-michael-gove-truth-fact-argument-a8072071.html>.

⁷³ House of Commons Library (UK), *Animal Sentience and Brexit* (8 August 2018), online: <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8155>.

⁷⁴ *Strategy*, *supra* note 56 at 1.

Colin Tudge has argued that the protection of animals is integral to a specifically European “version of civilization,” and that the treatment of the vulnerable – both vulnerable human beings and non-human species – is to a significant extent a measure of “the worth of the European ideal.”⁷⁵

The next two sections look at the historical background to the EU’s adoption of the Seals Measure: first, the history and current status of sealing in Canada, Norway and Greenland (section 7.4)⁷⁶ and then the legislative history of the Seals Measure (section 7.5).

7.4 Seal Hunting in Canada, Norway and Greenland

This section outlines how the conflict of values between the EU and sealing nations came about. It focuses on three locations: Canada, where the world’s largest seal hunt takes place; Norway, which joined Canada as a complainant in the *EC – Seal Products* WTO dispute; and Greenland, whose access to the EU market through the Indigenous Exception was a key point of comparison in *EC – Seal Products*. There is seal hunting in other places,⁷⁷ but these three hunts are the most relevant to the *EC – Seal Products* case.

⁷⁵ Colin Tudge, “Conclusion – Animal Welfare and the Ideal of Europe” in Council of Europe, ed, *Ethical Eye: Animal Welfare* (Belgium: Council of Europe Publishing: 2006) 255 at 255.

⁷⁶ See also discussion of this background in Katie Sykes, “Sealing Animal Welfare into the GATT Exceptions: The International Dimension of Animal Welfare in GATT Disputes” (2014) 13(3) *World Trade Review* 471 at 475-476.

⁷⁷ For summaries of the ecology, social significance, and regulation of seal hunting around the world see Selheim, *supra* note 2 at 160-216; Panel on Animal Health and Welfare, *Animal Welfare Aspects of the Killing and Skinning of Seals: Scientific Opinion of the Panel on Animal Health and Welfare* (2007) *The EFSA Journal* 610, online:<http://www.efsa.europa.eu/en/efsajournal/doc/610.pdf> [“EFA Opinion”] at 24-35; COWI Denmark, *Assessment of the potential impact of a ban of products derived from seal species* (Kongens Lyngby, Denmark: 2008), online:

7.4.1 Canada

Harp, hooded and grey seals spend time on the Eastern shores of Canada during their annual migrations, stopping there to give birth to and nurse their young.⁷⁸ They have been hunted for centuries for their fur, skins, meat and oil, first by Indigenous populations and then, more intensively, by Europeans.⁷⁹ The seal hunt and its products played an important part in the economic development of coastal areas in Canada, including the Magdalen Islands in Quebec, and Newfoundland and Labrador.⁸⁰ By the early nineteenth century, the commercial hunt grew larger in scale with the use of modern technologies such as large schooners and air surveillance.⁸¹

International controversy about seal hunting started around the 1950s to 1960s, when images and stories about the hunt started to appear in the national and international media.⁸² Objections to seal hunting can be categorized under two main headings: conservation, and animal suffering.

On the conservation side, intensive seal hunting reduced populations of seals and altered their geographic distribution enough to raise concerns that the survival of some species of seals might be threatened.⁸³ For example, by the mid-twentieth century grey

http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/seals_report.pdf [COWI Report] at 22-96.

⁷⁸ Lesli Bisgould & Peter Sankoff, “The Canadian Seal Hunt as Seen in Fraser’s Mirror” in Peter Sankoff, Vaughan Black & Katie Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin, 2015) 105 at 107-108.

⁷⁹ *Ibid* at 108-109; Tsafirir Gazit, Damian Lidgard & Katie Sykes, “Changing Environments: Tracking the Scientific, Political, Legal, and Ethical Currents of the Grey Seal-Cod Debate in Atlantic Canada” (2013) 16:4 *J Int’l Wildlife L & Pol’y* 266 at 270.

⁸⁰ Bisgould, *ibid* at 108-109.

⁸¹ *Ibid*.

⁸² *Ibid* at 109; Selheim, *supra* note 2 at 26-27.

⁸³ Selheim, *ibid* at 36-37; Nikolas Selheim, “The Goals of the EU Seal Products Trade Regulation: From Effectiveness to Consequence” (2014) 51:258 *Polar Record* 274 at 274-275.

seals in the North Atlantic were on the verge of extinction, with their range reduced to a narrow area around the Gulf of Saint Lawrence.⁸⁴

Today, however, the numbers of seals hunted are relatively small compared to the peak years. Populations appear to have stabilized.⁸⁵ As a result, the conservation concern is now less acute. Opponents of seal hunting do still cite this as a concern, especially given the problems of climate change and warming oceans for animals that depend on stable sea ice for successful reproduction.⁸⁶

The second type of criticism raised against sealing has to do with the pain, distress and suffering caused to the seals. The seal hunt is associated with an exceptionally stark image of brutality towards animals: hunters clubbing baby seals over the head on the ice floes.⁸⁷ The young seals are both defenseless and unusually attractive, with fluffy coats and faces that almost seem to have been designed to appeal to our sympathies.⁸⁸ Seal

⁸⁴ Gazit, Lidgard & Sykes, *supra* note 79 at 270.

⁸⁵ The seal species that are hunted by Canadian and Norwegian sealers are not listed in the appendices of CITES, and are listed as “least concern” or (in the case of hooded seals) “vulnerable” by the International Union for Conservation of Nature. See Perišin, *supra* note 8 at 375 n6.

⁸⁶ International Fund for Animal Welfare, “Seals and Climate Change,” online: <https://www.ifaw.org/canada/our-work/seals/seals-and-climate-change> (noting that “[h]arp seals require a stable ice platform on which to give birth and nurse their pups, but with the failure of ice to form, or its early disappearance in recent years, seals face a new and grave threat to their survival”).

⁸⁷ Killing very young seal pups, including the ‘whitecoat’ baby harp seals featured in these images, has been illegal in both Canada and Norway since the 1980s. Nevertheless, the hunt continues to be associated with the killing of fluffy white baby seals – to the chagrin of supporters of seal hunting.

⁸⁸ Driessen, *supra* note 36 at 554, argues that seals “benefit from looking the ‘right’ way and enjoy a measure of protection because of their ‘cuddliness’ factor.” Driessen (*ibid*) observes that “humans have evolved an innate affection for animals with large eyes, bulging craniums and short snouts. It follows from this that baby seals and giant pandas draw our sympathy; beady-eyed snouts such as pigs, crows and rats (all of which are highly intelligent) do not.” See also Selheim, *The Seal Hunt*, *supra* note 2 at 1, acknowledging that for many “[i]t is truly unthinkable to hunt a seal” because “the fluffy white ‘baby seal’ that looks at you with its big black eyes” is “incredibly cute”; Perišin, *supra* note 8 at 375, observing that “many feel emotionally touched by the ‘cuteness’ of seals and ... this makes them intuitively biased in supporting the EU measures,” and suggesting that, aside from “emotional attitudes towards seals,” it is hard to identify “what the rational basis behind special protection of seals (in contrast to that of other animals) is.”

hunting is not controversial simply because of the amount of suffering involved. On that measure alone, it would hardly be fair to single sealing out for stronger criticism than industrial animal farming. What seems to be particularly troubling about the seal hunt for those who fight against it is that it is a way of interacting with the natural world that seems starkly callous and lacking in compassion.

The Canadian nature writer and animal protection advocate Farley Mowat recounted in his 1987 book *Sea of Slaughter* that the controversy over sealing took off partly because of a tone-deaf marketing campaign by a company promoting tourism in Quebec.⁸⁹ A film intended to attract visitors included scenes from a seal hunt in the Magdalen islands and footage of a baby seal being clubbed to death. The images shocked viewers so much that, according to Mowat, it started the modern anti-sealing movement.⁹⁰

The international animal advocacy NGO the International Fund for Animal Welfare (IFAW) formed in 1969 to campaign against seal hunting. In 1983 and 1984, IFAW organized a consumer boycott of Canadian seafood products in the UK and the US. The boycott was very effective in changing public views and government policy on sealing – although the effects were temporary.

IFAW encouraged consumers and retailers to stop buying Canadian fish until the seal hunt was banned completely.⁹¹ Under pressure, the Canadian government formed a

⁸⁹ Farley Mowat, *Sea of Slaughter* (Toronto: Seal Books, 1987) [1984] at 386-427.

⁹⁰ *Ibid.*

⁹¹ Michael Clugston, “The antiseal boycott spreads” (March 19, 1984) *Maclean's* 20; Donald Barry, *Icy Battleground: Canada, the International Fund for Animal Welfare, and the Seal Hunt* (St. John's, NL: Breakwater Books, 2005).

Royal Commission on Seals and Sealing in Canada, under the chairmanship of Albert Malouf (known as the Malouf Commission).⁹² The government responded to public pressure and recommendations of the Malouf Commission by tightening up the regulation of seal hunting. It banned sealing from large ships and cut subsidies to the sealing industry.⁹³

In the aftermath of the IFAW boycott and the Malouf Commission, the seal hunt shrank to a small, local hunt of around 20,000 animals a year, and the Canadian government was reportedly considering abolishing seal hunting outright.⁹⁴ But in 1985 IFAW suspended the boycott, believing that it had largely achieved its goals; it was also concerned about the negative effects on people in Eastern Canada's fishing communities.⁹⁵ In 1995, then Minister of Fisheries and Oceans Brian Tobin brought back a subsidized and expanded seal hunt. The seal hunt resurged. The 2004 hunt was described as "bigger, bloodier, and crueller than at any time since the 1950s" and "the world's largest slaughter of marine mammals."⁹⁶

Meanwhile, the EEC enacted its first import restriction on seal products. In 1983, the EEC adopted a Directive prohibiting imports of skins from harp and hooded seal pups.⁹⁷ This Directive was justified based on conservation risks, rather than animal

⁹² Albert H Malouf, *Report of the Royal Commission on Seals and Sealing in Canada* (2 volumes) (Ottawa: Privy Council Office, 1986). See also discussion in Selheim, *The Seal Hunt*, *supra* note 77 at 36-37.

⁹³ Stephen Best, *Influencing Canadian Seal Hunt Policy with a Consumer Boycott of Canadian Seafood* (report prepared for the Directors of Animal Alliance Canada and Environment Voters, August 2004), online: http://stephenbest.ca/Seafood_Boycott.pdf at 10-11

⁹⁴ *Ibid* at 11.

⁹⁵ *Ibid*.

⁹⁶ *Ibid*.

⁹⁷ *Council Directive (EEC) No 83/129/EEC of 28 March 1983 concerning the importation into Member States of skins of certain seal pups and products derived therefrom*, [1983] OJ L 91/30 [Seal Pups Directive]; Mowat, *supra* note 89 at 411.

welfare concerns (although it is likely that objections to the cruelty of the hunt were part of what drove it). The Directive refers to “the population status of the harp and hooded seals and especially ... the effect of non-traditional hunting on the conservation and population status of hooded seals.”⁹⁸ It applied “only ... to products not resulting from traditional hunting by the Inuit people,” noting that seal hunting as traditionally practiced by the Inuit left seal pups unharmed.⁹⁹

The European import ban dramatically reduced the market for the white coats of baby harp seals. The Canadian government brought in regulations making it illegal to trade in the skins of baby harp seals in the “whitecoat” stage (up to about two weeks old) and hooded seals in the “bluecoat” stage (up to about 14 months).¹⁰⁰

Thus, by the time of the IFAW boycott, killing of the iconic fluffy white baby harp seals was already curtailed. But most harp seals that are killed were (and are) still very young, between a month and three and a half months old.¹⁰¹

7.4.2 Norway

Norwegian sealing has a long history, although the hunt is smaller in scale (and less internationally notorious) than the Canadian seal hunt.¹⁰² Petros Mavroidis

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Marine Mammal Regulations*, SOR/93-56 s 27.

¹⁰¹ Tristin Hopper, “The hunt Canada loves: Why seal clubbing will never die” (April 3, 2018) *The National Post*, online: <https://nationalpost.com/news/canada-is-never-ever-going-to-stop-killing-seals-your-tell-all-guide-to-the-seal-hunt>. This newspaper article points out, by way of context, that “[t]hose rotisserie chickens at the grocery store were likely alive for only 40 days. The average pack of bacon comes from a pig that was only on earth for four months.” This is either a corrective to anti-sealing campaigners who continue to criticize the slaughter of “baby seals” after hunting the youngest pups has ended or, depending on one’s perspective, an uncomfortable reminder that grocery stores contain a lot of baby animals.

¹⁰² EFSA Opinion, *supra* note 77 at 26.

characterizes the Norwegian seal hunt as part of a “very sophisticated resource management program” that does not include “brutal” or inhumane hunting methods.¹⁰³ In the past, however, the Norwegian seal hunt has been a target of controversy for much the same reasons as the larger Canadian hunt.

The centre of Norwegian sealing is the city of Tromsø, 350 kilometres north of the Arctic Circle.¹⁰⁴ Tromsø “owes its very existence to the harvesting of seals and whales.”¹⁰⁵ At the height of the industry in 1955, close to 300,000 seals were caught and processed in Norway, most in Tromsø.¹⁰⁶ Seal skin “was, and still is, used to make boots and clothing in Norway; the meat is eaten locally and across the country.”¹⁰⁷

In 1987 Odd F. Lindberg, a freelance journalist, author and photographer, joined a sealing ship for the season.¹⁰⁸ The following year he applied to be and was appointed as a volunteer seal hunting inspector for the Norwegian Ministry of Fisheries.¹⁰⁹ The Tromsø newspaper *Bladet Tromsø* published interviews with Lindberg in which he described witnessing illegal and inhumane practices, including seals being skinned while still alive and female harp seals being beaten to death while trying to protect their pups.¹¹⁰ Lindberg also made a documentary film, “Seal Mourning.”

¹⁰³ Mavroidis, *supra* note 8 at 388.

¹⁰⁴ Stephen Starr, “Norway’s Arctic communities lament the end of the seal hunt” (24 February 2018) *The Irish Times* online: <https://www.irishtimes.com/news/environment/norway-s-arctic-communities-lament-the-end-of-the-seal-hunt-1.3401745>.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ This summary of facts is taken from the European Court of Human Rights case concerning this matter, described below (*Bladet Tromsø and Stensaas v. Norway*, No 21980/93, [1999] 3 ECHR 29, (2000) 29 EHRR 125), at paras 6-29.

¹⁰⁹ *Ibid* at para 7.

¹¹⁰ *Ibid* at paras 8-10, 13.

In 1989 the entire film was shown on Swedish television, and clips were shown in TV stations around the world, including the BBC and CNN.¹¹¹ The seal hunters sued both Lindberg and the newspaper for defamation, and they were successful in the Norwegian courts. The case eventually went to the European Court of Human Rights, which ruled that Norway had unreasonably interfered with the defendants' freedom of expression, in violation of the European Convention on Human Rights.¹¹²

The publicity around this conflict, and the international attention to Lindberg's documentary, made Norwegian sealing a subject of controversy and a target of animal welfare activists. By the early 1990s, however, it appears that the controversy had faded. A 1993 Associated Press report observes that the annual seal hunt that year "began quietly," with no demonstrations or protests.¹¹³

But the bad publicity was the beginning of a series of events (including the EU ban) that shrank the market for seal products and has made the survival of the industry doubtful. As a recent *Irish Times* story reported,

Photos and footage of hunters vigorously clubbing seal pups in the 1980s and 1990s marked the beginning of the end. The outside world was appalled, and public opinion quickly turned against sealers and the governments that supported them. Since then, a combination of activism, an end to government subsidies and plummeting demand have driven the industry to the edge of extinction.¹¹⁴

The same story also reports that the loss of sea ice has also affected the hunt: "[t]he 2016 season saw hunters waste two months sailing from Tromso to the coast of Greenland:

¹¹¹ *Ibid* at para 29.

¹¹² *Ibid* at para 73.

¹¹³ Associated Press, "Norway Launches Annual Seal Hunt" (23 March 1993) *The Toronto Star*

A3.

¹¹⁴ Starr, *supra* note 104.

when they arrived, they were greeted by rain – and no ice.”¹¹⁵ Because commercial markets declined, the Norwegian seal hunt was sustained by government subsidies, but the subsidy program ended in 2014.¹¹⁶ With the loss of financial support and without access to the EU market, the Norwegian industry does not appear likely to survive at this point.

7.4.3 Greenland

Greenland is a semi-autonomous part of the Kingdom of Denmark. With respect to the EU, its status is that of an Overseas Country or Territory Associated with the Union.¹¹⁷ Although Denmark is an EU member state, Greenland is not part of the EU and therefore, for the purpose of WTO law and the Seal Products dispute, Greenlandic seal products are imports from a non-EU country. The law in Greenland is a mix of “domestic, Greenlandic laws of Danish and customary origin; Danish laws; and elements of the European Union’s legal system.”¹¹⁸

Five species of seal (harp, ringed, hooded, harbour and bearded) are found in the waters off Greenland, and all of them are hunted. Harp and ringed seals make up about

¹¹⁵ *Ibid.*

¹¹⁶ International Fund for Animal Welfare, “Norway axes commercial seal hunting subsidies – likely ending commercial seal hunting in Europe” (12 December 2014), online: <https://www.ifaw.org/united-states/news/norway-axes-commercial-seal-hunt-subsidies-%E2%80%93-likely-ending-commercial-seal-hunting-europe>.

¹¹⁷ *EC – Seal Products* Panel Report, *supra* note 1 at para 7.183 n187; Nielsen & Calle, *supra* note 30 at 44; Dimitry Kochenov, “The Application of EU Law in the EU’s Overseas Regions, Countries and Territories After the Entry into Force of the Treaty of Lisbon” (2012) 20:3 *Mich State Int’l L Rev* 669 at 679 n 44, 717 n 230; Selheim, *supra* note 2 at 186.

¹¹⁸ Selheim, *ibid.*

95% of the catch.¹¹⁹ Seal hunting contributes to hunters' subsistence and "is an important part of the cultural and social identity."¹²⁰

The population of Greenland is almost 90% Inuit, and almost all seal hunters in Greenland are Inuit. In the WTO proceedings it was estimated that 100% of seal products from Greenland would qualify for the Indigenous Exception.¹²¹

The seal hunt in Greenland is different in character from the Canadian and Norwegian hunts. It is "a full-year activity and is characterised by individual hunters going out with small boats and sled dogs to hunt."¹²² It is at least somewhat more of a recreational and cultural activity than an organized commercial one, "opportunistic and dispersed rather than organised and concentrated."¹²³ Seals are mainly (about 85%) killed by shooting them with rifles from small boats.¹²⁴ Local laws permit killing marine mammals, including seals, by netting and drowning them. About 15% of seals are killed this way.¹²⁵

The Greenlandic hunt has not been a target of activism, negative publicity, or boycotts, in the same manner as the Canadian and Norwegian hunts – even though by the numbers Greenland's is the second biggest seal hunt in the world. This is probably because the hunters are Greenlandic Inuit, and opponents of the hunt see an ethically

¹¹⁹ COWI Report, *supra* note 77 at 44.

¹²⁰ *Ibid.*

¹²¹ *EC – Seal Products* Panel Report, *supra* note 1 at para 7.597 n922.

¹²² Selheim, *supra* note 2 at 186.

¹²³ *Ibid.*

¹²⁴ COWI Report, *supra* note 77 at 13.

¹²⁵ *Ibid.*; EFSA Report, *supra* note 77 at 29.

meaningful distinction between Inuit hunting and non-indigenous commercial hunting. That distinction is also reflected in the EU Seals Measure.

7.5 Adoption of the Seals Measure

The resumption of the large-scale Canadian hunt in the 1990s sparked renewed opposition to sealing in Europe.¹²⁶ First, some of the EU member states enacted seal embargoes in their domestic legislation. The Netherlands and Belgium both imposed bans on seal products in 2007.¹²⁷ At the same time, Germany, Austria, France, Luxembourg, Italy and the UK were also considering bans or had taken steps towards banning seal products.¹²⁸

7.5.1 Declaration of the European Parliament

In 2006, the European Parliament adopted a Declaration calling on the European Commission to ban the import, export and sale of all products from harp and hooded seals, but without affecting traditional Inuit seal hunting.¹²⁹ The Declaration refers to both conservation concerns and animal suffering as reasons for restricting trade in seal products. The preamble of the Declaration notes that “more than one and a half million

¹²⁶ On the legislative history of the Seals Measure, see Ferdi de Ville, “Explaining the Genesis of a Trade Dispute: The European Union’s Seal Trade Ban” (2012) 34:1 J Eur Integration 37.

¹²⁷ The relevant legislation is referenced in Canada’s request for consultations regarding these measures submitted to the EU and the WTO Dispute Settlement Body in 2007 (WTO, *European Communities – Certain Measures Prohibiting the Importation and Marketing of Seal Products – Request for Consultations by Canada*, WTO Doc WT/DS369/1).

¹²⁸ BIORES, “Canada Launches Trade Dispute Over European Seal Products Ban” (5 October 2007), online: <https://www.ictsd.org/bridges-news/biores/news/canada-launches-trade-dispute-over-european-seal-products-ban>; European Parliament, “MEPs adopt written declaration banning seal products in the EU” (11 September 2006), online: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20060901BRI10216+FULL-TEXT+DOC+XML+V0//EN&language=EN#title11>.

¹²⁹ European Parliament, *Declaration 38/2006 of the European Parliament on banning seal products in the European Union*, OJ C 306E [“Declaration”].

harp seal pups have been slaughtered in the North West Atlantic over the last four years” that “the vast majority of these animals were less than three months old,” that “the last time the annual number of seals now being killed was slaughtered in the 1950s and 1960s the seal population was reduced by two thirds,” and that “a team of international veterinarians concluded that 42% of the slaughtered seals they examined may have been skinned whilst still conscious.”¹³⁰

7.5.2 EFSA Opinion

The European Commission requested the Animal Health and Animal Welfare Panel of the European Food Safety Authority (EFSA) to prepare a compilation of scientific evidence on the animal welfare effects of seal hunting (the EFSA Opinion).¹³¹

The EFSA Opinion brings together the available scientific evidence on the animal welfare aspects of seal hunting and on the killing methods best suited to reduce “unnecessary pain, distress and suffering.”¹³² It concluded that “seals are sentient mammals that can experience pain, distress, fear and other forms of suffering.”¹³³ Although it is possible to kill seals without causing avoidable suffering, there was “strong evidence that, in practice, effective killing does not always occur.”¹³⁴ The main risks were shots or blows that failed to kill on the first attempt; when the first try failed, the seals might have to be shot or hit again, or might be moved or skinned while conscious.¹³⁵ Another risk was “struck and lost” seals – those that are hit or (usually)

¹³⁰ *Ibid.*

¹³¹ *Supra* note 77.

¹³² *Ibid* at 3.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Ibid* at 3-4.

shot and then escape, “with injuries that may cause suffering and affect their survival in the wild.”¹³⁶

EFSA recommended using what it identified as the most effective killing methods: the hakapik, a specialized blunt-force instrument used to kill seals by crushing the skull; clubbing; and shooting. Each method had risks that should be reduced with appropriate rules, training, and management. Netting seals and drowning them under water was not recommended.¹³⁷

The EFSA Opinion did not consider the ethical or social implications of the seal hunting controversy, as the panel was charged only with assessing scientific evidence on whether seals can be killed with minimal pain, distress, fear and other forms of suffering, and which methods are best suited to achieve this result.

7.5.3 COWI Report (2008)

In 2008, the European Commission engaged a Denmark-based consulting firm, COWI, to carry out an assessment of the potential impact of a ban on seal products (the COWI Report).¹³⁸ The COWI Report includes analysis “of the socio-economic context in which [seal] hunting takes place” so as to assess “how legislative and non-legislative measures will affect local economies and trade patterns.”¹³⁹ It also considers the various ethical concerns (conservation, animal welfare, the effect on sealing communities, and

¹³⁶ *Ibid.*

¹³⁷ *Ibid* at 89-90.

¹³⁸ *Supra* note 77. COWI later prepared a second report on implementing measures: European Commission Directorate-General Environment, *Study on implementing measures for trade in seal products final report* (Kongens Lyngby, Denmark, 2010), online: http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/study_implementing_measures.pdf.

¹³⁹ *Ibid* at 7.

the cultural significance of Indigenous seal hunting) that are part of the discussion about the seal hunt.¹⁴⁰

The COWI Report includes an examination of public opinion on seal hunting, and on the different options for regulating the import and marketing of seal products in the EU. Public consultation was done through a questionnaire using the European Commission's Interactive Policy-Making tool, which ran for eight weeks from December 20, 2007 to February 13, 2008.¹⁴¹ The Commission received 73,153 responses, an "extremely high" number compared to previous consultations on animal welfare issues.¹⁴² Most respondents considered seal hunting distinguishable from other ways of using natural resources, and of these more than 80% thought seal hunting was different because "hunting seals to use for fur and other non-essential products is not justified."¹⁴³

Survey respondents were asked to indicate a preference among five different possible legislative measures: doing nothing; labeling to inform consumers that a product is made from seal; labeling to inform consumers where seal products come from; allowing seal products to be placed on the market only when they come from countries where seal hunting is regulated and monitored to protect animal welfare; or an outright ban on seal products.¹⁴⁴ A strikingly high percentage – 79.8% – favoured a complete ban.¹⁴⁵

¹⁴⁰ *Ibid* at 9.

¹⁴¹ *Ibid* at 31.

¹⁴² *Ibid* at 125.

¹⁴³ *Ibid* at 125.

¹⁴⁴ *Ibid* at 124.

¹⁴⁵ *Ibid* at 128.

As the COWI Report explains, the survey was open to non-residents of the EU, and there were public awareness campaigns by NGOs in Canada and the US urging people to register their disapproval of seal hunting by participating in the consultation.¹⁴⁶ The strong support for a ban among survey respondents overall is likely to have been affected, and perhaps exaggerated, as a result. But COWI also broke down the statistics for residents of the then 27 EU member states,¹⁴⁷ and of those respondents, 73% were in favour of a ban.¹⁴⁸

The COWI Report provides evidence (although with acknowledged weaknesses) that seal hunting was an important moral issue and that the public was morally opposed to the continued presence of seal products on the market. The report noted the high number of responses, indicating that “seal hunting is a very salient issue to a large number of citizens.”¹⁴⁹ Feelings about the matter were strong: responses showed “massive dissatisfaction with current seal hunting practices.”¹⁵⁰ A clear majority in all the geographical areas that COWI analysed preferred a ban on seal products, but this was more pronounced for respondents in the Anglo-Saxon countries (the UK, US and Canada), where most respondents lived.¹⁵¹

¹⁴⁶ *Ibid.*

¹⁴⁷ There are now (until the UK leaves) 28. Croatia joined the EU in 2013.

¹⁴⁸ COWI Report, *supra* note 77 at 129.

¹⁴⁹ *Ibid* at 131.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

7.5.4 European Commission's Proposal: Market Access Conditioned on Animal Welfare Standards

On July 23, 2008, the European Commission adopted a proposal for a regulation on trade in seal products within the EU, and imports into and exports from the EU.¹⁵² The proposal was not an outright ban, but made access to the market conditional on complying with specific requirements to ensure the seals were killed and skinned without unnecessary suffering.

The Commission Proposal referenced the expressions of moral rejection of sealing that it had received through public consultation, noting that members of the public were “concerned about the animal welfare aspects of the killing and skinning of seals.”¹⁵³ These concerns were based on “ethical reasons” and objection to the “avoidable pain, distress and other forms of suffering, which seals, as sentient mammals, are capable of experiencing.”¹⁵⁴ The Commission had received “a massive number of letters and petitions on the issue expressing citizens’ deep indignation and repulsion” about trade in seal products.¹⁵⁵ Another reason for the proposed legislation was to harmonize the conditions of trade within the EU, in light of the fact that two member states had

¹⁵² European Commission, “Environment: Commission proposes trade ban in products from seals to improve animal welfare” (European Commission: Brussels, 2008), online: http://europa.eu/rapid/press-release_IP-08-1197_en.htm; EC, Proposal for a Regulation of the European Parliament and of the Council concerning trade in seal products COM (2008) 469 final (13 July 2008), online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52008PC0469> [Commission Proposal].

¹⁵³ Commission Proposal, *ibid* at 2.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

legislated to restrict trade in seal products and several others were considering doing so.¹⁵⁶

The Commission Proposal was to permit trade in seal products only if, in the place where the seals were killed and skinned, there were “adequate legislative provisions or other requirements” to ensure that seals were killed and skinned without avoidable suffering.¹⁵⁷ It also required effective enforcement of such local legislative provisions, with an effective mechanism for certifying and monitoring compliance.¹⁵⁸ Annex II of the Proposal specified detailed criteria for determining whether the relevant animal welfare requirements and enforcement mechanisms were adequate, including that animal welfare principles must be “specified in the applicable legislation or other requirements” and that third-party monitoring must be possible with minimum of administrative or logistic impediments.¹⁵⁹

The Proposal recommended this regime for conditional market access because it would allow trade in seal products to take place where there were reasonable assurances that seals were killed and skinned without avoidable suffering, while addressing public concerns about the use of inhumane methods.¹⁶⁰ One other approach that had been discussed – and was part of the survey used in the COWI Report – was to label seal

¹⁵⁶ *Ibid* at 2-3.

¹⁵⁷ *Ibid* at 20-21 (Art 4 of the draft regulation).

¹⁵⁸ *Ibid*.

¹⁵⁹ *Ibid* at 24-25. IFAW released an analysis the same day the Proposal was adopted, in which it concluded that Canadian non-Inuit seal products would not meet these conditions. Sheryl Fink, “Canada’s Commercial Seal Hunt and the Proposal for a Regulation of the European Parliament and the Council Concerning Trade in Seal Products” (International Fund for Animal Welfare Technical Briefing 2008-03, 23 July 2008), online: https://s3.amazonaws.com/ifaw-pantheon/sites/default/files/legacy/2008_Canada%20commercial%20seal%20hunt%20and%20the%20proposal%20for%20a%20regulation%20of%20the%20European%20parliament%20and%20the%20council%20concerning%20trade%20in%20seals%20products.pdf.

¹⁶⁰ Commission Proposal, *ibid* at 4-5.

products so that consumers would be informed about where they came from and could make their own decisions about which sealing industries to support. The Commission Proposal rejected that option. The reason was that it would not give sealing countries enough incentive to improve their legislative protections for seal welfare.¹⁶¹

The Commission Proposal discussed the EU's legislative competence to enact the proposed legislation. The EU has no authority to legislate "in the field of ethics as such," but it does have power to regulate the internal EU market in a way that minimizes internal barriers.¹⁶² Unharmonized rules among the member states are trade barriers, so when members have adopted different rules on something, the EU is competent to bring in Union-wide rules.¹⁶³ This is so even if the matter involves ethical considerations, because ethics are not relied on as the basis of legislative competence.¹⁶⁴

7.5.5 The EU Legislates: A Complete Ban (With Exceptions)

The Commission Proposal tried to strike a balance between animal welfare protection and the sealing industry. The European Parliament and Council of Ministers decided instead to opt for a tougher approach: a complete ban on trade in all seal products. This was the approach adopted in the Seals Regulation of 2009.¹⁶⁵ There are exceptions in the Seals Regulation, but they are not designed to differentiate between products associated with higher or lower levels of animal welfare. Instead, they are exemptions that deal with other considerations and are not directly shaped by the animal

¹⁶¹ *Ibid* at 13.

¹⁶² *Ibid* at 4.

¹⁶³ *Ibid*.

¹⁶⁴ *Ibid*.

¹⁶⁵ *Supra* note 10.

welfare concerns underlying the main prohibition (this feature of the legislation would become a major point of contention in the WTO litigation). The Travel and Marine Management Exceptions are carve-outs for small amounts of seal-derived products and activities that should not make a material difference in the commercial market. The Indigenous Exception is based on an independent objective: to protect traditional Inuit culture and minimize interference in it.¹⁶⁶

The results of the public consultation described in the COWI Report informed the EU's decision to adopt a ban rather than a less strict measure, such as access to the market conditioned on regulatory standards where the seals were hunted, or a labeling scheme. The consultation survey was also referred to by the EU as evidence of public moral concerns about seal hunting, both in the Seals Regulation itself¹⁶⁷ and in the WTO dispute.¹⁶⁸

7.6 EC – Seal Products at the WTO

In November 2009, after the Seals Regulation was passed, Canada started proceedings against the EU in the WTO dispute settlement system.¹⁶⁹ Shortly afterwards, Norway also filed a complaint.¹⁷⁰ The complainants alleged violations of a long list of WTO provisions, but the most important were the MFN and NT rules in GATT and the

¹⁶⁶ See the summary of the exceptions in Section 7.2.3 above.

¹⁶⁷ The preamble of the Seals Regulation (*supra* note 10) refers to “expressions of serious concerns by members of the public” about “the pain, distress, fear and other forms of suffering which the killing and skinning of seals, as they are most frequently performed, cause to those animals.”

¹⁶⁸ *EC – Seal Products* Panel Report, *supra* note 1 at para 7.392.

¹⁶⁹ WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products* (Complainant: Canada) DS400 2 November 2009.

¹⁷⁰ WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products* (Complainant: Norway) DS401 5 November 2009.

TBT Agreement. The core of the complaints was that the exceptions to the ban discriminated against Canadian and Norwegian seal products compared to seal products originating elsewhere, especially those from Greenland that could benefit from the Indigenous Exception.

The WTO panel issued its report on November 25, 2013. The panel decided that some aspects of the Seals Measure – or, to be more precise, some aspects of the exceptions – discriminated against the complainants’ seal products in a way that was not justified under WTO law. To that extent, the *EC-Seals* case at this stage was a technical win for the complainants. But the implication was that the ban could be made WTO-compliant if the exemptions were narrowed, effectively meaning that the ban on trade in seal products would be WTO-legal if the EU made it *stricter*. In substance, the decision favoured the EU, and it was not welcomed by the complainants.¹⁷¹

7.6.1.1 The Seal Hunt and the Significance of Animal Suffering

A significant portion of the panel report is devoted to a careful and detailed analysis of the different kinds of seal hunting for which the EU legislation provides different treatment (that is, commercial hunting, culling for marine management purposes, and Inuit subsistence hunting).¹⁷² The panel reviewed in considerable detail the characteristics of these different types of seal hunt, whether they are different in ways that matter for the legal analysis, and how much pain, suffering and distress they involve for the seals.

¹⁷¹ As noted in Section 6.2.2.2 above, this was also roughly what happened in the *US-Shrimp* case. Although technically the complainants “won,” in that the challenged legislation was found not to comply with WTO law, the outcome did not benefit them.

¹⁷² *EC – Seal Products* Panel Report, *supra* note 1 at paras 7.181-7.245.

One of the noteworthy aspects of the report is how seriously the panel took these matters. The *EC – Seal Products* panel report is the first and, so far, the only place in WTO law (or in the jurisprudence of any international tribunal) where one can find a sustained, hard look at the realities of animal suffering at the hands of humans. That includes an unflinching assessment of evidence of some of the disturbing occurrences in seal hunting, such as the use of hooks and gaffs¹⁷³ to retrieve shot seals while they are still conscious.¹⁷⁴ As the panel observed, “[t]he complainants do not deny, and the evidence before us confirms, that inhumane killing and poor animal welfare outcomes do occur in seal hunts.”¹⁷⁵

During the hearing, the panel considered video evidence of seal suffering in the hunt. In the panel’s decision, the graphic nature of the video evidence is diluted by the objective and measured language of a formal legal ruling. But a blog post written by Robert Howse, a prominent trade law scholar who was at the panel hearing in Geneva, suggests that the experience of watching the video footage would have had considerable emotional impact, too:

The core of the EU's presentation was its video footage of the repeated failure of Canadian sealers to ensure that animals were rapidly made unconscious and thus did not suffer intensely before dying. The video ... is too horrible for me to describe it with greater precision or detail.

¹⁷³ A gaff is a long stick with a sharp hook on the end, used to land large fish (and seals).

¹⁷⁴ *EC – Seal Products* Panel Report, *supra* note 1 at para 7.218 (recognizing that “given the difficulties of assessing the consciousness of the seal and the challenges of re-stunning by firearm, there is a possibility that some seals will be conscious when hooked or gaffed leading to severe negative consequences for animal welfare”).

¹⁷⁵ *Ibid* at para 7.503.

What's abundantly clear is that these are not isolated cases, but a substantial number of seals are left in agony.¹⁷⁶

Howse observed that at the end of the first day of hearings, after seeing the video evidence, the panel chair "cautioned anyone who was in the room against going out and eating meat for dinner" and said that he would be having raclette (a Swiss cheese fondue-type dish).¹⁷⁷ This vignette is a sign of something significant happening in the evolution of animal-protection norms in international law. Animal suffering is not usually spoken of or given serious attention in adjudicative chambers at all, and especially not in international ones. But in this extraordinary moment, one of the inner sanctums of international lawmaking took account of the reality of animal suffering, and of its connection to everyday activities like eating dinner.

Ultimately, the panel decided that that although the risks of animal suffering in the seal hunt could be managed by using optimal methods with trained hunters in the right conditions, as a practical matter both environmental conditions and the profit imperative made it hard to ensure that this would always happen, and also made it hard to monitor hunting properly.¹⁷⁸

7.6.1.2 The TBT Agreement

The panel's legal analysis focused mainly on the TBT Agreement.

¹⁷⁶ Rob Howse, "The Seals Hearings Day One" (18 February, 2013), *International Economic Law and Policy Blog* (blog), online: <https://worldtradelaw.typepad.com/ielpblog/2013/02/the-seals-hearings-day-one.html>.

¹⁷⁷ *Ibid.*

¹⁷⁸ *EC – Seal Products* Panel Report, *supra* note 1 at paras 7.220, 7.245.

7.6.1.2.1 *Definition of Technical Regulation*

The panel first determined that the Seals Measure was a “technical regulation” within the meaning of the TBT Agreement.¹⁷⁹

The definition of a “technical regulation” sets out three requirements. A provision or measure is a technical regulation if: (1) it applies to an identifiable product or group of products, (2) it specifies one or more characteristics of the product or related processes and production methods (or PPMs), and (3) compliance with it is mandatory.¹⁸⁰

The parties only disagreed about the second part of this test: whether the Seals Measure established or (in the language of the TBT Agreement) “laid down,” product characteristics or related PPMs.¹⁸¹ The panel determined that the Seals Measure did lay down product characteristics, by specifying types of products containing seal that were and were not allowed to enter the EU market. Having decided that the Seals Measure laid down product characteristics – which was enough to determine that it was a technical regulation – the panel did not go on to determine whether it also laid down PPMs.

7.6.1.2.2 *Article 2.1*

The panel went on to consider Canada’s claim under Article 2.1 of the TBT Agreement that Indigenous and Marine Management Exceptions failed to accord “treatment no less favourable” to Canadian seal products, as compared to both domestic

¹⁷⁹ *Ibid* at paras 7.84-7.125; *Agreement on Technical Barriers to Trade*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization Annex 1A, 1868 UNTS 120 [TBT Agreement] Annex 1.1. See also the discussion of the scope and requirements of the TBT Agreement in Sections 5.5.2 and 6.2.1.4 above.

¹⁸⁰ TBT Agreement, *ibid*, Annex 1.1. See discussion of the Appellate Body’s expansive approach to the definition of a “technical regulation” in the *US-Tuna III* case, in Section 6.2.1.4.

¹⁸¹ *EC – Seal Products* Panel Report, *supra* note 1 at para 7.86.

third-country (Greenlandic) products. Canada argued that the Seals Measure discriminated against Canadian exports because products from seals culled in Sweden, an EU member state, were covered by the Marine Management Exception¹⁸² and substantially all Greenlandic seal products were covered by the Indigenous Exception, while Canadian products did not fit into these exemptions.

Article 2.1 of the TBT Agreement requires that “products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to *like products* of national origin and to *like products* originating in any other country.”¹⁸³ The complainants argued – and the EU did not contest, for this purpose – that all seal products were “like products,” regardless of whether or not they qualified for the exceptions.¹⁸⁴ The panel agreed that all seal products were “like.” The legislation differentiated between products based on different types of hunts – the purpose, and who is hunting. But these distinctions do not affect the characteristics, uses or tariff classification of the final product. Seal products from all types of hunts are like products.¹⁸⁵

There is a fourth factor (beside physical characteristics, end uses and tariff classification) in the test under WTO law for “likeness,” and that is consumers’ tastes and habits.¹⁸⁶ That is, if consumers see products as different and want to choose between

¹⁸² At the time of the panel hearing, the Marine Management exception was only available with respect to seals culled in Sweden. *Ibid* at para 7.166, para 7.430 n707.

¹⁸³ TBT Agreement, Art 2.1 (emphasis added). See the discussion of the Appellate Body’s application of Article 2.1 to dolphin-safe tuna labeling requirements in Section 6.2.1.4 above.

¹⁸⁴ *EC – Seal Products* Panel Report, *supra* note 1 at para 7.138.

¹⁸⁵ *Ibid* at para 7.139.

¹⁸⁶ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (2001), WT/DS135/AB/R (Appellate Body Report) at para 101.

them, that can be a factor indicating that they are not “like” or substitutable. The complainants presented evidence that people who buy seal products do not differentiate between them based on the way the seals were hunted.¹⁸⁷ The EU did not contest that evidence.

This is potentially an important point, although not much turned on it in this particular dispute. The “like products” analysis does *not* preclude the possibility that differences in the animal welfare effects of the way products are produced could ground a finding that they are not like products if there is evidence that consumers do differentiate between the products on that basis. If two categories of products – hypothetically, a category produced with high animal welfare standards versus one produced with low animal welfare standards – are not “like products,” then regulating them differently is much less likely to raise issues under WTO law.

The next step in the analysis, after deciding that the products at issue were “like products,” was to look at whether the complainants’ products had been given discriminatory treatment. The test here is whether the measure being challenged modifies the conditions of competition in the marketplace to the detriment of the complainants’ products. The EU argued that for this test, the panel should compare only between the different groups of products categorized by the Seals Measure. As the EU argued, the conditions of competition for all products that conformed to the Indigenous Exception were the same, regardless of where the products came from. Similarly, all products that qualified under the Marine Management Exception were treated the same, regardless of

¹⁸⁷ *EC – Seal Products*, *supra* note 1 at para 7.139.

origin, and all products that did not fit into an exception were treated the same, regardless of origin.¹⁸⁸ That, the EU said, was not discrimination.

The panel disagreed with that position. It said that the right approach was to compare Canada's seal products (conforming or not) to the entire category of domestic seal products and to the entire category of Greenlandic seal products.¹⁸⁹ Accordingly, it was all but a foregone conclusion that the exceptions were found to discriminate against Canada. EU products that met the Marine Management Exception were given an advantage compared to Canadian products, since Canadian products did not meet the Marine Management Exception. Similarly, Greenlandic products qualifying for the Indigenous Exception had an advantage over Canadian products that did not fit into that exception.

As discussed in Chapter Six in the analysis of the *US-Tuna III* (dolphin-safe tuna labeling) case, the WTO has read in an implicit policy exception in Article 2.1 of the TBT Agreement.¹⁹⁰ Discrimination that creates detrimental impact is permissible if it stems exclusively from a legitimate regulatory distinction that is designed and applied in an even-handed manner.¹⁹¹

The panel determined that the distinction between commercial and traditional Indigenous seal hunting created by the Indigenous Exception *was* legitimate, because of the different purposes of the two kinds of seal hunting. The purpose of hunts that met the

¹⁸⁸ *Ibid* at paras 7.149-7.151.

¹⁸⁹ *Ibid* at para 7.154.

¹⁹⁰ See discussion in Section 6.2.1.4 above.

¹⁹¹ *Ibid* at paras 7.171-7.172. See the discussion of this analysis as applied to the dolphin-safe tuna labeling scheme in Section 6.2.1.4 above.

criteria under the exception was “to preserve the tradition and culture of Inuit and to sustain their livelihood,” this was distinguishable from the purpose of commercial hunts, and the distinction justified the regulatory discrimination between the two kinds of products.¹⁹²

But the distinction was not designed and applied in an even-handed way. Greenlandic Inuit were the only Inuit community that had applied for and received the exemption for their products.¹⁹³ This was despite the fact that the Greenlandic hunt was, if anything, more similar to commercial sealing than was the case for other Inuit communities, including those in Canada.¹⁹⁴ The panel considered that this appeared not to be “merely an incidental effect of the application” of the Indigenous Exception.¹⁹⁵ When the exception was crafted, European legislators expected that only Greenlandic Inuit, who had essentially their own stand-alone industry, would be able to take advantage of it.¹⁹⁶ For Canadian Inuit, processing and distribution networks were inextricably integrated with those used by non-Inuit hunters. It was not feasible for Canadian Inuit to get access for their products under the Indigenous Exception when commercial Canadian products were banned.

In short, the panel found that the exception was “available *de facto* exclusively to Greenland, where the Inuit hunt bears the greatest similarities to the commercial

¹⁹² *Ibid* at para 7.300.

¹⁹³ *Ibid* at para 7.306.

¹⁹⁴ *Ibid* at paras 7.304, 7.309.

¹⁹⁵ *Ibid* at para 7.315.

¹⁹⁶ *Ibid*.

characteristics of commercial hunts.”¹⁹⁷ This aspect of the design of the exception was arbitrary, and disconnected from its legitimate purpose.

The panel found that the Marine Management Exception did not even make it past the first part of the test: it did not stem exclusively from a legitimate regulatory distinction.¹⁹⁸ Culls for marine management purposes involved the same risks of animal suffering as commercial hunts, and there and no separate justificatory purpose for this exception as there was for the Indigenous Exception.

7.6.1.2.3 Article 2.2

Both Canada and Norway argued that the Seals Measure violated Article 2.2 of the TBT Agreement. Under Article 2.2 of the TBT Agreement, a technical regulation must not be “more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.”¹⁹⁹ The complainants argued that the Seals Measure was not connected enough to its objective of protecting animal welfare, and that EU could have designed a law with a less severe impact on trade.

Under Article 2.2 of the TBT Agreement, 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.”²⁰⁰ Unlike GATT Article XX, Article 2.2 of the TBT Agreement does not include an express public morals exception. But the legitimate objectives are an open-ended list that (implicitly) does

¹⁹⁷ *Ibid* at para 7.317.

¹⁹⁸ *Ibid* at para 7.347.

¹⁹⁹ TBT Agreement, *supra* note 179, Art 2.2. See the summary of the TBT Agreement in Section 5.5.2 above, and the discussion of the application of this provision to the dolphin-safe tuna labelling scheme in *US-Tuna III*, in Section 6.2.1.4 above.

²⁰⁰ TBT Agreement, *ibid*.

include public morality.²⁰¹ The objective of addressing EU public moral concerns about animal welfare was, therefore, a legitimate objective.

The panel found that the Seals Measure was adopted to further a goal connected to public morality: standards of right and wrong conduct concerning seal welfare.²⁰²

Even though the exceptions allowed marketing of some seal products without any conditions related to animal welfare (which undermined the overall objective),²⁰³ the panel determined that the Seals Measure did contribute to the objective of addressing concerns over animal welfare.²⁰⁴ Appellate Body precedent had recognized the right of WTO members to determine for themselves what constitutes “public morals” in their own societies.²⁰⁵ The panel was persuaded that “animal welfare is an issue of ethical or moral nature in the European Union.”²⁰⁶ It was in this connection that the panel also acknowledged the growing presence of global norms concerning animal protection:

International doctrines and measures of a similar nature in other WTO members, while not necessarily relevant to identifying the European Union’s chosen objective, illustrate that animal welfare is a matter of ethical responsibility for human beings in general.²⁰⁷

The complainants argued that the Seals Measure did not meet the test of being “necessary” because a less trade-restrictive alternative could have been used. Rather than a ban, the EU could have granted seal products access to its market “conditioned on

²⁰¹ *EC – Seal Products* Panel Report, *supra* note 1 at paras 7.382, 7.418.

²⁰² *Ibid* at para 7.408.

²⁰³ *Ibid* at para 7.455.

²⁰⁴ *Ibid* at para 7.460.

²⁰⁵ *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (2005), WT/DS285/AB/R (Appellate Body Report).

EC – Seal Products Panel Report, *supra* note 1 at para 7.460.

²⁰⁷ *Ibid*.

compliance with animal welfare standards combined with certification and labeling requirements”²⁰⁸ – an approach that would be to some extent similar to the 2008 Commission Proposal.²⁰⁹ But the panel acknowledged the practical challenges and costs of identifying which products should be excluded, and concluded that it would not be reasonable to require the EU to choose this option over a ban.

7.6.1.3 GATT

The complainants also presented claims that the Seals Measure discriminated against them in contravention of Articles I and III of GATT. The panel’s analysis under GATT is relatively short. As the panel observed, recent WTO jurisprudence indicates that the obligations under GATT and the TBT Agreement should be interpreted as harmonious and consistent.²¹⁰ The legal analysis under GATT, therefore, covered much of the same ground that had already been covered under the TBT Agreement, and covered it briefly.

With respect to discrimination, the panel determined that the Seals Measure did discriminate against Norwegian and Canadian products by modifying the conditions of competition to their detriment, for substantially the same reasons that it found discrimination under Article 2.1 of GATT.²¹¹ There was therefore a *prima facie* violation of Articles I:1 (MFN) and III:4 (NT) of GATT.

²⁰⁸ *Ibid* at para 7.467.

²⁰⁹ *Ibid* at para 7.498; see discussion of the Commission Proposal in Section 7.5.4 above.

²¹⁰ *Ibid* at paras 7.582-7.586.

²¹¹ *Ibid* at paras 7.588-7.609.

Turning to the justification of the Seals Measure under GATT Article XX(a), the panel considered whether the legislation was “necessary to protect public morals” and whether it met the requirements of the Article XX chapeau.²¹²

Canada argued that the Seals Measure did not even come within the scope of public morals under Article XX(a), saying that it did not reflect a rule of moral conduct “applied generally throughout the community or society and broadly accepted within the community.”²¹³ Canada said that, in particular, the distinction drawn in the Seals Measure between commercial and non-commercial seal hunts did not reflect a pervasive standard of moral conduct in the EU.²¹⁴

This was an unusual move by Canada. In previous WTO cases concerning the policy exception for public morality, complainants had not challenged whether the measures in question came within the category of public morals at all. Rather, their arguments focused on whether moral distinctions were “applied in an impermissibly arbitrary way.”²¹⁵ *EC – Seal Products* was the first case in which complainants insinuated that “the measure was motivated by reasons that should not qualify as moral at all.”²¹⁶ Canada’s position “test[ed] the boundaries of the public morals exception.”²¹⁷

²¹² The EU also argued that the Seals Measure was justified under Article XX(b) (animal life and health). This argument was not dealt with at length in the panel report. The panel determined that the EU had not made a *prima facie* case for justification under Article XX(b). The Appellate Body made no determination on this point (see *EC – Seal Products* Appellate Body Report, *supra* note 1 at para 6.1(e)).

²¹³ *EC – Seal Products*, *supra* note 1 at para 7.627.

²¹⁴ *Ibid.*

²¹⁵ Howse, Langille & Sykes, *supra* note 8 at 84.

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

Although this argument did not persuade the panel, it is important that it even *was* an argument. Canada’s questioning of the EU’s *bona fides* in invoking public morality as a justification reflects the broader normative struggle in this case over the coherence and consistency of the Seals Measure, where balancing competing moral objectives or policy goals crosses over into hypocrisy, and, ultimately, whether the protection of animals has a place in the class of “public morals” and legitimate policy objectives at all.

The panel’s conclusion on this point was that it did. For essentially the same reasons that the panel went over in the TBT Agreement Article 2.2 analysis, it decided that the Seals Measure was indeed necessary to further an objective based in public morality. In this connection the panel indicated that a very trade restrictive measure such as a ban (which the Seals Measure was) would have to meet a threshold requirement of contribution to its objective, making at least a “material” contribution, to meet the necessity test.²¹⁸ (The panel determined that the Seals Measure did make a material contribution, by reducing the volume of trade in seal products.) As discussed in Section 7.6.2.2 below, the Appellate Body overruled the panel on this point.

Having determined that the Seals Measure passed the first step in the test for justification under Article XX, the panel then went on to look at its consistency with the requirements of the Article XX chapeau. Here, the Seals Measure fell short. In its analysis under Article 2.1 of the TBT Agreement, the panel had found that the distinctions between products that met the Indigenous and Marine Management Exceptions were not connected to the measure’s animal welfare objective or applied in an

²¹⁸ *EC – Seal Products*, *supra* note 1 at para 7.636.

even-handed manner. This amounted to “arbitrary or unjustifiable discrimination” under the chapeau, and so the Seals Measure was not justified under Article XX.²¹⁹

7.6.1.4 The Travel Exception

The Travel Exception played a very minor role in the panel decision. The complainants argued that the Seals Measure, including the Travel Exception, imposed quantitative restrictions on trade in violation of Article XI of GATT, and did not present any other specific claims on this particular exception.²²⁰ The panel did not agree that the Travel Exception constituted an import restriction; rather, it was a derogation from the general ban on seal products, which was analyzed as a discriminatory measure under GATT Articles I and III rather than a restriction on imports under Article XI. Given the limited scope and minimal practical effect of the Travel Exception, it was not an important aspect of the case.

7.6.2 Appellate Body Report

Canada, Norway and the EU all appealed aspects of the panel decision to the WTO Appellate Body. The Appellate Body’s report was released on May 22, 2014.

The Appellate Body made some important changes to the panel’s doctrinal analysis, overruling it on a number of legal points. But the overall substance of the Appellate Body’s decision was very similar to that of the panel. The Seals Measure did violate WTO law – once again, a technical victory for the complainants – but the compliance problem lay in the arbitrary operation of the exceptions, most importantly the

²¹⁹ *Ibid* at paras 7.644-7.651.

²²⁰ *Ibid* at para 7.662.

Indigenous Exceptions. The ban itself could coexist with WTO obligations, and the design of the whole scheme could be adjusted so as to comply. Importantly, the adjustments needed could be in the direction of stronger protection for animal welfare.

Most importantly from the point of view of the development of animal protection norms in WTO law and international law, the Appellate Body confirmed the place of animal welfare as a recognized value in WTO law and a legitimate basis for WTO members to exercise their right to regulate.

7.6.2.1 The TBT Agreement

The Appellate Body overruled the panel’s determination that the Seals Measure was a technical regulation because it specified required characteristics of the products in question.

The Appellate Body emphasized that the assessment of whether a measure is a “technical regulation” must be done based on a holistic consideration of the nature of the measure, especially of its “‘integral and essential’ aspects.”²²¹

The Appellate Body did not quite put it this way, but its approach guides decision-makers to look at a challenged measure overall, and ask whether in its essence it is really the kind of thing that was meant to be included in the category “technical regulation.” On that approach, the Seals Measure does not look very much like what one would ordinarily think of as a technical regulation. It is a ban. It has some exceptions

²²¹ *EC – Seal Products* Appellate Body Report, *supra* note 1 at para 5.19, citing *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (2012), WT/DS381/AB/R (Appellate Body Report), and para 5.29.

with conditions, but so do many prohibitions in law. If the Seals Measure is a technical regulation, then so are a lot of other legal provisions that we would not intuitively put in that category.

The Appellate Body disagreed with the panel's conclusion that the Seals Measure laid down rules concerning product characteristics with which compliance was mandatory.²²² The Appellate Body observed that the requirements the Seals Measure sets out for products to qualify for exemption from the ban – the kind of hunt involved, the identity of the hunter, and the purpose of the hunt, are *not* characteristics of the final product.²²³ If anything, they are aspects of the way the product was produced.

EC – Seal Products is the first case under the TBT Agreement to rein in the scope of the definition of a technical regulation. The category had been expanding steadily under interpretations applied in the prior TBT cases. The move in *EC-Seals* to stop the expansion could be important for the future of animal welfare and animal protection rules in the WTO context. Previous chapters have touched on the importance of the TBT Agreement for the trade-animal relationship: because this agreement covers such things as rules that require informing consumers about the treatment of animals in the production process, and because it creates cumulative obligations over and above the GATT disciplines, it could be an added constraint on the ability of WTO members to regulate for animal protection.²²⁴ So, provisionally at least, it is an encouraging

²²² *Ibid* at para 5.20.

²²³ *Ibid* at para 5.45.

²²⁴ See Sections 5.4.1 and 6.2.1 above.

development that the scope of the TBT Agreement has not continued to expand unchecked.

On the other hand, the Appellate Body's decision on this point is narrow, and it leaves an important question open. The panel had only determined that the Seals Measure was a technical regulation because it "laid down product characteristics." The definition of a technical regulation has two parts: a measure can be a technical regulation if it lays down product characteristics *or their related processes and production methods*. The panel had found it unnecessary to decide whether the Seals Measure met the second part of the test (processes and production methods). The Appellate Body declined to rule on this point in the absence of any analysis by the panel.²²⁵ It remains possible, therefore, that a complex set of rules and exceptions like the Seals Measure could be found to be a "technical regulation" on the basis that it lays down processes and production methods with which compliance is mandatory.²²⁶

Because the Appellate Body reversed the panel on whether the Seals Measure was a technical regulation, the panel's conclusions about its compliance with the TBT Agreement are of no force or effect.²²⁷ But the reasoning that supported those conclusions, including the panel's recognition of animal welfare as an important moral and ethical principle, was not overruled, and it remains instructive.

²²⁵ *EC – Seal Products* Appellate Body Report, *supra* note 1 at paras 5.61-5.69.

²²⁶ See discussion in Howse, Langille & Sykes, *supra* note 8 at 142-143.

²²⁷ *EC – Seal Products* Appellate Body Report, *supra* note 1 at para 6.1.

7.6.2.2 GATT: Discrimination and Article XX(a)

The Appellate Body agreed with the panel that the non-discrimination analysis under GATT is very similar to Article 2.1 of the TBT Agreement, and that the Seals Measure *de facto* discriminated against Canada and Norway because of the disproportionately detrimental effect on their products of the ban coupled with the exceptions.²²⁸

Canada argued that the panel had been wrong to conclude “that there was a risk to the public morals of the European Union regarding animal welfare that is unique to seals.”²²⁹ As the Appellate Body observed, this amounts to questioning whether the Seals Measure actually was adopted to protect public morals at all.²³⁰ Canada essentially accused the EU of moral incoherency or hypocrisy, for invoking moral concerns about animal suffering in seal hunting while at the same time tolerating animal suffering when other animals were hunted, or commercially slaughtered.²³¹

It is true that European laws on animal protection reflect complicated compromises between animal welfare and human interests in using animals. But there is a lot of evidence of a genuine, pervasive ethical commitment to animal protection in Europe.²³² There is more, and stronger, animal protection law than exists probably anywhere else in the world. European institutions are committed to improving animal welfare, and they invest in it. There is consistent public opinion data indicating that

²²⁸ *Ibid* at paras 5.96, 5.130.

²²⁹ *Ibid* at para 5.171.

²³⁰ *Ibid*.

²³¹ *Ibid* at para 5.194.

²³² As the panel recognized in its analysis of the legitimacy of the EU’s legislative objective. See *EC – Seal Products* Panel Report, *supra* note 1 at paras 7.386-7.421.

animal welfare is a matter of concern to European citizens. In this context, it is not inherently hypocritical to address a particular type of animal suffering in a specific way, even if there are inconsistencies in the ways that different ways of using animals are regulated.

The Appellate Body recognized this, pointing out that the concept of “public morals” is not a scientific or precise concept, but has to do with standards of right and wrong in a particular society. WTO members have the right to determine for themselves how strictly they want to protect against a moral ill and if they want to deal with moral concerns differently, even if the concerns are similar.²³³

Canada and Norway both argued that the necessity test under Article XX was not met because the Seals Measure did not make a material contribution to its objective.²³⁴ On this question, the Appellate Body corrected the panel’s analysis. The Appellate Body underscored that there is no “pre-determined threshold of contribution” of materiality, or any other threshold requirement, that has to be met to satisfy the requirement necessity in Article XX(a).²³⁵ Rather, necessity always involves a process of weighing and balancing factors including the importance of the measure’s objective, how much it contributes to the objective, and how trade restrictive it is.²³⁶

The Appellate Body upheld the panel’s determination that the Seals Measure contributed to its objective, and that the EU was entitled to choose this way over an

²³³ *EC – Seal Products* Appellate Body Report, *supra* note 1 at para 5.200.

²³⁴ *Ibid* at para 5.172.

²³⁵ *Ibid* at para 5.213.

²³⁶ *Ibid* at para 5.214.

alternative, less-trade-restrictive approach like a certification and labeling scheme. The Seals Measure was therefore provisionally justified under GATT.²³⁷

7.6.2.3 The Chapeau

The chapeau of Article XX requires that a measure must not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. The Appellate Body agreed with the panel that the Seals Measure did not meet this requirement. The application of the Seals Measure – in particular the *de facto* exclusive availability of the Indigenous Exception to Greenlandic Inuit products – was arbitrary or unjustifiable.²³⁸

The Appellate Body’s route to this conclusion, however, was by way of a different legal analysis to that of the panel. The panel had more or less transposed its reasoning from the “even-handedness” requirement under Article 2.1 of the TBT Agreement to the chapeau analysis. The Appellate Body determined that there were important textual and legal differences between the two inquiries, and that the panel had erred in applying the same test in both contexts.²³⁹ It went on to “complete the analysis,” in the parlance of WTO law – that is, to proceed to its own *de novo* examination of whether the Article XX chapeau requirements were met.

There were three reasons for the Appellate Body’s finding of arbitrary or unjustifiable discrimination. First, treating Inuit seal products differently under the

²³⁷ *Ibid* at para 5.290.

²³⁸ *Ibid* at para 5.338.

²³⁹ *Ibid* at paras 5.307-5.314.

Indigenous Exception, which had no eligibility requirements related to inhumane killing or skinning methods, could not be reconciled with the objective of reflecting moral concerns about seal welfare.²⁴⁰

Second, the requirements under the Indigenous exception that eligible seal products had to come from hunts that contributed to the subsistence of the Inuit community, and of which the products were at least partly used, consumed or processed within the community according to its traditions, were ambiguous. They left too much discretion to certifying bodies to determine whether they were met.²⁴¹ This vagueness left it open to authorities to allow in seal products from hunts that should really be defined as commercial hunts, under an exception that was supposed to be for non-commercial Indigenous subsistence hunting. In this connection, the Appellate Body referred to the concern identified in *US-Shrimp*: exporting countries could not know with clarity what was expected of them to qualify for entry into the US market.²⁴² That problem contributed to a finding of arbitrary or unjustifiable discrimination in *US-Shrimp*, and it also did in *EC – Seal Products*.

Third, the EU had not shown that it had made sufficient efforts to enable Canadian Inuit to access the European market via the Indigenous exception on a fair and equal footing with the Greenlandic Inuit sealing industry.²⁴³ The EU argued that this was not its fault, but Canada's fault. Canada had not designated a local entity qualified as a

²⁴⁰ *Ibid* at para 5.338.

²⁴¹ *Ibid* at paras 5.338, 5.322-5.328.

²⁴² *Ibid* at paras 5.327-5.328, citing *United States – Import of Certain Shrimp and Shrimp Products* (Appellate Body report), WT/DS58/AB/R, 12 October 1998 [*US-Shrimp*]. See the discussion of *US-Shrimp* and the chapeau analysis in that case in Section 6.2.2.2 above.

²⁴³ *Ibid* at paras 5.329-5.338.

“recognized body” that could sign off on the conformity of seal products with the criteria of the Indigenous Exception, and so Canada had chosen not to do what it needed to do to avail itself of the exception.

The Appellate Body acknowledged that if this had been entirely a matter of private choice – Canadian Inuit sealers simply refusing to participate in the program – it would not be discrimination by the EU.²⁴⁴ But the Indigenous Exception seemed to be purpose-built for Greenland’s Inuit sealers and for “recognized bodies” in that community. The Appellate Body was of the view that “the European Union [had] not pursued cooperative arrangements to facilitate the access of Canadian Inuit to the [Indigenous] exception.”²⁴⁵ Again, this situation was similar to the problem in *US-Shrimp*, where the US had worked out a cooperative, multilateral approach to sea turtle conservation with some trading partners (not including the complainants), but had not made appropriate efforts to negotiate a comparable arrangement with the complainants.²⁴⁶

7.7 Amendments to the Seals Measure After the WTO

Report

After the Appellate Body’s decision, the EU made changes to the Seals Measure to bring it into compliance with WTO law by addressing the problems identified in the panel and Appellate Body reports.

²⁴⁴ *Ibid* at para 5.336.

²⁴⁵ *Ibid* at para 5.337.

²⁴⁶ See discussion in Section 6.2.2.2 above.

In 2014, Canada signed a joint statement with the EU setting out a framework for cooperation that would allow Canadian Indigenous sealers access to EU markets under the Indigenous Exception.²⁴⁷ The two sides pledged to work together to establish the necessary administrative arrangements, including an attestation system no less favourable to Canadian Inuit than the system in place for Greenland.

In 2015, the EU passed the Amended Seals Regulation, which repealed the Original Implementing Regulation.²⁴⁸ The Amended Seals Regulation adds a new animal welfare requirement to the Indigenous Exception. Eligible hunts must be “conducted in a manner which has due regard to animal welfare, taking into consideration the way of life of the community and the subsistence purpose of the hunt.”²⁴⁹ The Marine Management Exception has been abolished completely, but an exemption for non-commercial, occasional imports of seal products for the personal use of travellers and their families remains. The New Implementing Regulation, also adopted in 2015, sets out amended rules for recognition of entities empowered to certify compliance with the conditions of the exemption, and for the process of attestation.²⁵⁰

If Canada and Norway had considered the Seals Measure as amended to still be out of compliance with WTO obligations, they could have pursued compliance proceedings.²⁵¹ They did not do so, and the deadline for further proceedings is long past.

²⁴⁷ European Commission, *Commission Decision on the Joint Statement by Canada and the European Union on Access to the European Union of Seal Products from Indigenous Communities of Canada*, C(2014) 5881 final (August 18, 2014), Annex 1, online: http://eeas.europa.eu/archives/docs/canada/docs/joint_statement_c_2014_5881_f1_annex_en.pdf.

²⁴⁸ *Supra* note 15.

²⁴⁹ *Ibid.*, Art 3(1)(c).

²⁵⁰ *Supra* note 16.

²⁵¹ See discussion of compliance proceedings in Sections 6.1.2.4 and 6.2.2.3 above.

It is therefore a reasonable conclusion that the complainants may have judged further litigation to be unlikely to yield more favourable results, or to have reluctantly accepted the modified regime as being within the EU's right to regulate under WTO law.

7.8 Inuit Sealing and the Indigenous Exception as “Strategy of Avoidance”

The biggest problem with the Seals Measure from the point of view of WTO compliance was the Indigenous Exception. When the EU decided to ban seal products, but at the same time to pay due recognition to the cultural significance of traditional hunting in Inuit communities, it took on a challenging task. The solution it chose was to exempt Greenland's Inuit hunt more or less completely, without anything in the rules to address whether the Inuit hunt also caused avoidable or unacceptable animal suffering. This strategy is an example of what Will Kymlicka and Sue Donaldson identify as the “strategy of avoidance” of the conflict between animal rights and Indigenous rights.²⁵² By this, they mean simply not applying animal rights or animal protection principles to Indigenous animal-use practices, drawing a line around those practices and treating them as not up for scrutiny or discussion.²⁵³

This is a common strategy, and an understandable one, when dealing with one of the most difficult problems in the development of animal-protection norms. Criticizing Indigenous practices for exploiting animals or causing animal suffering is a very sensitive matter, which can provoke accusation of cultural insensitivity or even racism, and it often

²⁵² Kymlicka & Donaldson, *supra* note 9.

²⁵³ *Ibid* at 169.

fails to get to productive dialogue.²⁵⁴ People who want to protect animals often do also want to respect Indigenous rights and traditions. Placing Indigenous practices off-limits for criticism or regulation can be an attractive solution²⁵⁵ but, as Kymlicka and Donaldson argue, it is “ultimately unstable.”²⁵⁶ The Appellate Body’s ruling in *EC – Seal Products* illustrates some of the problems that make it unstable: it introduces a moral and justificatory incoherence that is not compatible with the nature of legitimate and normatively well-grounded law.

The effect of the EU Seals Measure on Inuit sealers has been one of the most controversial aspects of this initiative. Inuit leaders strongly opposed the ban, denouncing it as colonialist and hypocritical,²⁵⁷ “insulting and culturally arrogant.”²⁵⁸ Some legal scholars have criticized it in similar terms; Elizabeth Whitsitt, for example, describes the Seals Measure as an instance of “moral imperialism ... whereby the dominant EU culture defines and imposes its morality onto foreign indigenous communities without meaningful consideration of their interests and in the face of effectively destroying their ability to benefit from traditional and cultural seal hunting practices.”²⁵⁹

²⁵⁴ *Ibid.*

²⁵⁵ Kymlicka and Donaldson go over some of the reasons that the strategy of avoidance may be adopted or acquiesced in: the necessity of some animal-use practices for Indigenous peoples, the fact that Indigenous practices account for an extremely small proportion of the total number of animals harmed and killed, treaty rights, self-determination rights, respect for cultural identity, and the desire to avoid being complicit with cultural imperialism or racism. See *ibid* at 170-171.

²⁵⁶ *Ibid* at 172.

²⁵⁷ Selheim, *supra* note 83 at 281.

²⁵⁸ Perišin, *supra* note 8 at 394.

²⁵⁹ Elizabeth Whitsitt, “A Comment on the Public Morals Exception in International Trade and the *EC – Seal Products* Case: Moral Imperialism and Other Concerns” (2014) 3 Cambridge J Int’l & Comp L 1376 at 1380.

The world's two largest seal hunts are in Canada and Greenland, and the main populations of Indigenous peoples involved in sealing are the Inuit of those two countries. Sealing is an "integral [part] of the way of life of Inuit communities in the Arctic," due to the importance of seal meat in the traditional diet, the supplemental income that sealing generates, and the importance of passing down hunting knowledge from one generation to the next.²⁶⁰

Because the Indigenous Exception as originally formulated seemed to be almost tailor-made for Greenland, and given the special relationship between Greenland and Denmark (an EU member state), some observers have questioned the *bona fides* of the EU in creating this carve-out from the general ban on seal products. Pietros Mavroidis, for example, expresses "doubt as to whether the EU was genuinely pursuing protection of public morals," suggesting that "[t]he likelier scenario is that the EU lawmakers were torn between those arguing for similar protection, and those caring more for the economic impact the measure would have on the Greenland Inuit community."²⁶¹ Mavroidis proposes that the problem could have been solved by budgeting for increased subsidies to the Greenland Inuit to make up for the loss of the seal trade.

But this is an oversimplification. The meaning of seal hunting to Inuit communities is more than merely economic, and the EU's compromise does appear to reflect more than mere political expediency. It was the outcome of a genuine struggle to reconcile competing values. The same values are also reflected in earlier European

²⁶⁰ Dorothee Cambou, "The Impact of the Ban on Seal Products on the Rights of Indigenous Peoples: A European Issue" (2013) 5 Y B Polar L 389 at 390.

²⁶¹ Mavroidis, *supra* note 8 at 389.

action on sealing. The 1983 Seal Pups Directive distinguished between commercial hunting and traditional hunting “with due respect for the balance of nature,” noting that “hunting, as traditionally practised by the Inuit people, leaves seal pups unharmed,” and applied only to seal products “not resulting from traditional hunting by the Inuit people.”²⁶²

Similarly, in 2006, when the European Parliament called on the European Commission to immediately draft a regulation to ban the import, export and sale of all harp and hooded seal products, it specified that “this regulation should not have an impact on traditional Inuit seal hunting which, however, only accounts for 3% of the current hunt.”²⁶³ Following that direction, the Seals Measure that the Commission adopted includes the Indigenous Exception as a mechanism to allow products of traditional Inuit hunting continued access to the EU market. The web page that explains EU policy on trade in seal products states that there is an exemption for Inuit seal products because “[t]he seal hunt is part of the socio-economy, culture and identity of the Inuit and other indigenous communities and it contributes greatly to their subsistence and development.”²⁶⁴

Among the EU’s objections to commercial sealing are the destructiveness of hunting on a large scale, and the association of commercial hunting with unnecessary

²⁶² Seal Pups Directive, *supra* note 97, preamble and Art 3.

²⁶³ Declaration, *supra* note 129. The COWI Report notes that the 3% figure comes from an estimate of the total number of harp seals hunted in Canada in one year that came from the Canadian Arctic, and is almost certainly an underestimate of the percentage of products of Inuit hunting that make up the total worldwide seal hunt of all species (including Greenlandic hunting, for example, Inuit hunts may account for 20% of the total harp seal hunt). COWI Report, *supra* note 77 at 11.

²⁶⁴ European Union, “Trade in Seal Products,” online:
http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/seal_hunting.htm.

luxury products. From the EU's point of view, traditional Inuit hunting does not engage these concerns – or, at least, does not engage them to the same extent as commercial hunting. Inuit hunting is, generally speaking, small in scale and closely linked to tradition and community. Seals are hunted for food, to generate subsistence income, and to keep traditional cultural practices alive, rather than simply for profit.²⁶⁵ Tradition, culture, community cohesion, and the transition of knowledge from one generation to the next are at least as important as exploiting a resource for financial return.

Sealers in the coastal communities of Eastern Canada and Norway might well argue that this description actually does fit their activities (which in the EU taxonomy would be defined as commercial). In general, all sealing communities consider the hunt to have cultural and social as well as economic importance. Selheim argues that hunting by seal hunters in two Newfoundland communities chosen as examples fits the criteria for the Indigenous Exception, and that it exhibits the characteristics that are the rationale for the exemption – apart from the fact that the hunters are of European origin. There is a long historical tradition of sealing, a community with a distinct identity, a continuation of the hunting tradition across generations, the products are used in a traditional and community-based way, and seal hunting contributes to subsistence.²⁶⁶

But in the case of Indigenous hunting, there is an additional consideration: the unique status of Indigenous peoples under international law. The United Nations

²⁶⁵ As Cambou argues, separating profit from these other purposes is also not always straightforward, because “the combination of subsistence and commercial activities provides the economic basis for the indigenous lifestyle,” and cash generated by commercially exploiting the products of hunting may be needed in order to buy equipment for continued hunting. Cambou, *supra* note 260 at 396-397. See also Selheim, “Goals,” *supra* note 83 at 280-281, on the interdependence of subsistence and market or commercial economies.

²⁶⁶ Selheim, *supra* note 83 at 281-282.

Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the UN in 2007.²⁶⁷ It acknowledges (*inter alia*) the right of Indigenous peoples not to be subjected to destruction of their culture,²⁶⁸ the right to practice and revitalize cultural traditions and customs,²⁶⁹ the right to be secure in the enjoyment of their means of subsistence and to engage freely in traditional and other economic activities,²⁷⁰ and the right to maintain, control, protect and develop their cultural heritage (including “knowledge of the properties of flora and fauna”).²⁷¹

With the adoption of the UNDRIP, the recognition of rights to self-determination in other international human rights instruments, and developing jurisprudence on Indigenous rights in domestic and regional law, the rights of Indigenous peoples “have crystalized as a specific issue within the framework of international law.”²⁷² The preamble of the Seals Regulation connects the Indigenous Exception to the protection of Inuit seal hunting under international law, noting that “[t]he hunt is an integral part of the culture and identity of the members of the Inuit society, and as such is recognised by the United Nations Declaration on the Rights of Indigenous Peoples.”²⁷³

Further, there is an argument that what makes Inuit hunting distinct is not simply the material features of the hunt (the scale of the hunt, how the products are used, how much money is made) but, at a much deeper level, the worldview and the conception of

²⁶⁷ *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, 61st Sess, UN Doc A/61/L.67 (2007).

²⁶⁸ *Ibid*, Art 8.

²⁶⁹ *Ibid*, Art 11.

²⁷⁰ *Ibid*, Art 20.

²⁷¹ *Ibid*, Art 31.

²⁷² Cambou, *supra* note 260 at 398.

²⁷³ Seals Regulation, *supra* note 10.

human-animal relationships on which Indigenous hunting traditions are based. Constance MacIntosh proposes that within Indigenous ontologies, hunting takes place in a context of ongoing relationships of reciprocal rights and responsibilities, in which animals are empowered, volitional participants – by contrast to a European view of hunting as an instrumental activity that uses animals as a material resource.²⁷⁴ Kymlicka and Donaldson argue that “the idea that animals are property to be used instrumentally is foreign to Indigenous cultures” and that Indigenous peoples regard animals as “selves and subjects, worthy of intrinsic respect, who are agents capable of co-authoring human-animal relations.”²⁷⁵

The Indigenous Exception manifests an intention to place Indigenous hunting, as a cultural practice with a special moral and internationally protected status, completely outside the scope of the animal welfare concerns that animate the Seals Measure. This is an example of what Kymlicka and Donaldson call the “strategy of avoidance,” concerning Indigenous treatment of animals, which they explain as follows:

If the application of AR [animal rights] principles to Aboriginal practices generates charges of racism and misunderstanding, and if respectful dialogue seems impossible, then a way out of the predicament is simply not to apply AR principles to Aboriginal practices. This is a common strategy amongst AR activists, not only in Canada, but around the world. Implicitly or explicitly, AR activists have supported, or at least acquiesced in, the idea of an Aboriginal exemption.²⁷⁶

²⁷⁴ Constance MacIntosh, “Indigenous Rights and Relations with Animals: Seeing Beyond Canadian Law” in Peter Sankoff, Vaughan Black & Katie Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin, 2015) 187 at 188-189.

²⁷⁵ Kymlicka & Donaldson, *supra* note 252 at 165-166.

²⁷⁶ *Ibid* at 169.

The carve-out for Indigenous sealing is one of the examples of this “strategy of avoidance” that Kymlicka and Donaldson point to, along with the exemption for Aboriginal subsistence whaling from the International Whaling Commission’s moratorium on commercial whaling.²⁷⁷

Kymlicka and Donaldson argue that, while there may be good reasons for adopting the strategy of avoidance, there are serious problems with it.²⁷⁸ The avoidance strategy precludes a “deeper discussion” that could find common ground on animal protection:

The avoidance strategy ... does nothing to explain why these practices might be ethically acceptable or even ethically admirable, as many Aboriginals believe. On the contrary, it leaves the implicit suggestion that Aboriginal practices are ethically deficient from an AR perspective, but granted a legal loophole on other grounds. And this uneasy *modus vivendi* stands in the way of coordinated action against the main beneficiaries of the status quo: the animal industrial complex that continues to exploit animals in ways that are abhorrent from both AR and Aboriginal perspectives.²⁷⁹

The Seals Measure and the Indigenous Exception illustrate how the avoidance strategy that Kymlicka and Donaldson analyze can break down. The EU tried to sequester traditional Indigenous sealing under an exemption with no conditions related to animal suffering. That suggests that the humaneness or otherwise of Indigenous sealing practices is simply not open to scrutiny – and also implies, as Kymlicka and Donaldson point out, that Indigenous hunting may *be* inhumane (but will not be held to any standard of humaneness).

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid* at 172.

²⁷⁹ *Ibid* at 176.

The idea of the strategy of avoidance helps to illuminate why the Seals Measure, especially the Indigenous Exception, was criticized for lacking moral coherence and ultimately failed to stand up to examination in the WTO dispute settlement process.²⁸⁰ The lack of connection between the exception and the moral (animal-welfare promoting) objectives of the ban on seal products was the main reason that the WTO Appellate Body found that the Seals Measure had elements of arbitrary discrimination that were inconsistent with WTO law.²⁸¹

Inuit opposition to the trade ban drove Canada's decision to seek dispute resolution at the WTO.²⁸² This was despite the fact that the Seals Measure was designed to carve out traditional Inuit sealing from its scope and, at least potentially, give Indigenous sealers a monopoly on access to the European market, which might look like a significant market advantage.²⁸³

In practice, however, the ban on commercial products more or less destroyed the market for Inuit sealers as well. This was the case not only for the Canadian Inuit whose products did not qualify for the Indigenous Exception, but also for the Greenlandic Inuit whose products did.²⁸⁴ The supply chains, processing facilities and market infrastructure

²⁸⁰ See, e.g., Perišin, *supra* note 8 at 397; Selheim, *supra* note 83.

²⁸¹ As discussed in Section 7.6.2, below.

²⁸² Perišin, *supra* note 8 at 378. Canadian Inuit representatives (led by Inuit Tapiriit Kanatami, an Inuit advocacy organization) also challenged the Seals Measure at the European Court of Justice, arguing that the EU lacked a legal basis to enact the legislation and that it violated fundamental rights and the principles of subsidiarity and proportionality (*Inuit Tapiriit Kanatami and Others*, C-583/11, [2013] ECR I-0000 (ECJ)); *Inuit Tapiriit Kanatami and Others v Commission* (2013), T-526/10 (ECJ)). These challenges were not successful. See discussion in Cambou, *supra* note 260 at 410-414.

²⁸³ Perišin, *ibid* at 378.

²⁸⁴ Malcolm Brabant, "Inuit hunters' plea to the EU: lift ban seal cull or our lifestyle will be doomed", *The Guardian* (16 May 2015), online: <https://www.theguardian.com/world/2015/may/16/greenland-inuits-urge-eu-reverse-seal-ban-save-way-of-life> (reporting that Greenlandic Inuit viewed the ban as "misguided" and likely to "[drive] a centuries-old way of life to the edge of extinction").

for Inuit and non-Inuit seal products are not separable, but intertwined and interdependent.²⁸⁵ This interconnection is more pronounced for Canadian Inuit seal products, which use the same processing facilities and routes to market as non-Indigenous products. But Greenlandic Inuit sealers, too, are not immune from the economic forces that shape the overall market.

The practical effect of a ban with a special carve-out for Inuit products on Inuit producers is a concrete illustration of the problem Kymlicka and Donaldson identify when they say that avoidance is “ultimately unstable.”²⁸⁶ In the real world, the distinction cannot be upheld in a logically coherent way, nor can it achieve results that are calibrated as intended. Inuit sealers do not exist in a pristine zone untainted by commerce or by interaction with non-Inuit enterprises. The animal welfare concerns that drove regulation of non-Inuit sealing do not stop mattering when it comes to Inuit sealing, and a legislative framework that elides this can only amount to an “uneasy *modus vivendi*.” The result was a fragile legal structure that did not withstand scrutiny by WTO adjudicators.

The long history of the conflict over seal hunting shows that it is connected to deeply felt and conflicting values: moral abhorrence against the way some seals are killed and the suffering that they endure, rejection of seal hunting as an unnecessary use of charismatic animals to make luxury goods, and the place of sealing in local cultural traditions and in the economic life of the communities where it is practiced. It is a

²⁸⁵ Perišin, *supra* note 85 at 378-379; Selheim, “Goals,” *supra* note 83 at 280-281; COWI Report, *supra* note 77 at 117.

²⁸⁶ *Supra* note 252 at 169.

question on which consensus or “shared understandings” are hard to achieve. This clash of values has an additional layer of complexity because of the importance of seal hunting to Indigenous peoples.

The fate of the Indigenous Exception at the WTO illustrates that an attempt to get around these problems through an appealing, but unstable, “strategy of avoidance” is hard to defend on grounds of fairness, even-handedness, non-arbitrariness and justifiability – in other words, qualities that make law law-like, and that reflect Fuller’s criteria of legality. The WTO’s *EC – Seal Products* decision reminds international actors that if shared understandings on animal protection are to be reflected in law in a way that generates adherence, these criteria cannot be ignored.

7.9 Interactional Analysis: How *EC – Seal Products* Developed WTO Law on Animal Protection

This section uses Brunnée and Toope’s interaction theory as a framework for evaluating the evolution of animal protection norms in WTO law in the *EC – Seal Products* case. There are five main developments from *EC – Seal Products* that are important from the point of view of animal welfare and animal protection in the WTO legal context. Each one is considered here with attention to what it means for the formation of legal norms concerning animal protection, as understood through the lens of interactional theory.

7.9.1 Norm Formation: Animals Matter

The first point is simply the fact that animals matter in WTO law. Animal

protection has been recognized as a serious value with real weight in this context. The WTO panel and Appellate Body treated the interests and the protection of animals as beings that matter in themselves as real, serious values that deserved to be balanced alongside human economic interests – even to be weighed against important human rights like the cultural rights of Indigenous peoples.

This was a material change. Recall that, as recently as 2005, informed observers feared that the WTO would completely devalue animal interests in the international legal system and would damage, dilute and undermine animal protection efforts.²⁸⁷ The extent to which animals are recognized in *EC – Seal Products* as morally significant beings, the careful attention paid to the evidence of suffering in seal hunting and the details of different hunting methods and welfare protections, and the serious consideration given to expressions of moral outrage concerning seal hunting, are important signs of progress on this front. So is the shift away from subsuming animals' individual interests within questions of environmental protection and conservation, to giving serious consideration to the idea that animals matter in themselves and that humans have ethical obligations towards them beyond just not causing the extinction of animal species.

For those who are (understandably) frustrated with the limited protection of animals in international law, and with the additional complications that international obligations – especially trade obligations – can create for animal protection initiatives, this development may not seem like much. Perhaps it is not. But if it is looked at as part of the process of emergence of an international norm through a process of social

²⁸⁷ See discussion in Chapter Two.

interaction, it can be seen as a meaningful shift that may build the groundwork for more progress in the future.

The WTO DSB adjudicators' acceptance that animal suffering is a real and serious matter that implicates ethical obligations for humanity – a consideration that can even alter our choices about what to have for dinner – is a sign that these normative propositions have evolved beyond the stage of propagation by the vanguard of “norm entrepreneurs”²⁸⁸ and into mainstream acceptance. The professional scientific and policy experts (EFSA and COWI) who were involved in developing and informing the normative foundation of the Seals Measure may be considered “epistemic communities,” whose input helped to “[frame] the issues for collective debate, [propose] specific policies, and [identify] salient points for negotiation,”²⁸⁹ and also enhanced the credibility and legitimacy of the resulting policy choices.

The acknowledgement of animal interests as inherently ethically significant and as grounding human obligations is in itself evidence of the progression of animal protective norms through the process of norm formation in the international legal system. But it is not – as Brunnée and Toope's interactional theory underlines – the end of the story. The emergence of an international norm is not a binary event, but, rather, occurs along a continuum, and it is not a sufficient condition for the formation of a legal norm. It is, however, a necessary condition.

²⁸⁸ In Finnemore and Sikkink's phrase; see discussion in Section 3.3.3 above.

²⁸⁹ Peter M Haas, “Introduction: Epistemic Communities and International Policy Coordination” (1992) 46:1 *Int'l Organization* 1 at 2; see Section 3.3.4 above.

7.9.2 Public Morals, Moral Incoherence, and the Criteria of Legality

The second important development in *EC – Seal Products* is the express recognition that animal welfare can be a component of public morals and a legitimate basis for invoking public policy exceptions.

EC – Seal Products is an important case on the public morals policy exception. There had only been two prior WTO cases on public morals: *US-Gambling*,²⁹⁰ in 2005 (which involved an equivalent exception in the WTO treaty on trade in services), and *China-Audiovisuals*, in 2009.²⁹¹ The law on public morals was, therefore, relatively underdeveloped. *EC – Seal Products* moved the jurisprudence ahead on a number of points that had not been fully addressed, including what can count as public morals and how the necessity requirement can be met.

There is extensive scholarship on the seal dispute and public morals, written both before and after the *EC – Seal Products* case was decided.²⁹² Here, I do not propose to reiterate all the analysis that has already been done by other scholars. Rather, I focus on a particular aspect that is important to my interactional analysis of the progression of

²⁹⁰ *Supra* note 206.

²⁹¹ *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (2009), WT/DS363/AB/R (Appellate Body Report).

²⁹² See, e.g., Steve Charnovitz, “The Moral Exception in Trade Policy” (1997), 38 *Va J Int’l L* 689; Nicolas F Diebold, “The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole” (2007) 11:1 *JIEL* 43; Mark Wu, “Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine” (2008) 33:1 *Yale J Int’l L* 215; Jeremy C Marwell, “Trade and Morality: The WTO Public Morals Exception After *Gambling*” (2008), 81 *NYU L Rev* 802; Peter L Fitzgerald, “‘Morality’ May Not Be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law” (2011) 14 *J Int’l Wildlife L & Pol’y* 85; Howse & Langille, *supra* note 8; Howse, Langille & Sykes, *supra* note 8; Whitsitt, *supra* note 259; Nikolas Selheim, “The Legal Question of Morality: Seal Hunting and the European Moral Standard” (2016) 25:2 *Soc & Leg Studies* 141; Serpin, *supra* note 8; Selheim, *supra* note 2 at 261-295; Oisín Suttle, “What Sorts of Things are Public Morals? A Liberal Cosmopolitan Approach to Article XX GATT” (2017) 80:4 *MLR* 569.

animal protection norms into legal norms. That aspect is the coherence or moral consistency of the Seals Measure.

Coherence matters in the process of transforming social norms, or shared understandings, into specifically legal norms. Interactional theory tells us that this metamorphosis occurs through articulation of norms in a practice of legality – which, I have argued, the WTO dispute settlement process is – and that it happens when norms come to exhibit the characteristic qualities of law, or the criteria of legality.

In *EC – Seal Products*, the panel and the Appellate Body interrogated the moral justifications that the EU advanced to justify its legislation for conformity with certain requirements that law has to meet to be legitimate law. To the extent that the Seals Measure was found wanting in this respect, it had to change.²⁹³

Canada and Norway attacked the moral coherence of the Seals Measure for two reasons. The first was that the EU singled out the treatment of seals for moral condemnation, while other kinds of mistreatment of animals which were factually similar in relevant ways – industrial slaughter of food animals, and hunting animals other than seals – were legal in the EU and not marked as morally abhorrent. The second was the lack of continuity from the overall ban to the Indigenous and Marine Management exceptions, both of which allowed seal products into the EU market without any requirements related to animal welfare.

²⁹³ I do not mean to imply that the panel and the Appellate Body were necessarily right in their conclusions; there will always be an element of value judgment and room for different takes in such an inquiry. What I intend to bring out is the ways in which the legal analysis in *EC – Seal Products* implicitly tracks the characteristics that interactional theory suggests a norm has to exhibit to evolve into law, and to generate adherence.

On the first point, the WTO Appellate Body rightly rejected the complainants' arguments, following established WTO precedent that confirmed the right of members to choose for themselves what is morally important to them and what degree of protection for public moral values they want to reflect in their law. These are indispensable underpinnings of the right to regulate. A requirement of moral consistency across the board would be an impossible standard to meet. Every society makes choices about what it finds morally condemnable. Those choices might seem illogical or inexplicable from the outside. But that is the nature of moral judgments: at least to an extent, they are not reducible to logic.

In practical terms, if no WTO member could legislate to protect certain kinds of animals in certain situations (for example, to protect the wellbeing of pets) without also extending consistent protections to all animals in all situations (for example, ensuring a similar standard of wellbeing for laboratory animals or animals raised for food), it would be impossible for WTO members to legislate to protect animals at all without triggering WTO compliance difficulties. This is exactly what WTO critics feared in the 2000s. *EC – Seal Products* definitively (and encouragingly) holds that WTO law imposes no such requirement.

By contrast, the second coherence problem, the inconsistency between the moral objective of the Seals Measure and its exceptions, was the reason that the WTO DSB found that the measure was not consistent with WTO law, in particular with the chapeau of Article XX.

Critics have argued that requiring moral consistency between the primary measure and its exceptions is itself somewhat hypocritical, given how easily and commonly we accept mismatches between the objectives of primary rules and exemptions in areas other than animal protection.²⁹⁴ We have securities laws that require listing and disclosure to protect investors, but contain exceptions for crowdfunding, grants of stock to employees, and sales to family members.²⁹⁵ We have freedom of information laws that contain exceptions for privacy.²⁹⁶ It is completely normal for a legal provision to reflect an overall objective counterbalanced by one or many different, competing, sometimes contradictory objectives.

More pertinently, in the area of regulation for the protection of animals, exceptions are ubiquitous. As noted in Chapter Three, *de facto* exceptions to animal protection rules exist because authorities chronically fail to enforce those rules.²⁹⁷ Even leaving the problem of underenforcement aside, many general legal requirements to protect animals or refrain from treating them inhumanely contain express exceptions that are so broad as to render the primary obligation almost meaningless.²⁹⁸

So it is very common in domestic law for animal protection laws to contain exceptions that undermine their apparent moral objectives. And yet the Appellate Body

²⁹⁴ See, e.g., Howse, Langille & Sykes, *supra* note 8 at 98-99, arguing that “[t]he WTO should ... permit states to regulate for complex moral reasons that may include multiple justifications, some of which may even appear to conflict” and noting that, for example, in the case of a prohibition on murder that has an exception for assisted suicide both the rule and the exception may be morally motivated, but they could be based on different and competing moral norms.

²⁹⁵ See, e.g., *Securities Act*, RSBC 1996 c 418, s 48, empowering the Securities Commission to order exemptions where it considers that it is not contrary to the public interest.

²⁹⁶ See, e.g., *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c 165 s 22.

²⁹⁷ See discussion in Section 3.5 above.

²⁹⁸ A striking example is the existence of exemptions from general animal cruelty laws for practices that are commonly followed in the relevant industry, particularly in farming. See discussion in Section 6.4 above.

found that this was not acceptable, in the context of WTO law, for a legal regime that affected international trade.

This is where the WTO's moral coherence analysis connects to the criteria of legality, in particular to the criterion of congruence of official actions with declared rules. As I argued in Chapter Three, the congruence requirement is the Achilles heel of animal protection as an international legal norm.²⁹⁹ Our laws on animal protection (international and domestic) are in fact, generally, deeply morally incoherent, even morally schizophrenic, and self-contradictory, in a different way from laws that regulate around other moral values. It is almost as if we want to look as if we are legislating to protect animals, but, at the same time, we do not really want to do it if it means we have to make any real changes or sacrifices. And when it comes to conflicts between animal protection and Indigenous rights, the "strategy of avoidance," while it may appear to be a way around an impasse, is unstable because, as Kymlicka and Donaldson note, "it fails to engage with the actual ethical commitments of any of the parties."³⁰⁰ It is unstable because, taken to its logical conclusion, it destroys law's congruence with its own stated ethical purpose.

One way of understanding the Appellate Body's ruling in *EC – Seal Products* is as a discipline on this kind of mismatch between officially declared rules and the reality of the law in action (as it is applied, in the language of the Article XX chapeau). WTO members can enact laws reflecting their moral views about animal protection. Each WTO member can do this in a way that reflects its own choices about which animals

²⁹⁹ See discussion in Section 3.5.1 above.

³⁰⁰ Kymlicka & Donaldson, *supra* note 9 at 173.

deserve protection, what kind of practices should be morally condemned, and how much protection it thinks is the right amount. That kind of moral inconsistency could be called incoherence, but it is really more accurate to call it diversity, and is not a problem from a rule of law point of view. But exceptions that are not well grounded in principle or that significantly undermine the overall animal protection objective make the law as it is on the books incongruent with what it actually does in practice, and that, in turn, makes the law impermissibly arbitrary. The moral incoherence of animal protection law (in this sense) is a serious impediment to its potential evolution as an international legal norm.

Other problems that the Appellate Body found with the Indigenous Exception can also be linked to Fuller's criteria of legality. Fuller argued that legitimate law must exhibit generality, treating like cases alike and not making *ad hoc* determinations without a consistent basis, and that it must be publicly promulgated so that people who are subject to it know what it is that they are subject to.³⁰¹ The Appellate Body's criticisms of the Indigenous Exception (like the shortcomings of the US rules on turtle excluder devices in *US-Shrimp*³⁰²) reflect concerns that these qualities of legitimate law were lacking. The Indigenous Exception purported to be a generally available exemption, but the Appellate Body considered it to be only available as a practical matter to Greenland. The "subsistence" and "partial use" criteria were vague and permitted too much official discretion, so that Canadian Inuit seeking access to the exemption did not know what was expected of them.

³⁰¹ See discussion in Section 3.4.3 above.

³⁰² See discussion in Section 6.3.2 above.

7.9.3 Implied Jurisdictional Limitation and the Qualities of Law

The third important point to take from *EC – Seal Products* concerning animal protection law is that actions taken to condemn or attack animal cruelty in other jurisdictions are not necessarily illegal under WTO law. *EC – Seal Products* strongly suggests, even if it avoids explicitly stating, that there is no across-the-board prohibition on legislation that affects conduct outside the enacting jurisdiction – no “implied jurisdictional limitation.”³⁰³

The EU Seals Measure was fairly frankly aimed at stopping or punishing the Canadian seal hunt. The Appellate Body held that it did not need to decide the question of whether there was an implied jurisdictional limitation prohibiting this kind of extra-territorially directed legislation, or what the extent or nature of such a limitation might be, because in this case there was a nexus to the EU: the EU wanted to protect its citizens and consumers from participation in a practice to which they had a moral objection. But the Appellate Body’s analysis leaves very little space where the concept of an implied jurisdictional limitation could operate. It is hard to imagine a law with extra-territorial effects that could not somehow be connected to moral or other concerns in the enacting jurisdiction.

This is an important practical point for the future of disputes over animal protection in WTO law. *EC – Seal Products* should allay some of the early concerns that WTO obligations would unduly constrain the ability of member states to adopt legislation

³⁰³ *EC – Seal Products* Appellate Body Report, *supra* note 1 at para 5.173

reacting to poor animal welfare practices in other countries by restricting imports or conditioning market access on compliance with higher animal welfare standards.

EC – Seal Products does underline, however, that there are limits on what one WTO member state can do on the basis of its moral convictions to affect industries and practices in other member states, consistent with its WTO obligations. Those limits reflect the criteria of legality. One society’s rules about protecting animals can, in principle, reach beyond the jurisdiction and target what is being done in another jurisdiction – at least if there is some kind of connection or nexus to the enacting jurisdiction. But it must do so in a way that is justifiable, non-arbitrary, and consistent with the rule of law.

Trade measures like the Seals Measure may aim to promulgate animal-protective norms to other jurisdictions, and to raise the standard of animal protection internationally. In some cases, they even may succeed in doing so. But interactional theory suggests that these nascent norms will not inspire adherence or be accepted as legitimate unless they exhibit what Fuller called the “internal morality of law.”³⁰⁴

7.9.4 Regulatory Distinctions Based on “PPMs” Are Not Illegal

The fourth point is that it is hard to argue plausibly after *EC – Seal Products* that PPM-type restrictions based on the animal welfare effects of the way an item was

³⁰⁴ See Section 3.4.3, above.

produced cannot be designed in a way that complies with WTO law (if the debate over PPMs was not already dead after *US-Shrimp* and subsequent cases).³⁰⁵

This development, too, is consistent with the insights of interactional theory. There is nothing about PPMs that is inherently offensive to any of the criteria of legality. In fact, if anything, it is the old assumption that PPMs were WTO-illegal that is hard to reconcile with the characteristic qualities of law.

The supposed rule against PPMs does not appear in GATT at all. It is in the definition of a “technical regulation” under the TBT Agreement, but not in a way that suggests that distinguishing between products on the basis of PPMs is impermissible. Nor does this posited prohibition have a solid basis in case law. In short, it is not “promulgated,” in Fuller’s terminology. If there were such a prohibition, it would constrain the right of WTO members to regulate too strictly, and on an unclear and illogical basis. There is no coherent rationale for permitting trade rules based on the outward characteristics of a product but prohibiting trade rules based on the way the product was produced.

The requirements under the Seals Measure for seal products to be placed on the EU market *are* PPMs. The Appellate Body implicitly recognized this when it overruled the panel’s determination that the Seals Measure “laid down product characteristics,”

³⁰⁵ See discussion in Marceau, *supra* note 8 at 323-328. Marceau argues that, in light of the Appellate Body’s remarks on “related processes and production methods” under Annex 1 of the TBT Agreement, the category may have renewed significance and need fresh consideration. With respect to the justification of “PPMs” under GATT, however, she observes that “it seems clear that the traditional product-related/non-product-related distinction may no longer be relevant in the GATT context, particularly since it is not expressly referred to therein. Moreover, Article XX is open to a series of policy considerations, without any distinction of whether and how such policy affects the products subject to the challenged restriction.” *Ibid* at 326.

while indicating that it actually had much more to do with the way the products were produced. There is no suggestion at all, however, that if the Seals Measure is indeed a PPM that would preclude it (or any other animal-welfare related PPM) from being justified and upheld under GATT or the TBT Agreement.

7.9.5 Arbitrary Discrimination Can Be Cured with Stronger Animal-Protection Measures

Finally, the outcome of *EC – Seal Products* illustrates that the requirement under WTO law to avoid arbitrary discrimination can actually result in stricter rules that *raise* the standard of animal protection across the board, rather than driving it down to a lowest common denominator. The EU’s amendment to the Seals Measure eliminated one exception (the Marine Management Exception) and added an animal welfare criterion to another (the Indigenous Exception). This change did a great deal to correct the lack of coherence between the moral objective of the Seals Measure and the exceptions.

As a result of the amendments to the scheme, the overall category of exempt products is smaller than it was before. Furthermore, no seal products are allowed into the EU (except for the very minor group of products exempt under the Travel Exception) without satisfying criteria related to animal welfare. As was the case in *US-Shrimp*, the final result of *EC – Seal Products* was to increase the animal protection requirements under the challenged legislation.

7.10 Conclusion

We live in an international society that is like a “densely-packed high-rise,”³⁰⁶ where one country’s animal welfare values and practices are intertwined with those of other countries. Seal hunting methods in Canada affect citizens in the EU because they may be unwillingly supporting those practices by participating in a market for seal products. Expressions of moral opprobrium against seal hunting by the EU affect the sealing economy outside the EU. If international legal norms on animal protection are to evolve, the challenge is to work out common ground and mutually acceptable rules in a world where there are very different beliefs about the ethical status of animals, and especially about how animal interests should be weighed against other important interests, including those of Indigenous peoples.

EC – Seal Products is an example of this process in action. The case provides a strong basis to conclude that there is some real common ground on animal protection, even if that common ground is narrow. It is notable that none of the participants in the dispute rejected the notion that animal welfare was a moral issue, or that it was a legitimate area to legislate on. The complainants only questioned the consistency and good faith of the EU in choosing this one issue to target, as well as the way it chose to legislate about it.

From *EC – Seal Products*, it appears that these international actors, at least, did not share common understandings on the substance of animal protection legislation – on

³⁰⁶ Eyal Benvenisti, “Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders” (2013) 107:2 AJIL 295.

how laws should be or legitimately can be made to protect animals. International shared understandings at this level would be a necessary precondition to the emergence of positive, substantive international law on animal protection, and that foundation does not appear to exist yet. But *EC – Seal Products* is evidence of a more limited, but fairly solid, consensus on the idea that animal protection is among the acceptable and legitimate reasons for which international actors in the “global high-rise” can adopt legal measures that affects others.

EC – Seal Products also specifies some of the ways that norms have to comply with Fuller’s criteria if they are to stand up to scrutiny in the practice of legality that is the WTO dispute settlement process. This goes both ways. WTO members that act to protect animals have to act non-arbitrarily, transparently and even-handedly. By the same token, WTO members have a right to regulate to protect animals. Arbitrary, unpromulgated restrictions on that right (like the prohibition that once was thought to apply to trade measures aimed at processes and production methods) are not valid.

The greatest single weakness for animal protection as a true legal norm is unpunished or exempted noncompliance. The reality is that animal protection law is too often just law on paper, not real law. In *EC – Seal Products*, the WTO panel Appellate Body policed what Fuller calls the criterion of congruence of official action and declared rules, by insisting that the EU could not have a paper seal protection regime that undermined its own rationale by exempting an important category of potentially low-welfare products – even if there was an important competing rationale, the protection of Indigenous cultural traditions, for that exception.

EC – Seal Products is a significant step in the process of construction of animal protection as an international norm. The next chapter looks at another context where development in this direction may occur: the construction of positive obligations concerning animal protection under non-WTO trade law, especially in the new, ambitious trade agreements that look to create robust shared transnational regulatory frameworks. As I argue in Chapter Eight, animal protection has a place in those emerging cooperative regulatory efforts.

Chapter 8 **Emerging Animal Protection Norms in Preferential Trade Agreements**

8.1 **Introduction**

This chapter examines developments on animal protection in the context of reciprocal non-WTO trade agreements: preferential trade agreements or PTAs.¹ PTAs are numerous, and proliferating. A 2011 report by the WTO observes that there has been a “rapid expansion and intensification of ... activity [in non-WTO trade agreements], particularly over the last 20 years.”² A new and potentially even more important development is the emergence of an ambitious category of PTAs, the “megaregional trade agreements” or MRTAs. These new trade deals that aim to achieve regulatory cooperation and harmonization on a much wider range of matters than are covered by traditional trade agreements, including on many areas usually considered domestic.

Applying the analytical tools of interactional theory, I argue that certain features of PTAs enable the emergence of robust shared understandings, support the development of animal protection epistemic communities, and encourage meaningful implementation and enforcement of both domestic and international animal protection law, making it more law-like. Earlier chapters of this thesis considered WTO dispute resolution as a practice of legality that is contributing to the formation of legal norms on animal

¹ Section 8.2 explains why I use this term, which seems to be becoming standard among scholars.

² WTO, *World Trade Report 2011: The WTO and preferential trade agreements: From co-existence to coherence* (Geneva: WTO, 2011), online: https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf. See also David A Gantz, “Regional Trade Arrangements” in Daniel Bethlehem et al, *The Oxford Handbook of International Trade Law* (Oxford: Oxford University Press, 2009) 237 at 238.

protection. This chapter argues that new treaty norms included in PTAs are another practice of legality that is doing so as well, but in different ways.

Section 8.2 gives some background on PTAs and on the terminology used to describe them. Section 8.3 is a brief discussion of the significance of PTAs for the development of international legal norms on animal protection. Section 8.4 explains the relationship of PTAs to the WTO and GATT. Section 8.5 focuses on the emergence of the MRTAs and the current challenges to their continued progress.

The most important MRTA for the purposes of this analysis is the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP, also referred to as the TPP), which entered into force for Canada in 2018.³ The CPTPP Environment Chapter contains a number of important provisions relevant to animal protection. To understand how those provisions evolved, in Section 8.6 I review precursors to the CPTPP Environment Chapter in some earlier PTAs.

Section 8.7 is a detailed analysis of the CPTPP Environment Chapter sections relevant to animal protection. Section 8.8 looks at the inclusion of animal welfare provisions in the EU's PTAs. Section 8.9 applies the interactional theoretical model to understand PTAs as a practice of legality contributing to the construction of global animal protection norms.

³ *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, 8 March 2018, [2018] ATS 23 (entered into force on 30 December 2018 for Canada, Australia, Japan, Mexico, New Zealand, and Singapore, and entered into force 14 January 2019 for Vietnam) [CPTPP].

One feature of modern PTAs that I do not address here is investor-state dispute settlement, or ISDS. It is typical for PTAs to include chapters providing certain non-discrimination and other rights to foreign investors, and providing for recourse against the state if those provisions are breached – something that is not part of WTO law. Such rules can undermine domestic regulation, including regulation for the protection of the environment and of animals. ISDS is a complex and multifaceted area of law that is distinct from trade law (although typically linked to it), and to address it adequately would take this analysis far off course. I would simply note that PTAs are not wholly good or wholly bad, for animals or in any other sense, and that the potential they may have to build global animal-protection norms may be undercut by other aspects of economic globalization including ISDS.

8.2 What are PTAs?

The term “preferential trade agreements” is used here to mean all reciprocal trade agreements between two or more parties that offer one another preferential terms on trade. They range from bilateral agreements between just two countries, through trade deals formed between a number of countries that may be close together or share other commonalities, all the way up to the MRTAs, which cover huge fractions of the global economy.

The terminology in this area is confusing, and in a state of flux. Some of the scholarship that I refer to in this discussion uses different terms for what I am calling PTAs. In the WTO’s own in-house terminology, these agreements are usually called regional trade agreements, or RTAs. Although “regional trade agreement” is not a term

defined in WTO treaty law, it is established in WTO usage. The WTO has a Committee on RTAs, established in 1996, which is responsible for monitoring individual agreements and also considers the systemic implications of such agreements on the multilateral trading system.⁴ It also maintains a database of Regional Trade Agreements in force of which it is notified by members (as is called for under WTO rules).⁵ Until recently, it was fairly standard for scholars to follow the same convention and use the terms “regional trade agreements” or “RTAs.”

In the last decade or so, however, that descriptor has been rendered less accurate by the expansion of trade negotiations to agreements that go beyond the geographical scope of anything that could reasonably be called a “region.”⁶ The CPTPP, for example, was originally signed by twelve nations in Asia and North and South America: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, and the United States. When the US pulled out after the 2016 election, the remaining eleven nations concluded an agreement incorporating most of the

⁴ WTO, *Committee on Regional Trade Agreements*, WTO General Council Decision of 6 February 1996 WTO Doc WT/L/127 (establishing the Committee on Regional Trade Agreements and its terms of reference).

⁵ WTO, Regional Trade Agreements Database, online: <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>. See also Petros C Mavroidis, “Always Look on the Bright Side of Non-Delivery: WTO and Preferential Trade Agreements, Yesterday and Today” (2011) in WTO Discussion Forum *World Trade Report 2011: The WTO and preferential trade agreements: From co-existence to coherence*, online: https://www.wto.org/english/res_e/publications_e/wtr11_forum_e/wtr11_14dec10_e.pdf (discussing the mechanism for reporting PTAs to the WTO Committee on Regional Trade Agreements and for the Committee’s authority to decide whether or not to clear PTAs as consistent with GATT Article XXIV).

⁶ See discussion of the major initiatives towards creating MRTAs that began in the 2000s, in Shujiro Urata, “The Trans-Pacific Partnership: Origin, Evolution, Special Features and Economic Implications” (2018) 35:1 J Southeast Asian Economies 22 at 23.

provisions of the TPP: the CPTPP.⁷ To call this vast trading bloc “regional” would stretch the meaning of the word beyond recognition.

Similarly, the US has for several years been in talks with the EU towards a proposed trade agreement called the Transatlantic Trade and Investment Partnership (TTIP); Canada recently concluded a trade agreement with the EU and its member states, the Comprehensive Economic and Trade Agreement (CETA)⁸; and sixteen Asian and Pacific nations are negotiating a proposed trade agreement called the Regional Comprehensive Economic Partnership (RCEP). Despite the presence of the word “Regional” in the title of the latter, these are not regional agreements. The logic that drives them is not geographical contiguity or regional identification, but the economic power of liberalizing trade across significant portions of the global economy. The WTO Regional Trade Agreements web page refers to this category of trade agreements and proposed agreements as “large plurilateral agreements.”⁹ These are the class of agreements that I refer to here as MRTAs.

There are also a large number of PTAs that are too *small* to be accurately be called “regional,” because they are between only two parties (which also may not be in the same region). Trebilcock, Howse and Eliason note that in 2013 about 60% of active PTAs were bilateral agreements.¹⁰ They speculate that the increase in bilateral

⁷ *Supra* note 3.

⁸ *Comprehensive Economic and Trade Agreement*, Canada and European Union, 30 October 2016, online: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng> (entered into force provisionally 21 September 2017).

⁹ WTO, “Regional trade agreements,” online: https://www.wto.org/english/tratop_e/region_e/region_e.htm (referring to “a notable increase in large plurilateral agreements under negotiation”).

¹⁰ Michael Trebilcock, Robert Howse & Antonia Eliason, *The Regulation of International Trade* 4th ed, (London: Routledge, 2013 at 86.

agreements and the growth in MRTAs may be linked, since agreements with many parties are difficult to conclude and take a long time, and in the meantime bilateral agreements remain a viable, less ambitious way to develop preferential trade relationships.¹¹

Because “regional trade agreement” now seems an outdated and even misleading term, I prefer to use the term PTA, which appears to be becoming the predominant term used by writers on trade law. The WTO’s own 2011 report adopts this usage, noting that “[o]ne half of the PTAs currently in force are not strictly ‘regional,’” and that “[t]he trend towards a broader geographical scope of PTAs is even more pronounced for those PTAs that are currently under negotiation or have recently been signed,” which are nearly all cross-regional.¹²

“Preferential” is not the only option for denoting non-WTO reciprocal trade agreements. One disadvantage of this choice of terminology is that “preferential” has some degree of pejorative connotation in the WTO context, since trade “preferences” are a form of discrimination at odds with core WTO principles.¹³ On the other hand, it is accurate. It is a fact that PTAs do create preferential trade terms as between the parties to them (that is really the point of a PTA), whether one views that as positive or negative.

Some commentators refer to the class of agreements that I am calling PTAs simply as “free trade agreements” or FTAs. But this seems imprecise, since the WTO treaties are themselves free trade agreements. In any event, “free trade,” whether under

¹¹ *Ibid.*

¹² WTO, *supra* note 2 at 6.

¹³ For example, Gantz describes the use of the term “preferential” by scholars critical of PTAs as “somewhat derisive.” Gantz, *supra* note 2 at 243.

WTO rules or PTAs, is always a relative concept; no trade treaty mandates absolutely “free” trade without any regulatory or tariff barriers at all. Arguably, PTAs actually diminish free trade at the global level, because every nation treats all of its trading partners differently depending on which PTAs they are signed up to together. Jagdish Bhagwati, a scholar who has been a vocal critic of PTAs, argues that because of their proliferation “we now have once again a world marred by discriminatory trade, much as we had in the 1930s.”¹⁴ In his view, PTAs have created a new protectionism.¹⁵ Gantz suggests that a more accurate term would be “non-global” trade agreements,¹⁶ but this usage is not common.

To make matters even more confusing, there is also a category of non-MFN trade schemes that the WTO refers to as “preferential trade arrangements” (and for which it uses the acronym PTAs).¹⁷ These are unilateral trade preferences such as tariff waivers, which are sometimes extended to developing countries by wealthier countries and often conditioned on compliance with provisions concerning non-trade objectives, such as human rights provisions. For the avoidance of doubt, I am not following the WTO’s usage here, and the term “PTA” as used in this thesis means reciprocal trade agreements outside the WTO.

¹⁴ Jagdish Bhagwati, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade* (Oxford: Oxford University Press, 2008) at 14.

¹⁵ *Ibid.*

¹⁶ Gantz, *supra* note 2 at 238.

¹⁷ WTO, “Regional trade agreements and preferential trade arrangements,” online: https://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm.

8.3 PTAs and Animal Protection

There are two important points to highlight regarding the relationship between animal protection and PTAs. The first is that, in the WTO system, significant legal developments since the Uruguay Round have mainly occurred in the dispute settlement system, through the interpretation and application of WTO law by DSB panels and the Appellate Body, rather than through the negotiation and conclusion of new treaty provisions. In other words, legal evolution is happening in the judicial rather than the legislative branch of the WTO.

This is because the WTO treaty-making process has not produced much in the way of significant outcomes since the creation of the WTO. The current Doha Round of negotiations has been going on since 2001, and it has been declared dead numerous times.¹⁸ This is probably because the high number of members of the WTO and the diversity of perspectives, economies and cultures among them have made it difficult to reach consensus on anything but relatively narrow and uncontroversial matters.¹⁹ In addition, the ideological commitments to neoliberalism and economic globalization that drove the Uruguay Round and the creation of the WTO architecture were already

¹⁸ For example, the 2013 edition of Trebilcock, Howse & Eliason's authoritative work on the regulation of international trade law has a postscript reflecting on the reasons for the "Doha collapse" (Trebilcock, Howse & Eliason, *supra* note 10 at 802-808). Six years later, the Doha Round is still officially going on.

¹⁹ As Trebilcock, Howse & Eliason observe, "[t]oday, more than ever, the WTO membership exhibits enormous diversity in levels and trajectories of economic development, political systems and capacities." *Ibid* at 805. See also Frank Altemöller, "A Future for Multilateralism? New Regionalism, Counter-Multilateralism and Perspectives for the World Trade System after the Bali Ministerial Conference" (2015) 10:1 *Global Trade & Customs* J 42 at 42 (since 2001, "negotiations progressively stagnated. It seemed ever more difficult to find common interests, let alone to formulate results, amongst the numerous, politically outspoken and highly disputatious Member States. Several WTO Ministerial Conferences ended in failure").

becoming less fashionable before it was concluded. The WTO is a diverse global institution without a “thick” shared normative foundation. It is probably neither possible nor desirable for it to be otherwise, given the WTO’s truly global reach and the diversity of international society. But it means there is a lack of common ground and agreement about how to achieve further trade liberalization through the WTO negotiation and treaty-making process.²⁰

With the treaty negotiation process stagnating, the formation, development and articulation of legal norms occur mainly through the judicial branch of the WTO. While the diplomatic process has gone through “almost two decades of political paralysis,”²¹ the WTO’s judicial system is an institutional success, having navigated two decades of disputes and produced a “vast jurisprudential *acquis*”²² while managing not to become the target of serious attacks on its legitimacy, and crafting rulings that balance trade liberalization with non-trade values.

PTAs, by contrast to the treaty negotiation process at the WTO, provide opportunities for smaller groups of countries to make progress on the political and diplomatic front, creating new and more ambitious trade treaty regimes that incorporate progressive norms. In the PTA context, treaty negotiation and treaty drafting are important practices of legality within which new legal norms are taking shape and being articulated. Some of those new norms are very relevant to animal protection, and open up

²⁰ Robert Howse, “The World Trade Organization 20 Years on: Global Governance by Judiciary” (2016) 77:1 EJIL 9 at 10.

²¹ *Ibid* at 10.

²² *Ibid*.

new possibilities for international cooperation and interactive lawmaking for the protection of animals.

The second point of contrast with the WTO is that animal protection has a place in WTO law only in a negative sense, in the context of exceptions. WTO case law has now firmly established that animal protection, including animal welfare, can justify derogation from trade obligations. It is not, however, an affirmative obligation in any way. In PTAs, this, too, is different. Modern PTAs typically include positive obligations to maintain specified legal and enforcement standards on social issues linked to trade, such as human rights, labour, and the environment. Positive environmental obligations under PTAs include commitments to certain types of animal protection, such as the protection of endangered animal species and the prevention of illegal trafficking of animals and products derived from them.

There is a good deal of skepticism among both environmental and animal advocates about these types of trade treaty provisions,²³ and the skepticism is understandable. Environmental provisions in PTAs, especially older ones, have been somewhat ineffective in practice. It could reasonably be argued that these kinds of additions to trade deals are more about making the trade agreements look acceptable than about really doing anything to protect the environment. The same risk exists with the animal-protection aspects of PTAs. My own view is that this concern, while it is certainly not unfounded, is no reason to turn away from the potential of PTAs to disseminate higher

²³ Chapter Two reviews some of the writing by animal law scholars arguing that trade law and the WTO are a threat to progress on animal protection.

legal standards of animal protection, and to increase international dialogue and cooperation on building frameworks for better animal protection.

8.4 Preferential Trade Agreements and the Global Trade

Regime: GATT Article XXIV

Bilateral and multi-party trade agreements have coexisted with GATT since its creation – and, indeed, predated its creation by many decades.²⁴ When GATT was originally formed after the Second World War, negotiators were already contemplating the creation of a separate trading bloc (in WTO parlance, a customs union²⁵) in Europe. This European trading partnership would eventually evolve into the EU. The project of economic unification in Western Europe was seen as important for rebuilding the economy and keeping peace after the Second World War.²⁶ Britain also had a system of trade preferences for countries that were part of the Empire, and later the Commonwealth, and those preferences remained in place when the GATT multilateral system was created.²⁷

Today, WTO members are parties to a large number of bilateral trade agreements, free trade zones and multiparty trade agreements.²⁸ The number of PTAs has increased

²⁴ See, for example, the discussion in Chapter Five of the network of bilateral MFN treaties that proliferated in the nineteenth century.

²⁵ “Customs union” is a term of art in WTO law, as discussed below. In essence, it means a group of countries that have agreed to have no internal customs borders between them, and to share common rules and tariffs with respect to goods coming into the area.

²⁶ Trebilcock, Howse & Eliason, *supra* note 10 at 85.

²⁷ These existing trade preferences were excepted from GATT obligations under Article I:2 of GATT.

²⁸ According to the WTO website, as of January 4, 2019 there were 291 such agreements in force. WTO, “Regional trade agreements,” online: https://www.wto.org/english/tratop_e/region_e/region_e.htm#facts.

significantly in the last couple of decades. Gantz, writing in 2009, observed that “[w]hereas 12-15 years ago only a few dozen functioning agreements existed, now there are hundreds.”²⁹

There is an inherent tension between PTAs and the basic non-discrimination principles of the multilateral trade regime. The point of a PTA is to create mutually favourable trade terms for the parties. This objective is at odds with one of the core principles of GATT / WTO law: the most-favoured nation (MFN) rule. As discussed in Chapter Five, the MFN rule under Article I:1 of GATT (along with equivalent provisions in other WTO agreements) requires each WTO member to grant all other WTO members treatment at least as favourable as that which it extends to any other trading partner. The logic of MFN says that entering into any preferential trade deal with a trading partner, whether a member of the WTO or not, would immediately result in equally favourable terms having to be offered to the rest of the WTO.

What makes this apparent contradiction legally possible is Article XXIV of GATT.³⁰ Article XXIV creates an exception from the application of GATT rules for two types of trading arrangements outside GATT: a customs union, or a free trade area.³¹ The exemption also applies to interim arrangements necessary to form either a customs union or a free trade area, if they set out a plan for doing so within a reasonable period of time, and provided that the duties and regulations imposed on goods from outside the customs

²⁹ Gantz, *supra* note 2 at 238.

³⁰ There is also an equivalent provision in Article V of the GATS. See discussion in Gantz, *ibid* at 254-255.

³¹ Art XXIV:5.

union or free trade area do not become more onerous than they were before its formation.³²

In a customs union, two or more members eliminate internal duties on “substantially all the trade” between themselves, and apply common duties and regulations to imports from outside the union.³³ The members of a customs union adopt a common trade border for the whole union, and eradicate trade borders within the union. The EU is an example of a customs union. The formation of a customs union, which requires adopting a common external trade policy, involves a relatively high degree of economic integration between the parties.

Most of the preferential trade agreements that exist now are not customs unions. The more common type of non-WTO free-trade agreement is the second category: the free-trade area. In a free-trade area, two or more members eliminate duties and trade barriers on “substantially all the trade” internally, but – unlike in a customs union – the members continue to set their own external trade policy.³⁴ As between the members of the free-trade area, duties and regulatory trade restrictions should be reduced or eliminated on “substantially all” (although not *all*) trade for the exemption to apply. But this exemption is looser than the one for customs unions. It is easier for two or more countries to agree on liberalized trade rules among themselves but retain independence on other aspects of trade policy than it is to enter into a customs union, which is a step further towards full economic integration.

³² Art XXIV:5, 5(c).

³³ Art XXIV:8(a).

³⁴ Art XXIV:8(b).

The inclusion of an exemption for free trade areas (and also for interim arrangements leading up to the creation of a free trade area) considerably expands the scope of the Article XXIV exemption from MFN rules.³⁵ Kerry Chase has shown through illuminating archival research that this expansion was supported by US officials during the negotiations towards the ITO and then the GATT³⁶ because at the time the US was secretly negotiating a free trade agreement with Canada (which was never concluded) and wanted global trade rules that would permit the adoption of that agreement.³⁷

In addition to being broader in scope than an exception limited to customs unions, Article XXIV has many ambiguities and conditions that are difficult to apply. For example, where exactly the line is demarcating “substantially all” trade? Ambiguities like this give WTO members opportunities to stretch the limits of the exemption.

Reading the treaty text literally, it might seem that Article XXIV creates a limited and carefully controlled exception to MFN rules, limited to trading blocs that are relatively closely integrated or on the way to a high level of integration. In practice, however, it has functioned as a generous loophole, and it has enabled the proliferation of PTAs. It is possible or even likely that many of the PTAs in existence now are not strictly compliant with the requirements of Article XXIV. But GATT or WTO complaints on this matter are extremely rare. Mavroidis summarizes a number of reasons

³⁵ See discussion of the expansion of the exemption to include free-trade areas as well as customs unions in the drafting of the ITO Charter in Trebilcock, Howse & Eliason, *supra* note 10 at 85-86.

³⁶ For an account of how the post-war negotiations towards the creation of an International Trade Organization (ITO) failed, but led to the adoption of the GATT, see Chapter Five.

³⁷ Kerry Chase, “Multilateralism Compromised: The Mysterious Origins of GATT Article XXIV” (2006) 5 World Trade Rev 1.

for this, including the fact that virtually all WTO members participate in PTAs and they therefore “have little incentive to undermine their options in this area .”³⁸

The relationship between the GATT / WTO multilateral trade framework and PTAs has been ambivalent from the start, and it remains so. On the one hand, PTAs undermine, even cancel out, the essential premise of multilateralism that global trade should be on equal terms for all. On the other, stricter restrictions on PTAs would prevent the development of newer, potentially deeper trading relationships among smaller groups of participants in the multilateral regime that could become more widely adopted.

These different views of the effect of PTAs on global trade is captured in the metaphors of the “spaghetti bowl” and the “stepping stone.” The “spaghetti bowl” portrays PTAs as generators of multiple entangled and overcomplex separate sets of trade rules that undermine the coherence and fairness of the global trading system. Bhagwati (the leading proponent of this view) argues:

With PTAs proliferating, the trading system can ... be expected to become chaotic. Crisscrossing PTAs, where a nation had multiple PTAs with other nations, each of which then had its own PTAs with yet other nations, was inevitable. Indeed, if one only mapped the phenomenon, it would remind one of a child scrawling a number of chaotic lines on a sketch pad.³⁹

Conversely, the metaphor of PTAs as “stepping stones” sees them as interim steps towards more widespread progress, with many WTO members looking to them as a way to “accomplish a degree of trade liberalization on a sub-global level that is

³⁸ Petros C Mavroidis, *supra* note 5 at 3. See also Petros C Mavroidis, “If I Don’t Do it Somebody Else Will (or Won’t),” (2005) 40 J World Trade 187.

³⁹ Bhagwati, *supra* note 14 at 61.

impossible or at least more difficult to achieve globally.”⁴⁰ Furthermore, agreements reached at the sub-global level could become a template or precedent for commitments that all WTO members might eventually agree to.

Whether PTAs are ultimately a good thing or a bad thing for the world trading system, from the point of view of animal protection their most interesting aspect is the incorporation of linked affirmative obligations on non-trade matters. PTAs provide a way for international obligations concerning the protection of animals – both protection of wild animals, as an aspect of environmental commitments, and animal welfare, through explicit provisions on welfare – to be linked to binding dispute settlement mechanisms under trade treaties. The trade-animal protection link can also foster dialogue, transparency, exchanges of ideas and expertise, and international collaboration to improve capacity to protect animals. Indeed, there are examples where this has already occurred, as I set out below – in particular, in Section 8.6.3, which looks at how mechanisms under a PTA provided a way to enhance the protection of endangered sea turtles in the Dominican Republic.⁴¹

8.5 The Rise (and Fall?) of the MRTAs

An important new development in PTA lawmaking is the emergence of MRTAs: big and far-reaching new trade deals that cover large portions of the world’s economy and territory. MRTAs are different, and significant, not only because they have outsized geographical scope, but also because they go beyond the regulatory scope of older trade

⁴⁰ Gantz, *supra* note 2 at 238.

⁴¹ As discussed in Andrew Lurie & Maria Kalinina, “Protecting Animals in International Trade: A Study of Recent Successes and the WTO and in Free Trade Agreements” (2015) 30 Am U Int’l L Rev 431.

agreements. They aim to create trade relationships for the twenty-first century, covering new areas of economic activity and addressing various non-trade governance matters that are affected by trade liberalization, including environmental protection.

This ambitious agenda is described by trade scholars as “deep integration.” Modern PTAs, especially those that bring together many diverse nations, aim to achieve coherence on a number of regulatory fronts as a way to reduce barriers to trade. Another motivation is to shore up the legitimacy and public acceptance of trade agreements that may have a significant effect on many aspects of economic and social life, and can be controversial. If trade liberalization in the mid-twentieth century was mainly about reducing tariffs, today, after decades of negotiations on tariff reduction (at the WTO and in PTAs), tariff differentials are not as important as they used to be as a barrier to trade.⁴² The main focus now is on reducing differences in regulatory standards that impede or slow down cross-border trade.

The more regulatory requirements between trading partners coalesce, the less friction there will be for cross-border flows of goods and services. “Deep integration” is the process of moving closer to coalescence and cooperation on these behind-the-border regulatory matters. The deep integration agenda is not exclusive to MRTAs. Bilateral and smaller multilateral treaties now frequently include deep-integration features. But it is one of the common characteristics of the large trading blocs that are now emerging.

The impact of this shift towards regulatory coherence goes further than just facilitating trade. MRTAs are “deep integration partnerships” that aim not only to

⁴² WTO, *supra* note 2 at 48.

increase trade links but also to “improve regulatory compatibility and provide a rules-based framework for ironing out differences in investment and business climates.”⁴³ This means that modern trade agreements include multiple pages of rules about matters that may not seem to have much to do with trade at all, and are usually solidly within the purview of domestic law. They aim to re-shape “various aspects of what previously were viewed as mainly internal matters, including anti-corruption policy, business organization law, competition policy, consumer protection, data protection, domestic environmental law, intellectual property, labor law, and other areas.”⁴⁴

The WTO’s 2011 report on PTAs posits that deep integration is needed not only to stimulate trade, but also to respond appropriately to the transnational governance challenges that economic integration creates.⁴⁵ Freer trade brings about more integrated economies and transnational production networks. For these networks to work well, they “may require a degree of international governance that only deep integration can supply.”⁴⁶ MRTAs respond to this need by creating various substantive provisions and institutional frameworks for transnational regulation. Kingsbury et al describe this form of global governance through MRTAs as “megaregulation,” by which they mean “a novel

⁴³ Tomas Hirst, “What are mega-regional trade agreements?” *World Economic Forum* (9 July 2014), online: <https://www.weforum.org/agenda/2014/07/trade-what-are-megaregionals/>.

⁴⁴ Errol Meidinger, “The Trans-Pacific Partnership Agreement and Environmental Regulation” in Benedict Kingsbury et al, eds, *Megaregulation Contested: Global Economic Ordering After TPP* (Oxford: Oxford University Press, 2019) 175 at 176-177.

⁴⁵ WTO, *supra* note 2 at 45.

⁴⁶ *Ibid.*

form of inter-state economic ordering and regulatory governance on an extensive substantive and trans-regional scale.”⁴⁷

One of the fears of trade critics is that the homogenization of regulatory standards through trade automatically means driving those standards down. But integration can actually work in the opposite direction, at least theoretically and perhaps in practice. Modern MRTAs typically include affirmative obligations to maintain and enforce relatively high legal standards in certain social policy areas, including environmental protection. Wealthier countries are concerned that developing nations will gain an unfair advantage by having lower standards in these areas. So richer states like the US and the EU ask trade partners to commit to higher standards as a condition of access to new trade deals. For example, as outlined in Section 8.6, for many years US trade policy has been not to enter into PTAs without affirmative commitments on labour and the environment.

Meidinger sees MRTAs as more than mere trade agreements. For him, they are “tools in forming geopolitical alliances that extend beyond liberalized trade.”⁴⁸ Meidinger argues that they are essentially geostrategic in nature.⁴⁹ In a similar vein, Kerr queries whether the purpose of the CPTPP is really to increase trade, or rather the geostrategic objective of moving the “gravitational center of influence from China to the U.S. in the Asia-Pacific.”⁵⁰

⁴⁷ Benedict Kingsbury et al, “Introduction: The Essence, Significance, and Problems of the TPP” in Benedict Kingsbury et al, *Megaregulation Contested: Global Economic Ordering After TPP* (Oxford: Oxford University Press, 2019) 1 at 2.

⁴⁸ Errol Meidinger, *supra* note 44 at 176.

⁴⁹ *Ibid.*

⁵⁰ Andrew Jensen Kerr, “The Trans-Pacific Partnership and the Construction of a Syncretic Animal Welfare Norm” (2016) 27 *Duke Env’t L & Pol’y Forum* 155 at 161.

MRTAs are also about more than just the nations that are party to the MRTA. Because they are “sufficiently large and ambitious to influence trade rules beyond their areas of application,” MRTAs have “a systemic and global impact.”⁵¹ They are designed to set the standards on which trade agreements negotiated and concluded in the future will build, and to function as a benchmark for regulatory and other reforms that may influence future reforms in global trade regulation.⁵²

These features make MRTAs worth watching as incubators of developing global norms, not just on trade rules in the limited or traditional sense, but also on the extensive and expanding list of connected “deep integration” subjects. To an extent, that list already includes animal protection, because it is a component of environmental obligations.

Until 2016, it seemed reasonable to predict that the fast pace of formation of new MRTAs would continue, much as the general category of PTAs has proliferated over the last few decades. Now, though, it is unclear what will happen. The US was the most important driver of new trade agreements, with its strong ideological commitment to trade liberalization, deep institutional expertise, and huge amount of political and economic leverage to get agreements done. That has changed. Despite the enthusiasm of political and institutional leaders for economic globalization, popular opposition to it is real and passionate. The anti-trade point of view is now reflected in the Trump

⁵¹ Divesh Kaul, “Trans-Pacific Partnership Trump(ed): Was TPP That Bad an Acronym in New US Trade Terminology?” (2018) 27:1 Tulane J Int’l & Comp L 1 at 6.

⁵² *Ibid.*

administration, although there are still administration officials who are in favour of free trade.

At present, the future direction of the US government on trade is unpredictable, and it is also unclear what the rest of the world will do in these new circumstances. The US has withdrawn from the TPP, but the other parties have proceeded to conclude the CPTPP. Following US threats to withdraw from NAFTA, the NAFTA parties have signed a new agreement with mostly similar terms: the Canada-United States-Mexico Agreement (CUSMA).⁵³

Whether or not MRTAs as a class of trade agreements are the way of the future, for the time being, at least, their potential systemic impact on international legal norms is worthy of attention and analysis. MRTAs are powerful engines of global governance. If global animal law is to be a meaningful part of global governance in the coming decades, these agreements are probably a good place to look for it. The clearest connection to animal protection is in the environmental provisions of MRTAs.

8.6 Precursors of the CPTPP Environment Chapter

The CPTPP Environment Chapter includes a number of features that represent the current “state of the art” for PTA environment rules, including a binding obligation to effectively enforce domestic environmental law, incorporation by reference of obligations under multilateral environmental agreements (MEAs), binding dispute resolution, and

⁵³ *Canada-United States-Mexico Agreement*, 30 November 2018, online: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng> [CUSMA].

mechanisms for public submissions. These provisions, discussed in detail in the next section, evolved from earlier PTAs, especially those to which the US was a party. They reflect the historical experience of the US with integrating environmental provisions into trade agreements. This section summarizes how the environmental language of the CPTPP emerged from previous PTAs.

8.6.1 NAFTA

The first multilateral PTA to include affirmative rules on the environment was NAFTA, which came into force in 1994.⁵⁴ The environmental provisions are elaborated in a side agreement, the North American Agreement on Environmental Cooperation (NAAEC).⁵⁵

The NAAEC was, for its time, an innovative and progressive way to link trade and the environment. It obligated each party to “ensure that its laws and regulations provide for high levels of environmental protection” and to “strive to continue to improve those laws and regulations.”⁵⁶ It provided for the parties to request dispute resolution (under a process separate from the general NAFTA dispute settlement process) in the case of an allegation of a “persistent pattern of failure” by another party to effectively enforce its environmental law.⁵⁷

⁵⁴ David P Vincent, “The Trans-Pacific Partnership: Environmental Savior or Regulatory Carte Blanche?” (2014) 23:1 Minn J Int’l L 1 at 8.

⁵⁵ *North American Agreement on Environmental Cooperation*, Canada, Mexico and United States, 14 September 1993, online: <http://www.cec.org/about-us/NAAEC> (in force 1 January 1994) [NAAEC].

⁵⁶ *Ibid*, Art 3.

⁵⁷ *Ibid*, Art 22-Art 36.

The NAAEC also created the North American Commission for Environmental Cooperation (CEC),⁵⁸ “the first trilateral forum for promoting a regional collaborative approach to environmental protection in North America.”⁵⁹ The CEC consists of a Council, a Secretariat and a Joint Public Advisory Committee.⁶⁰ The Secretariat is authorized to consider submissions “from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law,” provided that certain criteria are met.⁶¹ It can respond to submissions by determining that the submission warrants a response from the party in question.⁶² It can also (independently of the determination as to whether the submission warrants a response) determine that the submission warrants the creation of a factual record, in which case it informs the Council and then proceeds to prepare a factual record if the Council instructs it to do so.⁶³ The NAAEC structure for public participation and civil society submissions is borrowed from and built on in later PTAs, including the CPTPP Environment Chapter.

Although the environmental provisions of NAFTA were precedent-setting, they have been criticized for “[falling] short of holding member countries to a high environmental standard.”⁶⁴ The CEC had no power to enforce compliance or investigate failures to enforce regulations, and there was little evidence to suggest that it influenced

⁵⁸ *Ibid*, Art 8.1.

⁵⁹ Commission for Environmental Cooperation, “CEC Council Statement – 2019” (25 June 2019), online: <http://www.cec.org/about-us/council-statements/cec-council-statement-2019>. See David L Markell & John H Knox, *Greening NAFTA: The North American Commission for Environmental Cooperation* (Stanford: Stanford Law and Politics, 2003).

⁶⁰ NAAEC, *supra* note 55, Art 8.2.

⁶¹ *Ibid*, Art 14.1.

⁶² *Ibid*, Art 14.2.

⁶³ *Ibid*, Art 15.

⁶⁴ Vincent, *supra* note 54 at 8.

NAFTA parties' trade policies.⁶⁵ The citizen submission process has been described as “a significant step in the democratization of international environmental law,”⁶⁶ but it has important weaknesses.⁶⁷ The lack of strong environmental enforcement mechanisms under NAFTA spurred demands for tougher environmental provisions in future PTAs.⁶⁸

In 2018 NAFTA was superseded by CUSMA,⁶⁹ which has an Environment Chapter (Chapter 24) featuring many of the more modern environment provisions now commonly found in PTAs. Many of the CUSMA provisions are identical to or even stronger than the CPTPP Environment Chapter rules that are discussed in detail in Section 8.7. The CEC remains in existence and is referred to in the CUSMA Environment Chapter as the main mechanism for cooperative environmental activities between the parties.⁷⁰

8.6.2 After NAFTA: Environmental Norms in US PTAs

NAFTA raised public awareness of the risks of weak environmental governance associated with liberalized trade. As a result, it has become a political priority to ensure that trade agreements are married to stronger environmental provisions.⁷¹ The US government negotiates trade agreements on the basis of a conditional pre-authorization from Congress called the Trade Promotion Authority or “fast track,” which specifies

⁶⁵ *Ibid* at 9.

⁶⁶ Jonathan G Dorn, “NAAEC Citizen Submission Against Mexico: An Analysis of the Effectiveness of a Participatory Approach to Environmental Law Enforcement” (2007) 20 *Geo Int'l Env't'l L Rev* 129 at 145.

⁶⁷ See analysis of the strengths and weaknesses of the process in *ibid* at 138-145.

⁶⁸ Vincent *supra* note 54 at 18-19.

⁶⁹ *Supra* note 53.

⁷⁰ *Ibid*, Art 24.25(3).

⁷¹ *Ibid* at 22-23.

conditions that trade agreements have to satisfy; the requirements for environmental protection have become increasingly strong over time.⁷²

Reflecting these requirements, all recent US PTAs include “environmental chapters that contain core obligations to provide for high levels of environmental protection.”⁷³ Since a bipartisan agreement in 2007, PTAs are required to specify the incorporation of seven listed MEAs, a binding obligation not to fail to implement or enforce environmental laws in a way affects trade or investment, and inclusion of these environmental obligations in the dispute settlement system that applies to the whole agreement.⁷⁴ Another common feature of recent US PTAs is “provisions to promote public participation, provide appropriate remedies for violations of environmental laws, and promote measures to enhance environmental performance.”⁷⁵

The PTAs drafted to meet these requirements have had a global influence, beyond agreements that the US is party to. As Meidinger notes, they draw on a “common pool of environmental norms” and both borrow from past agreements and serve as templates for future ones.⁷⁶

The US has been the global *demandeur* for strong environmental chapters that include binding rather than merely hortatory or aspirational provisions, incorporation of

⁷² See Lurié & Kalinina, *supra* note 41 at 452; Katie Sykes, “Globalization and the Animal Turn: How International Trade Law Contributes to Global Norms of Animal Protection” (2016) 5(1) TEL 55 at 76-77; Raj Bhala, “Trans-Pacific Partnership or Trampling Poor Partners? A Tentative Critical Review” (2014) 11:1 Manchester J Int’l Econ L 2 at 23-24.

⁷³ W Davis Jones, “The Relationship between Trade and Effective Enforcement” (2008) 36:3 Denv J Int’l L & Pol’y 389 at 390.

⁷⁴ Meidinger, *supra* note 48 at 179.

⁷⁵ *Ibid.*

⁷⁶ *Ibid* at 7-8.

MEAs, dispute resolution through the dispute resolution process that applies to the main agreement with potential monetary and trade sanctions for persistent failure to enforce environmental law, and robust public participation mechanisms. All of these features are in the CPTPP, largely reflecting the US negotiating position, although the US is no longer part of the agreement.

8.6.3 CAFTA-DR: Public Participation and Capacity-Building for Endangered Species Protection

The first major PTA after NAFTA for the US was CAFTA-DR, an agreement with a group of Central American countries (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua) and the Dominican Republic. The US joined this PTA in 2005.

Responding to criticisms of NAFTA's environmental provisions, the US government promoted CAFTA-DR as "a significant improvement upon NAFTA," with strengthened dispute settlement and citizen submission processes.⁷⁷ CAFTA-DR builds incrementally on NAFTA, and it still has weaknesses; as Vincent observes, "CAFTA-DR encourages countries to strengthen environmental regulation at all levels, but it neither requires them to do so nor gives them incentives for such action."⁷⁸

But CAFTA-DR does have a mechanism for public participation in monitoring and advocating on the implementation of the environmental provisions (which is common in modern PTAs). This may seem like a weak form of oversight compared to formal

⁷⁷ Vincent, *supra* note 54 at 18-19.

⁷⁸ *Ibid* at 19.

enforcement mechanisms, but there has been experience using these public participation provisions that have yielded quite promising results in international collaboration for the protection of animals. CAFTA-DR's public participation process is the only PTA mechanism so far (as far as I am aware) to have been used by an animal protection NGO specifically for the purpose of improving legal protection of animals.

Article 17.7 of CAFTA-DR sets out the process for making submissions. It provides that "[a]ny person of a Party" (including NGOs that have a presence in the relevant country) can file a submission saying that the party is not effectively enforcing its environmental laws. Submissions are filed with a secretariat, which may decide to request a response from the party in question. Whether or not the secretariat decides to request a response, it can decide that the matter warrants development of a factual record, and can do so if the Environmental Affairs Council instructs it to.⁷⁹

In 2007, Humane Society International (HSI) filed the first submission under Article 17.7, concerning the Dominican Republic's enforcement of domestic laws on the protection of endangered sea turtles.⁸⁰ Andrew Lurié, an attorney with the Humane Society of the United States, and Maria Kalinina, an international trade specialist with HSI, recount in a 2015 article how this process unfolded after HSI filed its submission.⁸¹

Local law banned the capture and killing of green, hawksbill, loggerhead and leatherback turtles, the collection of their eggs, and the sale of any products derived from them.⁸² It also required the government to prepare an inventory of products made from

⁷⁹ Art 17.8.

⁸⁰ Jones, *supra* note 73 at 391.

⁸¹ Lurié & Kalinina, *supra* note 41.

⁸² *Ibid* at 460.

sea turtles that were made before the ban came into force and were sold or used in artisan and commercial establishments.⁸³

HSI and wildlife protection organizations working with them determined that the required inventory had not been prepared, so that the government lacked information on which products were made before the ban came into effect. HSI argued that “without the inventory, enforcing the domestic laws was impossible and undermined the [Dominican Republic's] ability to determine if any turtle products are imported illegally” – a violation of the Dominican Republic’s obligations under CITES which are also incorporated by reference into the Environment Chapter of CAFTA-DR. Ultimately, the secretariat compiled a factual record and released it publicly in 2011.⁸⁴

Lurié and Kalinina describe the submission process as having a number of important benefits. Most importantly, the Dominican Republic did take steps to improve enforcement of its sea turtle protection laws in response to HSI’s submission.⁸⁵ The development of a detailed factual record by the secretariat on technical, scientific, and legal issues concerning sea turtles in the Dominican Republic created a baseline of useful information, and spared the resource-constrained government of a developing country the cost of developing this record itself.⁸⁶ Increased public awareness of the issue due to the submission process helped the government to build up the political capital to act on sea

⁸³ *Ibid.*

⁸⁴ *Ibid* at 459, 461.

⁸⁵ *Ibid* at 461

⁸⁶ *Ibid* at 463.

turtle conservation, and to “engage with various entities on capacity building to improve enforcement of its environmental legislation.”⁸⁷

Lurié and Kalinina write that the main shortcoming of the process was that it took too long (almost four years) for the factual record to be completed. They argue that failure to develop a record within a reasonable time could be very harmful when endangered species are struggling to survive and delays could have grave consequences.⁸⁸

If it is evaluated against an adversarial model of enforcement, where compliance is mandatory and noncompliance is penalized with binding judgments and financial penalties or suspension of trade benefits, the process that Lurié and Kalinina recount might appear to be weak and toothless. But HSI’s experience with the sea turtle matter illustrates how real, positive results that help animals can emerge from a process of sharing information, public discussion, and cooperation, not just from litigation and punishment. For developing-country governments with limited resources, whose people may see conservation as a low priority versus economic survival, there are fiscal and political obstacles to fulfilling environmental commitments that adversarial enforcement may not do very much to solve. The submission process under CAFTA-DR, by contrast, provided help in enabling the government of the Dominican Republic to act.

It is also important that a robust framework for collaboration and capacity-building was already in place, as contemplated in the capacity-building provisions of CAFTA-DR.⁸⁹ HSI had been involved in capacity-building efforts in the Dominican

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid* at 463-465.

Republic since 2005, and had worked on public outreach efforts against wildlife trafficking and improving care for rescued and confiscated animals.⁹⁰

Many elements of the CAFTA-DR Environment Chapter, including the provisions allowing submissions by private citizens and NGOs as well as capacity-building, are also found in the CPTPP. HSI's experience with this type of legal structure under CAFTA-DR is an illustration of what advocates can potentially do to benefit animals using the tools that exist in the CPTPP and in other modern PTAs.

8.7 The TPP / CPTPP: Environmental Protection Linked to Trade Partnership

The Trans-Pacific Partnership or TPP began life as a negotiation to update an existing PTA, the Trans-Pacific Strategic Economic Partnership (also known as the P4) between Brunei, Chile, New Zealand and Singapore.⁹¹ The negotiations eventually expanded to the twelve TPP countries, which were already linked by an extensive network of bilateral and multilateral PTAs between them in various configurations. The TPP developed at least in part as a consolidation and harmonization of existing trade agreements.⁹²

The trade agreement that ultimately emerged was ambitious indeed, covering a huge portion of the global economy, about 40% of global GDP, a combined population of

⁹⁰ *Ibid* at 464-465.

⁹¹ Rodrigo Polanco Lazo & Sebastian Gomez Fiedler, "A Requiem for the Trans-Pacific Partnership: Something New, Something Old and Something Borrowed" (2017) 18 *Melb J Int'l L* 298 at 302; Urata, *supra* note 6 at 23-24.

⁹² Polanco Lazo & Fiedler, *ibid* at 302-304.

about 800 million, and about 40% of world trade.⁹³ The coverage of legal and economic issues was similarly ambitious. The TPP is probably the most prominent example of the “high-quality, twenty-first century” deep-integration trade agreement, addressing a much broader range of issues than traditional trade deals.⁹⁴ It had chapters addressing a number of areas that are not addressed in the WTO agreements, including telecommunications, e-commerce, and small and medium enterprises.

The TPP parties announced that they had agreed on a final text in late 2015, and the treaty was signed in February 2016 in Auckland.⁹⁵ Before the official text was made public, versions of some of the chapters were leaked by organizations critical of trade and economic liberalism, Citizens Trade Campaign and Wikileaks.⁹⁶ The leaked text sparked impassioned criticism mainly from the left-leaning end of the political spectrum. Critics argued that the new trade agreement served the agenda of powerful US corporations and did nothing to alleviate poverty in the Asia-Pacific region, and that the negotiation process had lacked transparency.⁹⁷

As it turned out, a more decisive threat to the TPP, somewhat unexpectedly, came from the other end of the political spectrum. In 2016, Donald Trump was elected President of the US, after a campaign in which he was sharply critical of US trade agreements and especially of the TPP, which had been the signature trade initiative of the

⁹³ “Trans-Pacific Partnership Ministers’ Statement” (February 4, 2016), online: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/February/TPP-Ministers-Statement>; Kaul, *supra* note 51 at 3.

⁹⁴ C L Lim, Deborah K Elms and Patrick Low, “What is high-quality, twenty-first century’ anyway?” in C L Lim, Deborah K. Elms and Patrick Low, eds, *The Trans-Pacific Partnership: A Quest for a Twenty-first-Century Trade Agreement* (Cambridge: Cambridge University Press, 2012) 3 at 8.

⁹⁵ “Trans-Pacific Partnership Ministers’ Statement,” *supra* note 93.

⁹⁶ Polanco Lazo & Fiedler, *supra* note 91 at 299; Bhala, *supra* note 72 at 3.

⁹⁷ Bhala, *ibid* at 26-27, 29.

prior Obama administration. In January 2017, days after the new administration took power, the US government announced that it was withdrawing from the TPP.⁹⁸ Since the US was by far the biggest economy among the twelve parties, its withdrawal seemed initially to spell the end for the TPP. But the remaining eleven members decided to move ahead and conclude an agreement that incorporated by reference most of the agreed text of the TPP.⁹⁹ This reborn, but diminished,¹⁰⁰ trade deal is the CPTPP.

After the profound shifts in global politics and ideology since 2016, it is difficult to predict what will happen to the CPTPP. Until 2016, the progression to increased international trade liberalization, deeper economic integration and more comprehensive and ambitious PTAs seemed almost inexorable. That is no longer the case. The legitimacy of ever-increasing economic globalization is in question now in a way that it has not been since the protests against the WTO in the 1990s.

Nevertheless, and despite its diminished coverage after the US exit, the CPTPP remains an important example of the MRTA phenomenon and an indication of the direction that trade-related legal standards may take in the future. Part of the reason for this is that the CPTPP parties hope that additional countries will join the pact in future, increasing its reach and influence over time. The eleven CPTPP members have

⁹⁸ Peter Baker, “Trump Abandons Trans-Pacific Partnership, Obama’s Signature Trade Deal”, *The New York Times* (23 January 2017) online: <https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html>.

⁹⁹ The CPTPP itself is a brief framework agreement; Article 1 incorporates by reference the provisions of the TPP as signed in 2016, with changes as necessary to reflect the withdrawal of the US. CPTPP, *supra* note 7.

¹⁰⁰ The trading bloc of 11 countries represents a combined population of 495 million people and GDP of \$13.5 trillion. Global Affairs Canada, “Overview and benefits of the CPTPP,” online: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/overview-apercu.aspx?lang=eng>.

reportedly reached out to the US and even to China to discuss the possibility of their eventually joining the pact.¹⁰¹ In 2017, the parties issued a joint statement speaking of their vision for the TPP to expand to include other economies willing to accept its high standards.¹⁰²

A further reason for the CPTPP's continuing significance is the fact that the agreed text represents the outcome of many years of tough negotiations, and expresses the consensus of the parties on what the standards of a high-quality, state-of-the-art modern trade agreement should be. Urata observes that the agreement "aims to set a new standard for global trade and incorporate next-generation issues to boost the competitiveness of member countries in the global economy."¹⁰³ Polanco Lazo and Fiedler propose that it will set a precedent for trade agreements for years to come, becoming a "template for negotiations" on trade-linked matters such as anti-corruption, environmental protection, and labour standards.¹⁰⁴

These scholars' analyses suggest that the CPTPP may be a useful place to look in order to anticipate what lawmaking in the trade arena might look like in the future, including how trade provisions may be integrated with a progressive agenda on linked social issues. The CPTPP is significant for animal protection because there is potential for animal protection to become part of a trade-linked progressive agenda. In fact, animal

¹⁰¹ Anthony Fensom, "New Life for the TPP?" *The Diplomat* (22 May 2017), online: <https://thediplomat.com/2017/05/new-life-for-the-tpp/>.

¹⁰² "Joint Statement by TPP Partners" (21 May 2017), Annex A to Ministry of Trade and Industry of Singapore, "Statement on the Trans-Pacific Partnership" (21 May 2017), online: https://www.gov.sg/~sgpcmedia/media_releases/mti/press_release/P-20170521-1/attachment/Statement%20on%20the%20Trans-Pacific%20Partnership_21%20May%202017.pdf.

¹⁰³ Urata, *supra* note 6 at 32.

¹⁰⁴ Polanco Lazo & Fiedler, *supra* note 91 at 300.

protection is already integrated into the CPTPP to an extent through the agreement's Environment Chapter.

8.7.1 Animal Protection and the CPTPP Environment Chapter

The Environment Chapter is not the only aspect of the CPTPP that is relevant to environmental regulation in the new trade bloc. Other provisions, including ISDS and rules on regulatory coherence, have implications for environmental protection.¹⁰⁵ For animal protection, however, Chapter 20 has special importance, because it creates positive obligations to protect wild animals and to prevent illegal trade in wild animals, linked to a powerful dispute settlement mechanism.

This development is especially important since wildlife poaching and trafficking are significant problems in the Asia-Pacific region. CPTPP countries “are either source or demand countries for illegally trafficked wildlife, many of which are endangered or likely to become endangered,” and domestic laws against wildlife trafficking may be lacking or underenforced.¹⁰⁶ For example, the elephant population in Vietnam (a CPTPP party) has crashed due to poaching and weak environmental laws, among other factors.¹⁰⁷ Vietnam is also an importer of rhino horn, and “heavily implicated in the rapid decline of the African rhino population.”¹⁰⁸ The CPTPP creates both legal leverage and institutional frameworks to improve the regulation of activities that cause significant harm to animals.

¹⁰⁵ Meidinger, *supra* note 48 at 179.

¹⁰⁶ Lurié & Kalinina, *supra* note 41 at 472.

¹⁰⁷ Kerr, *supra* note 50 at 171; Christina Russo, “The Silent Crisis: Vietnam’s Elephants on the Verge of Extinction” *National Geographic* (5 December 2013), online: <https://blog.nationalgeographic.org/2013/12/05/the-silent-crisis-vietnams-elephants-on-the-verge-of-extinction/>.

¹⁰⁸ Kerr, *ibid.*

When Wikileaks released the draft text of the draft Environment Chapter in 2014, it also issued a press release describing the environmental obligations as “just media sugar water” and “a toothless public relations exercise.”¹⁰⁹ Compared to NAFTA, however, the TPP reflects a meaningfully tougher approach on linking high environmental standards to membership in the trading partnership. In fact, the stringent environmental standards were “one of the most challenging areas of the negotiations,” in particular with developing nations, who were “concerned with including environmental provisions, as they would be at a disadvantage if they must adhere to the same standards as developed nations.”¹¹⁰ Canada’s foreign affairs ministry, Global Affairs Canada, describes the agreement’s provisions to enhance environmental protection as “one of the most ambitious outcomes negotiated by Canada to date.”¹¹¹

The next subsections look at specific provisions of the Environment Chapter that are potentially significant for animal protection:

- Article 20.3, which sets out the parties’ general commitment to environmental protection and to ensuring a high level of environmental protection under domestic law;

¹⁰⁹ Wikileaks, “Secret Trans-Pacific Partnership Agreement (TPP) Environment Chapter” (January 15, 2014), online: <https://www.sierraclub.ca/en/main-page/tpp-environment-chapter-wikileaks-press-release-secret-trans-pacific-partnership-agreement>. See also discussion in Sykes, *supra* note 72 at 78. The final agreed text of the TPP differed from the draft leaked in 2014 in some important ways, including strengthening the enforcement provisions, so the criticism may have been more well founded at the time than it now appears.

¹¹⁰ Vincent, *supra* note 54 at 24.

¹¹¹ Global Affairs Canada, “Overview and benefits of the CPTPP,” online: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptppg/overview-apercu.aspx?lang=eng>.

- Article 20.4, which commits the parties to the implementation of multilateral environmental agreements;
- Articles 20.8 and 20.9, which provide mechanisms for public participation and submissions and for members of the public to seek information about implementation of the Chapter;
- Article 20.12, which deals with frameworks for cooperation between the parties to implement the Chapter;
- Article 20.16, which commits the parties to promote conservation of marine wildlife, including by prohibiting shark finning;
- Article 20.17, which deals specifically with illegal trade in wildlife; and
- Article 20.23, the rules for settlement of disputes.

8.7.1.1 General Commitment to Environmental Protection under Domestic Law

Article 20.3 establishes general commitments under the Environment Chapter. In this Article, the parties “recognise the importance of mutually supportive trade and environmental policies and practices to improve environmental protection in the furtherance of sustainable development.”¹¹² The Article also reiterates the customary international law principle that each party has the sovereign right to set its own levels of domestic environmental protection.¹¹³

¹¹² Art 20.3(1).

¹¹³ Art 20.3(2).

The parties agree to maintain a high level of environmental protection, and continuous improvement, under their respective domestic laws.¹¹⁴ They also agree not to fail to enforce environmental laws through a sustained or recurring course of action that affects trade between the parties.¹¹⁵

These obligations require all of the CPTPP parties to ensure that their laws, regulations and enforcement mechanisms bring about a high and improving level of environmental protection. That includes developing countries, where domestic standards of environmental protection may (whether on paper or in practice) be relatively weak. Theoretically, these commitments under the CPTPP could translate into better legal protection for wildlife threatened by low domestic environmental standards. The softness of the legal standards in the text and the counterbalancing principle of sovereign autonomy in these matters may, however, dilute the strength of these general commitments as hard, enforceable obligations.

8.7.1.2 *Multilateral Environmental Agreements*

Article 20.4 of the CPTPP affirms each party's commitment to "implement the multilateral environmental agreements to which it is a party." In one sense, this obligation is empty, since CPTPP parties are already legally bound to implement MEAs to which they are parties. There is, however, some symbolic importance to the foregrounding of MEA commitments in the context of an influential trade treaty. There

¹¹⁴ Art 20.3(3).

¹¹⁵ Art 20.3(4).

is also potential practical significance to incorporating them by reference into actionable obligations under the CPTPP.

“Affirms its commitment to implement” is not as strong as “shall implement,” but it is possible that a party’s persistent failure to implement provisions of an MEA could lead to a complaint under the dispute settlement provisions and, ultimately, to the imposition of trade sanctions as a penalty for the lack of implementation – something that is typically not available under MEAs themselves. Joining up MEA obligations and trade compliance measures in this way enhances the enforceability of MEAs among CPTPP parties.

One MEA to which all of the CPTPP countries are parties is CITES.¹¹⁶ As discussed below in Section 8.7.1.6, the Environment Chapter also contains additional specific provisions concerning CITES and illegal trade in wildlife.

8.7.1.3 Public Information and Participation

The CPTPP provides for citizen participation in monitoring and providing input on the parties’ implementation of the Environment Chapter, through requests for information, consultation, and written submissions that may *inter alia* allege a party’s failure to effectively enforce its environmental laws.

These provisions are similar to the public participation structure under CAFTA-DR, although there are some differences. The CPTPP does not expressly provide for the creation of a factual record as CAFTA-DR Article 17.8 does, but Article 20.9(5) provides

¹¹⁶ Bhala, *supra* note 72 at 52.

that the CPTPP Committee on Environment shall develop its own procedures and that they may provide for creating reports.

Article 20.8, Opportunities for Public Submissions, provides that the parties “shall seek to accommodate requests for information” regarding their implementation of the Environment Chapter, and calls for the use of existing or newly created consultative mechanisms with members of the public, including people with relevant experience “including experience in business, natural resource conservation and management, or other environmental matters.”

Article 20.9, Public Submissions, commits each of the parties to making provisions for receiving and considering public submissions on the implementation of the Environment Chapter. If there is a submission, the party in question has to respond in a timely manner and must make the submissions and the response available to the public. The Committee on Environment established under the CPTPP can also consider whether the matter is suitable for cooperative activities.¹¹⁷

This framework for public participation may in some ways seem a weak tool for combatting severe problems of environmental degradation and wildlife depletion in CPTPP countries. Some of the language is merely hortatory. For example, under Article 20.8 the parties need only “*seek* to accommodate” requests for information, and have no hard obligation to do so. In the consultative process envisioned in Article 20.8, input from business is on the same footing as input from environmental NGOs and experts on ecology, which seems to do little to alter the balance of a legal structure that is already

¹¹⁷ Art 20.9(4).

heavily tilted towards trade and economic interests with environmental protections as an add-on. The potential outcome is discussion and cooperation, rather than sanctions for noncompliance.

But to dismiss the public participation provisions as nothing but window-dressing would be to miss the genuine opportunities for improved openness and dialogue that they offer. Recall that in the WTO system there is no formal space for citizen or non-state participation, apart from the limited case of being able to submit *amicus* briefs in DSB proceedings. The CPTPP provides more: an avenue for citizens to hold TPP member governments accountable for meeting their commitments under the Environment Chapter, and also to have a voice on how best to implement those commitments. HSI's experience using the public submission process under CAFTA-DR generated effective collaborative efforts to improve protection for sea turtles. NGOs with a presence in CPTPP countries now have the same kind tool available for addressing the implementation of animal protection obligations under the Environment Chapter, including those that protect animal welfare.

Take, for instance, the example posited in Section 8.7.1.4 of wild animals covered by CITES being transported with inadequate welfare protections in a way that subjects them to suffering and injury. Only another CPTPP party would have standing to seek formal litigation in respect of such an incident through dispute resolution, and this would be unlikely to happen. But HSI and similar organizations would have a legal means under the public participation provisions to seek information about the problem, bring it to public attention, and make suggestions on how the situation could be improved. These provisions provide citizens and NGOs with a potentially meaningful soft power.

We might associate these kinds of mechanisms mainly with improving environmental governance in developing countries, where it tends to be weaker – as was the case in the Dominican Republic sea turtle case. But wealthy countries, too, often have inadequate and underenforced animal protection laws. The CPTPP public participation mechanisms provide a new tool for animal advocates in Canada to hold our own government accountable for what it does, and fails to do, on animal protection. Animal protection groups, environmental organizations concerned with wildlife protection, and private citizens, could use these mechanisms to seek information and to be consulted about matters such as whether approval of big infrastructure projects that affect wildlife habitats is consistent with Canada’s obligations under MEAs incorporated by reference into the CPTPP, or whether Canada’s new shark finning ban (discussed in Section 8.7.1.5) is being properly enforced so as to meet TPP commitments on shark conservation.

Kerr sees “hope that the citizen participation model of the TPP can help to find a common currency for negotiating transnational issues related to habitat destruction, species loss, climate change and business development.”¹¹⁸ Admittedly, the public participation provisions give citizens no more than a platform to ask questions and give input, and governments can ignore the input. But, as Kerr rhetorically asks, “is it better to remain in a pre-TPP universe where no one is talking, or to bring in a chorus of new voices even if we’re not sure anyone will listen? It is unclear what there is to lose.”¹¹⁹

¹¹⁸ Kerr, *supra* note 50 at 169.

¹¹⁹ *Ibid* at 173.

8.7.1.4 Cooperation Frameworks

The CPTPP Environment Chapter is replete with references to cooperation on environmental problems and to working together to develop the parties' capacity to address with those problems. The most important of these provisions is Article 20.12, Cooperation Frameworks, which specifies that the parties "shall cooperate to address matters of joint or common interest among the participating Parties related to the implementation of this Chapter, when there is mutual benefit from that cooperation," and that cooperative frameworks may include NGOs and non-parties to the agreement.¹²⁰ There are also references to cooperative efforts and frameworks woven into many of the other sections of the Environment Chapter.

These references include, *inter alia*:

- The Objectives section (Art 20.2(1)), pursuant to which "the Parties recognise that enhanced cooperation to protect and conserve the environment and sustainably manage their natural resources brings benefits that can contribute to sustainable development, strengthen their environmental governance and complement the objectives of this Agreement,"
- The Public Submissions section (Article 20.9(4)), which provides that the response to a submission alleging that a party is failing to effectively enforce its environmental laws may include consideration of "whether the matter could benefit from cooperative activities," and

¹²⁰ Art 20.12(2).

- The Conservation and Trade section (Article 20.14(7)), whereby the parties “shall endeavour to identify opportunities, consistent with their respective law and in accordance with applicable international agreements, to enhance law enforcement cooperation and information sharing, for example by creating and participating in law enforcement networks.”

These are exactly the kinds of provisions that inspire accusations of window-dressing and empty public relations exercises. They really do not function as hard, enforceable legal obligations. It seems implausible, for example, that CPTPP parties could be held to account on these commitments through dispute resolution; how could a panel determine whether or not a party has “endeavour[ed] to find opportunities” to enhance law enforcement opportunities on wildlife trafficking? But an important point to keep in mind is that adversarial disputes and punishment of noncompliance are not the only, or even necessarily the most effective, ways to foster adherence to legal norms.

The CAFTA-DR example discussed in Section 8.6.4 above demonstrates that cooperation and help with building capacity can be a “powerful tool to improve enforcement and benefit wildlife conservation.”¹²¹ Cooperative frameworks are not necessarily an obligation that is imposed on the parties or that they take on reluctantly. Rather, these opportunities to share knowledge and institutional capacity can be a perk of membership in a trade partnership, one that augments the parties’ collective and

¹²¹ Lurié & Kalinina, *supra* note 41 at 463.

individual capacity to cope with environmental threats and creates channels for dialogue and relationship-building.

8.7.1.5 Marine Wildlife and Shark Finning Bans

Article 20.16 of the CPTPP, Marine Capture Fisheries, includes commitments to regulate marine fisheries so as to prevent overfishing, reduce by-catch, and promote the recovery of overfished stocks.¹²² The parties also agree to promote long-term conservation of sharks, marine turtles, seabirds, and marine mammals, “through the implementation and effective enforcement of conservation and management measures.”¹²³ For sharks, those measures are to include, along with data collection, bycatch mitigation and catch limits, prohibitions on shark finning.¹²⁴

Shark finning is the practice of catching sharks, cutting off their fins, and returning the shark to the ocean.¹²⁵ They either drown, are eaten by predators, or bleed to death.¹²⁶ Shark fins are used for shark fin soup, “a highly desirable traditional Chinese luxury dish that is prized as a status symbol.”¹²⁷ The fin trade is driven by demand from China and other Asian countries where shark fin soup has cultural cachet.¹²⁸

¹²² Art 20.16(3).

¹²³ Art 20.17(4).

¹²⁴ Art 20.16(a).

¹²⁵ Cameron S G Jefferies, “Think Globally, Act Locally: How Innovative Domestic American Efforts to Reduce Shark Finning May Accomplish What the International Community Has Not” (2012) 34 U Haw L Rev 125 at 126.

¹²⁶ *Ibid.*

¹²⁷ *Ibid* at 127. See also *ibid* at 131-132, explaining that shark fin soup became a status symbol in Imperial China because sharks were considered dangerous, strong, and virile and because their fins were thought to have medicinal properties, and noting that consumption of shark fin soup has exploded since the late 1980s as the Chinese middle class has grown wealthy.

¹²⁸ *Ibid* at 137; Ilja Pavone, “Race to Extinction: Shark Conservation under International and European Law and Its Limits” (2018) 23:1 Ocean & Coastal L 45 at 46-47.

Shark finning threatens the survival of sharks, an important group of marine species. It is also cruel. That is to say, it is an animal protection problem that combines both conservation and welfare concerns. For both reasons, it has become very controversial.¹²⁹ Shark finning is also an example (like seal hunting) of an animal protection problem connected to a culturally significant practice.

Many international frameworks already exist that could be a basis to protect sharks from overexploitation and to target shark finning in particular. These international instruments include CITES, the UN Convention on the Law of the Sea, and the Bonn Convention on Migratory Species of Wild Animals. But the response of the international community through these mechanisms has, so far, fallen far short of acting effectively to conserve sharks.¹³⁰ Jefferies proposes that this regulatory gap can be remedied at least in part by a network of domestic legislative actions, citing the examples of US federal law concerning shark finning, and Hawaiian state law that prohibits both trade in shark fins and the preparation and sale of shark fin soup.¹³¹ Hawaii's ban on shark fin sales shut down the market for shark fin soup in the state. This demonstrates, Jefferies argues, that a domestic jurisdiction that is not "plagued by the problems preventing the creation of a

¹²⁹ *Ibid.*

¹³⁰ See Jefferies, *ibid* at 134-135, outlining the "failure of the international community to adequately address the cruel and unnecessary act of shark finning." See also Pavone, *ibid*; Peter J Jacques, "The Social Oceanography of Top Oceanic Predators and the Decline of Sharks: A Call for a New Field" (2010) 86 *Progress in Oceanography* 192; Stijn Van Osch, "Save Our Sharks: Using International Fisheries Law Within Regional Fisheries Management Organizations to Improve Shark Conservation" (2012) 33:2 *Mich J Int'l L* 383; Jessica L Spiegel, "Even Jaws Deserves to Keep His Fins: Outlawing Shark Finning Throughout Global Waters" (2001) 24:2 *Boston College Int'l & Comp L Rev* 409; Jeremy Ilouliau, "From Shark Finning to Shark Fishing: A Strategy for the US and EU to Combat Shark Finning in China and Hong Kong" (2017) 27:2 *Duke Env't'l L & Pol'y Forum* 345; Crystal Green, "An International SOS (Save Our Sharks): How The International Legal Framework Should Be Used to Save Our Sharks" (2015) 27:2 *Pace Int'l L Rev* 701; Erika J Techera, "Fishing, Finning and Tourism: Trends in Pacific Shark Conservation and Management" (2012) 27:4 *Int'l J Marine & Coastal L* 597; and Jared R Wigginton, "Governing a Global Commons: Sharks in the High Seas" (2014) 25:2 *Villanova Env't'l L J* 431.

¹³¹ Jefferies, *ibid* at 145-149.

comprehensive international response” can take effective action unilaterally to protect sharks.¹³² Jefferies suggests that initiatives like this may come to have much greater impact as part of a network of similar domestic legal reforms in many jurisdictions, and notes that other US states as well as several other countries have been considering the adoption of shark-fin bans based on Hawaii’s.¹³³

In June 2019, Canada passed a new law bringing in amendments to the *Fisheries Act* and related legislation that include a prohibition on the import and export of shark fins.¹³⁴ The legislation makes Canada the first G7 nation not just to prohibit shark finning in domestic waters¹³⁵ but to shut down the market for imported shark fins.¹³⁶

Not long ago, such legislation would probably have made lawmakers apprehensive about possible challenges under international trade law. Compare, for example, the US measures on sea turtles and dolphins that were challenged under GATT and WTO law, discussed in Chapter Five. Today, there can be little doubt that Canada’s new shark fin trade ban is well within the policy space allowed under WTO law. Furthermore, it can be seen as an action that fulfils the affirmative commitments Canada has taken on under the CPTPP,¹³⁷ and it could be example of what other CPTPP parties might do in furtherance of those commitments. Article 20.16 of the CPTPP Environment

¹³² *Ibid* at 151.

¹³³ *Ibid*.

¹³⁴ Bill C-68, *An Act to amend the Fisheries Act and other Acts in consequence*, 1st Sess, 42nd Parl, 2015, c1 32 (assented to 21 June 2019).

¹³⁵ Shark finning has been effectively prohibited in Canada since 1994 pursuant to licensing conditions under the *Fisheries Act*, RSC 1985 c F-14, but before the 2019 amendments there was no clear prohibition in the legislation.

¹³⁶ Leyland Cecco, “Canada becomes first G7 country to ban shark fin imports” *The Guardian* (21 June 2019), online: <https://www.theguardian.com/world/2019/jun/21/canada-bans-shark-fin-imports-sale>.

¹³⁷ CUSMA, *supra* note 53, Art 24.18 also requires the parties to adopt or maintain measures designed to prohibit the practice of shark finning.

Chapter does not expressly require banning imports of shark fins; the treaty text only calls for “measures that should include, as appropriate ... finning prohibitions.” But legislation that deals with the demand side of the shark finning problem is undoubtedly an effective way to lead on this new international obligation to promote the long-term conservation of an iconic marine animal.

Sharks are ecologically important apex predators. But they are not like the typical, appealing “charismatic megafauna” that are often used as symbols of our responsibility to protect wildlife (such as polar bears, elephants, and whales). They are definitely not cute; on the contrary, many people find them repugnant or terrifying. Nevertheless, attitudes about sharks have gradually changed, from an attitude of fear and loathing to one of respect and care, in a way that reflects an evolving environmental consciousness. The express requirement in the CPTPP to adopt domestic laws prohibiting shark finning can be seen as an expression of that evolving consciousness, and a vehicle for the international dissemination of associated legal norms.

8.7.1.6 CITES and Illegal Trade in Wildlife

Article 20.17 of the CPTPP (Conservation and Trade) addresses the problem of trade in wildlife, and sets out commitments to improve conservation and combat the illegal wildlife trade. It begins with an affirmation of the importance of combatting illegal taking of and trade in wildlife. Under Article 20.17(2), the parties agree to take appropriate legislative and other action to fulfil their obligations under CITES.

Like the other affirmative obligations in the Environment Chapter, this provision is enforceable through dispute resolution. However, the complaining party has to meet

two prerequisites first. It must show as a threshold matter that the other party has failed to meet its CITES obligations “in a manner affecting trade or investment” between the parties.¹³⁸ It must also try to address the matter through consultative or other procedures under CITES before accessing the CPTPP dispute resolution mechanism.¹³⁹ The parties also commit to take measures to protect and conserve wildlife within their territories, and to strengthen government capacity and cooperation with civil society organizations on these matters.¹⁴⁰

One provision in Article 20.17 that would have been a fairly significant move to stronger wildlife protection is Article 20.17(5), which is in the treaty text and would have taken effect had the original TPP not failed – but under the new CPTPP this language is indefinitely suspended.¹⁴¹ Article 20.17(5) would have obligated each party to combat trade in wildlife if it was illegal to take it under any applicable law – not just the law of that country. The text provides that each party “shall take measures to combat, and cooperate to prevent, the trade of wild fauna and flora that, based on credible evidence, were taken or traded in violation of that Party’s law *or another applicable law*, the primary purpose of which is to conserve, protect, or manage wild fauna or flora.”

Footnote 26 clarifies that “‘another applicable law’ means a law of the jurisdiction where

¹³⁸ Art 20.17(2) n23.

¹³⁹ *Ibid* n 4.

¹⁴⁰ Art 20.17(4).

¹⁴¹ The umbrella CPTPP agreement sets out an annex of provisions of the TPP text that are suspended until the parties agree to end their suspension. CPTPP, *supra* note 3, Art 2 and Annex 3. The eighth item is “Article 20.17 (Conservation and Trade) – paragraph 5: the phrase ‘or another applicable law’ including footnote 26.” The Environment Chapter in the new CUSMA (*supra* note 53 Art 24.2(5)) does include the same language as the now inoperative language in Article 20.17 of the CPTPP Environment Chapter.

the take or trade occurred and is only relevant to the question of whether the wild fauna and flora has been taken or traded in violation of that law.”

This provision had (and may have in the future, if the parties eventually agree to un-suspend it) the potential to drive legal standards on trade in wildlife upwards through a ratcheting-up effect. It would have bound the CPTPP parties to take measures to combat trade in wildlife and wildlife products even if taking the wildlife was not illegal under the domestic law of that party – if it *was* illegal in the source country (whether or not the source country itself was party to the CPTPP).¹⁴²

For example, assume that an animal is protected under domestic conservation laws in country A so that it is illegal to hunt that animal, or to sell it or parts of it. Say there is an active trade in these animals, perhaps for display in zoos or as exotic pets or to be used for adornment or traditional medicine, in other countries where the species is *not* legally protected. If the animal in question is illegally hunted or sold in country A and shipped to zoos or consumers in country B, or shipped through country B to end destinations somewhere else, and if country B is party to the CPTPP, then country B would be obligated under this provision to endeavour to take measure to combat and prevent the trade. This obligation would apply even if country B had no laws prohibiting hunting or trading these animals, and even if they were not a species listed under CITES. The highest level of protection in force in any country where the animals are taken would have become the benchmark level of protection for all the CPTPP parties to which, or through which, those animals were traded.

¹⁴² See discussion in Meidinger, *supra* note 48 at 187.

It is not difficult to see why the CPTPP parties were ultimately not able to agree on this once the US, a proponent of high environmental standards with a disproportionate amount of negotiation leverage, had exited.¹⁴³ The remnant of this text, even though it currently has no legal force, is evidence of the high degree of ambition in the TPP to protect wildlife and crack down on the illegal wildlife trade.

From the point of view of animal protection as a principle that bridges conservation and animal welfare, perhaps the most notable aspect of Article 20.17 is the specific incorporation of CITES obligations – bearing in mind that CITES, although it is not primarily an animal welfare treaty, does include a number of provisions related to animal welfare. The animal welfare aspects of CITES are discussed in Chapter Four.¹⁴⁴ The relevant provisions deal with the humane treatment of wild animal specimens during transportation, and with the care of illegally traded animals if they are seized by authorities for failure to comply with CITES requirements.

This means that the CPTPP is a real, current example of positive animal welfare obligations being incorporated into a major trade agreement and potentially backed up with the force of binding dispute settlement and trade sanctions. As discussed in Chapter Four, noncompliance with CITES is widespread, and its animal welfare provisions, which may often seem like a mere afterthought, are certainly no exception.¹⁴⁵ The CPTPP creates the possibility that a CITES party could seek dispute resolution concerning

¹⁴³ See Lurié & Kalinina, *supra* note 41 at 474-475, analyzing insights into the negotiating history of the Environment Chapter revealed in the draft released by Wikileaks in 2014, and noting that “[n]ine countries could not agree with the draft language that required TPP parties to take measures to prohibit trade in wild flora and fauna taken or traded in contravention of a foreign law” (*ibid* at 475).

¹⁴⁴ See Section 4.4.3.

¹⁴⁵ See Section 4.6.3.

another CITES party's noncompliance with animal welfare obligations by, for example, permitting live animals to be shipped in a manner that causes them injury or subjects them to cruel treatment. That may be a remote possibility, given that the complaining party would have to show that the noncompliance affected trade and investment between the parties, and would also have to get through numerous layers of required process before being able to request dispute resolution by a CPTPP panel. It is still, however, a possibility, and that is a meaningful, if small and incremental, development in the status of animal welfare in international law.

8.7.1.7 Dispute Resolution

One of the most important features of the CPTPP Environment Chapter is that it is enforceable through the dispute resolution mechanism that applies to the entire agreement. It also has an internal process that a complaining party is required to go through before dispute resolution under the main agreement. There are a series of required steps, starting with consultations between the parties on matters arising under the Chapter, then moving to the representatives of each party (senior trade and environment officials) on the Environment Committee, and culminating with consultations at the ministerial level.¹⁴⁶ Should this fail to resolve the matter, Article 20.23 provides that a CPTPP party can request consultations or the formation of a dispute settlement panel under Chapter 28 of the CPTPP, the overall dispute settlement mechanism.

Importantly, Chapter 28 provides that, if there is a ruling against a CPTPP party and that party fails to comply with the ruling, the noncompliant party may be required to

¹⁴⁶ CPTPP, *supra* note 3, Arts 20.20 through 20.22.

provide compensation in a form agreed on with the complaining party, or the complaining party may “suspend benefits” (that is, impose trade sanctions) as a punishment for the noncompliance.¹⁴⁷ This means that failure to meet commitments under the Environment Chapter can be disciplined through the regular dispute settlement process and by the imposition of trade sanctions. As Global Affairs Canada observes, it is “a first for Canada” for environmental provisions to be enforceable under the general dispute mechanism of a trade agreement.¹⁴⁸

Meidinger argues that the compliance mechanism for the Environment Chapter is weakened by the requirement to go through a series of consultations before having access to dispute settlement under Chapter 28.¹⁴⁹ Nevertheless, it is relatively strong compared both to some prior environmental provisions in trade agreements and also compared to compliance mechanisms under international environmental law. As Vincent notes, the multiplicity of multilateral environmental agreements has done relatively little in practice to solve global environmental problems, because noncompliance under those agreements has no real consequences, or consequences less costly than compliance.¹⁵⁰

Integrating environmental commitments into trade agreements, especially if those commitments are linked to the enforcement mechanism under the trade agreement, may be an effective way to promote adherence to international environmental obligations. Vincent argues that in fact it may “represent the best chance for true promotion of

¹⁴⁷ *Ibid.*, Art 28.20.

¹⁴⁸ Global Affairs Canada, “Overview and benefits of the CPTPP,” online: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/overview-apercu.aspx?lang=eng>.

¹⁴⁹ Meidinger, *supra* note 48 at 180.

¹⁵⁰ Vincent, *supra* note 54 at 33-34.

environmental sustainability.”¹⁵¹ To the extent that obligations for the protection of animals are included in the environmental standards covered by the CPTPP, the same observation can also be applied concerning the international promotion of animal protection.

8.8 Animal Welfare in the EU’s Trade Agreements

The EU places a relatively high value on animal welfare. Chapter Seven explained some of the legal and institutional architecture in the EU for the protection of animal welfare,¹⁵² and Chapters Five and Six both briefly touched on the EU’s unsuccessful efforts to include animal welfare on the WTO agenda – after which it changed focus to incorporating animal welfare provisions into its PTAs.¹⁵³

The first free trade agreement to reference animal welfare standards expressly¹⁵⁴ is the 2002 Association Agreement between the EU and Chile.¹⁵⁵ The Agreement refers in the Preamble to the “importance of animal welfare.” The annexed agreement on sanitary and phytosanitary measures¹⁵⁶ expressly addresses the development of mutually

¹⁵¹ *Ibid* at 45.

¹⁵² See Section 7.3

¹⁵³ See Sections 5.5.3 and 6.4.

¹⁵⁴ Cédric Cabanne, “The EU-Chile Association Agreement: A booster for animal welfare” (22 March 2013) 22:1 ICTSD Biores, online: <<https://www.ictsd.org/bridges-news/biores/news/the-eu-chile-association-agreement-a-booster-for-animal-welfare>>.

¹⁵⁵ *Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part*, [2002] OJ L352/3.

¹⁵⁶ *Agreement on Sanitary and Phytosanitary Measures Applicable to Trade in Animals and Animal Products, Plants, Plant Products and other Goods and Animal Welfare*, Annex IV to *Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part* (30 December 2002), online: <https://eur-lex.europa.eu/resource.html?uri=cellar:f83a503c-fa20-4b3a-9535-f1074175eaf0.0004.02/DOC_2&format=PDF>.

agreed standards in animal welfare that reflect the standards adopted by the OIE.¹⁵⁷ It also provides for consultations between the parties to be initiated based on animal welfare concerns,¹⁵⁸ and incorporates specific standards on stunning and slaughter.

Cabanne observes that, since this agreement was concluded in 2003, Chile has adopted new regulations on animal welfare in the transportation and slaughter contexts, has implemented a stakeholder consultation program that includes animal welfare NGOs, and collaborates productively with the EU on animal welfare both domestically and internationally.¹⁵⁹

The EU's trade agreement with South Korea,¹⁶⁰ which has been provisionally applied since 2011 and was ratified in 2015, states in the chapter on sanitary and phytosanitary measures that the chapter "aims to enhance cooperation between the Parties on animal welfare issues, taking into consideration various factors such as livestock industry conditions of the Parties."¹⁶¹ Since then, the EU has typically included a similar provision in its bilateral PTAs.¹⁶²

The EU has been criticized for not doing enough in its PTAs to fully reflect the values of the European public concerning the moral status of animals as sentient beings and the importance of high animal welfare standards. Eurogroup for Animals, a

¹⁵⁷ See definition of "animal welfare standards," *ibid* Art 4. Section 4.4.2 above discusses the OIE's animal welfare standards.

¹⁵⁸ *Ibid* Art 13.4.

¹⁵⁹ Cabanne, *supra* note 154.

¹⁶⁰ *Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part*, [2011] OJ L 54/127.

¹⁶¹ *Ibid*, Art 5.1(2).

¹⁶² Eurogroup for Animals, *Model Animal Welfare Provisions for EU Trade Agreements* (Brussels: Eurogroup for Animals, 2017), online: http://www.eurogroupforanimals.org/wp-content/uploads/E4A-MAWP_Report-screen.pdf.

European animal welfare advocacy organization, points out that the language typically built into EU trade agreements is non-obligatory, and limited to the context of cooperation on sanitary and phytosanitary regulatory matters, when the significance of animal welfare extends beyond that context.¹⁶³

Eurogroup for Animals argues that a better approach would be to include a separate chapter on animal welfare in all EU trade agreements, to allow trade partners access to the EU market only on condition that they adhere to animal welfare standards equivalent to those in the EU, and to make express reference to animal welfare as a component of sustainable development.¹⁶⁴ Eurogroup for Animals has drafted model provisions that it proposes for inclusion in EU PTAs.¹⁶⁵ These model provisions borrow some design elements and concepts from existing environmental rules in PTAs. For example, the draft text provides that parties shall not fail to effectively enforce animal welfare law to encourage trade or investment,¹⁶⁶ provides for frameworks for cooperation on animal welfare issues,¹⁶⁷ and sets up mechanisms for citizen participation and submissions.¹⁶⁸ The explanatory notes accompanying the model text note where particular provisions are based on the Trade and Environment chapter of CETA and PTAs either under negotiation or already concluded.¹⁶⁹

¹⁶³ *Ibid* at 3-4.

¹⁶⁴ *Ibid* at 5.

¹⁶⁵ *Ibid* at 6-12.

¹⁶⁶ *Ibid* at 7.

¹⁶⁷ *Ibid* at 8.

¹⁶⁸ *Ibid* at 8-9.

¹⁶⁹ *Ibid* at 13-14.

8.9 Applying Interactional Theory: PTAs and the Formation of International Animal Law

The theory of interactional international law proposes that the formation of international legal norms that command adherence requires three related components: a basis in shared understandings, articulation in a way that exhibits the distinctive qualities of law or principles of legality, and elaboration through a specifically legal category of interaction, or a practice of legality.¹⁷⁰ This section assesses the development of animal protection norms in the context of PTAs against the criteria of interactional theory. The international trade arena has become an important generator of legal norms on animal protection that meet the criteria of binding interactional law to a greater extent than many of the examples of global animal law discussed in Chapter Four. This is a needed contribution to the formation of global animal law.

So far there are no fully articulated provisions in trade agreements that address animal welfare specifically in the thorough way proposed by Eurogroup for Animals.¹⁷¹ But there are norms of animal protection embedded in the environmental provisions of PTAs, which are evolving through the trade lawmaking practice of legality.

8.9.1 Shared Understandings

PTAs, and especially MRTAs, are vehicles for disseminating wildlife protection values globally, building a basis of shared understandings between the parties, stimulating the growth of epistemic communities, and creating opportunities for legal

¹⁷⁰ See discussion of the theoretical model in Chapter Three above.

¹⁷¹ As discussed in Section 8.7 above.

interaction on environmental and animal protection. That is not the central purpose of PTAs; they are trade agreements, not animal protection agreements. But the linked obligations on improving environmental and animal protection standards create fertile ground for international interaction on this matter in the context of a practice of legality.

Chapter Four discussed objections to international animal welfare norms on the basis that they reflect a chauvinistically Western worldview, and how important it is that it not be just a way to “naively export European values.”¹⁷² PTAs do not dispel doubts about cultural imperialism, or concerns that they could be a vehicle for exporting Western values to unwilling destinations. There are undeniable differences in power between the parties to these agreements. The growing body of environmental norms in MRTAs has mainly been included in response to US demands (as outlined in Section 8.6), and the EU consciously uses trade access as a bargaining chip to induce trade partners to accept its preferred treaty language on animal welfare. In some cases, animal-protective values in PTAs may even be foregrounded in part to shame or single out those who are not part of the PTA club. For example, the specific reference to shark finning in the CPTPP could be taken as defining a normative stance in opposition to China.

But to portray what is happening just as cultural imperialism or the export of Western animal protection values would be much too simplistic, and would misrepresent a much richer and more nuanced reality. PTAs, and in particular MRTAs, which cut across diverse regions and cultures, are a forum where a great diversity of ideas about animal protection interact with one another. Kerr argues that through interaction in these

¹⁷² Anne Peters, “Global Animal Law: What It Is and Why We Need It” (2016) 5:1 *Transnat’l Env’tl L* 9 at 22. See Section 4.2.2.

frameworks in the CPTPP context “legal actors become more embedded in the discourse of endangered species and habitat integrity, and this helps to internalize concepts like animal welfare within the individual and collective legal consciousness of a given nation.”¹⁷³ Through this process, “[t]he increased institutionalization of global animal law within the commercial and bureaucratic communities of the Asia-Pacific should help to promote a workable, transnational valence to animal rights discourse.”¹⁷⁴ As a result, we may hope to see animal protection norms – not just Western ones, but global ones – becoming woven into the social fabric of nations that participate in this discourse.

The exchange of ideas and values about animals in the PTA context does not run in just one direction. All cultures have their blind spots and areas of moral inconsistency regarding animals. Kerr suggests that through the process of intercultural confrontation, Western countries may be prodded to re-examine and modify their own conceptions of animal protection: “animal welfare activists should ... acknowledge the possibility of a re-definition of what animal welfare means” as a result of the emergence of a “trans-cultural conception of animals.”¹⁷⁵

Kerr also suggests that the positioning of animal welfare norms in the Environment Chapter of the CPTPP may contribute to the emergence of a synthesis between US animal and environmental law, which he describes as “kin doctrines” despite the theoretical differences and even opposition between them in US thought.¹⁷⁶ In other words, Kerr suggests that interaction through the CPTPP may contribute to the

¹⁷³ Kerr, *supra* note 50 at 164.

¹⁷⁴ *Ibid* at 157.

¹⁷⁵ *Ibid* at 178.

¹⁷⁶ *Ibid* at 156-157.

emergence of a more holistic conception of animal protection that bridges the divide between welfare and environment.¹⁷⁷

Another way in which PTAs can foster shared understandings is through dissemination of the work of norm entrepreneurs and by generating robust epistemic communities. Here, the mechanisms for public participation and cooperative capacity-building are especially important. Through these channels, NGOs, citizen advocates, and experts have a way in to shaping practice under trade agreements that does not exist in the WTO context and is a new aspect in international trade law. This model started with NAFTA's creation of the CEC, but now it is spreading in a truly global way through its inclusion in MRTAs that span vast portions of the world.

HSI's experience with sea turtle protection in the Dominican Republic, using the public participation and capacity-building frameworks of CAFTA-DR, is a real-world example of how this can happen. That example suggests that advocates and experts can genuinely move the needle concerning the priority given to animal protection in a community, by framing and publicizing information, deploying their expertise in a culturally sensitive way, and building up trust and knowledge through their work to help build local capacity to address animal protection problems – a process that interactional theory would recognize as norm-generating social interaction. Such activities enhance the legitimacy of animal protection norms and their ability to command adherence in a way that mere imposition from the outside (or “naively exporting” them) cannot.

¹⁷⁷ With the US now out of the CPTPP, perhaps these cross-cultural influences will not be felt in the same way. However, the Canadian and Australian concepts of the relationship between animal welfare and environmental protection also still see them as mainly separate and dichotomous, and Australia and Canada are CPTPP parties.

8.9.2 The Criteria of Legality

Interactional theory argues that norms may emerge from a basis in shared understandings, but they will not be in the distinctive subset *legal* norms unless they take on specific characteristics associated with law. Those characteristics are what Fuller described as the criteria of legality.¹⁷⁸

Chapter Four summarized the existing and emerging examples of global animal law in treaties and other international legal practices. There are international animal protection norms that exhibit some, even most, of the criteria of legality. But the case for global animal law as law is weak when it comes to what Fuller called the criterion of congruence of official action with declared rules.¹⁷⁹ Put simply, there may be rules on paper, but international actors often do not follow them. Another area of weakness is that law must not require more of those subject to it than is possible for them to perform. Some international actors, particularly developing countries with limited resources, may not realistically be able to live up to aspirational animal protection norms, at least not without help.

The animal protection norms in PTAs may go some way to remedying both of these deficiencies. To the extent that animal protection principles in international law fail to exhibit the criteria of legality, they fall short of being legitimate law that commands adherence. If PTAs and the practice of legality around them can supplement the

¹⁷⁸ These are discussed in detail in Section 3.4.3 above.

¹⁷⁹ See discussion in Section 3.5.1.

deficiencies, then they are making an indispensable contribution to the development of global animal law as real law.

8.9.2.1 *The Congruence Criterion*

The biggest weakness of global animal law is that it falls short on the criterion of congruence of official action with declared rules. Lack of enforcement and widespread noncompliance undermine the status of law as law. As discussed in Chapter Four, the animal welfare requirements of CITES may not really be law in the sense of interactional theory (despite near-global commitment to them as a formal matter) because of pervasive failure to comply with them.¹⁸⁰ The Environment Chapter of the CPTPP, and parallel provisions in other PTAs that draw from the same common pool of norms and legal templates, could change that. Under the CPTPP, failure to implement CITES obligations is potentially a matter for dispute resolution and trade sanctions: an enforcement mechanism with teeth. It remains to be seen whether compliance will actually improve as a result, but the possibility should not be discounted.

If in the future trade agreements include comprehensive animal welfare chapters, as Eurogroup for Animals proposes for the EU's trade agreements, then persistent failure to enforce domestic animal welfare standards could also become actionable through trade dispute resolution processes, promoting better compliance and the development of more robust legal norms.

¹⁸⁰ See Section 4.6.3.

8.9.2.2 *The Possibility Criterion*

Fuller argued that a law cannot really be a law if it demands what is impossible to perform.¹⁸¹ PTAs may augment the extent to which animal protection obligations exhibit this characteristic of law, through their mechanisms for cooperation and capacity-building. Lurié and Kalinina’s account of working for better sea turtle protection in the Dominican Republic emphasizes that funding, public information and shared expertise through cooperative frameworks were essential in making it a real possibility for officials in the Dominican Republic to implement their domestic law in accordance with their international obligations under CAFTA-DR.

8.9.3 PTAs as a Practice of Legality

The negotiation, drafting, and implementation of PTAs amount to a quintessential practice of legality, involving the negotiation and expression of agreed norms in a characteristically legal form. The interactional concept of articulation of norms through a practice of legality is more a holistic than a linear one. PTA norms are based on existing shared understandings, but interaction through PTA practice disseminates, strengthens, and reshapes those shared understandings.

The institutional mechanisms of PTAs create settings that are conducive to interaction between participants in epistemic communities, government officials, and members of the public – the kind of environment that fosters the growth of norms based on shared understandings. Kerr describes the CPTPP as having a “dialogic quality” that “decentralizes compliance management across national boundaries and outside of state

¹⁸¹ See Section 3.4.3.

actors.”¹⁸² His description is reminiscent of Brunnée’s characterization of a practice of legality as a “range of practices through which all participants in the international legal system demonstrate adherence to [a] norm as well as support its legality.”¹⁸³ This suggests that modern PTAs, and especially MRTAs, have created a potentially powerful engine for driving the development of global animal protection norms through a practice of legality.

The overview of global animal law in Chapter Four portrays an intellectually fertile area of emerging norms, with flourishing scholarly activity and active NGO advocacy. The weakness of such activities is that they do not necessarily translate into law. The mechanisms for interaction, participation and dialogue in PTAs create opportunities for the ideas of global animal law to take concrete shape in influencing policy, official actions, and the emergence and widespread support of legal norms.

8.10 Conclusion

This chapter has reviewed developments on animal protection in PTAs, with the main focus being on the Environment Chapter of the CPTPP. I have evaluated these initiatives as part of a process of formation of legal norms on animal protection that meet the criteria set out in Brunnée and Toope’s interactional theory of international law.

On the whole, these are promising developments for global animal law. PTAs provide something that the WTO does not (and seems unlikely to in the near future): an

¹⁸² Kerr, *supra* note 50 at 178.

¹⁸³ Jutta Brunnée, “The Sources of International Environmental Law: Interactional Law” in Jean d’Aspremont & Samantha Besson, eds, *The Oxford Handbook of the Sources of International Law* (Oxford: Oxford University Press, 2017) 960 at 962-963. See also discussion in Section 3.5.

avenue for creating positive international obligations concerning animal protection, rather than just negative space where parties are permitted to choose their preferred level of animal protection in their own territories. Mechanisms in PTAs including meaningful enforcement and participation infrastructure exhibit some of the hallmarks of practices of legality. These are places where truly global, truly legal animal protection norms could start to emerge, based on robust shared understandings, exhibiting the characteristics of law – including, importantly, meaningful enforceability and compliance – and elaborated through a practice of legality. Lurié and Kalinina argue that this type of practice under PTAs is “changing the way that governments and civil society think about wildlife conservation and animal welfare,” and they express hope that “this groundswell of enthusiasm for the protection of wild animals will inspire negotiators to include meaningful protections for animals beyond the environment provisions.”¹⁸⁴

In case this assessment seems naively optimistic, some caveats should be added. First of all, what exists in PTAs so far is almost entirely the *potential* for the formation of animal-protective legal norms, not mature international animal law already formed. There is no treaty text that expressly sets out detailed animal welfare obligations and mechanisms for implementing and enforcing those obligations, along the lines of the provisions Eurogroup for Animals has proposed for EU trade treaties. What we have instead is mainly hints and implications about animal protection that motivated advocates have managed to discern in the environmental provisions of PTAs.

¹⁸⁴ Lurié & Kalinina, *supra* note 41 at 487.

Institutional structures like the public participation mechanisms under CAFTA-DR and the CPTPP are important, and they offer animal advocates an unprecedented opportunity to speak up for animal interests in the trade arena. There are new channels to talk. There is still, as Kerr puts it, the risk that no one will listen.

Perhaps more concerning than these deficiencies is the fundamental tension between liberalized trade and animal protection that is discussed in the Introduction to this thesis. We cannot ignore the risk that, all other things being equal, the more PTAs succeed in furthering their central purpose of increasing trade and economic activity, the worse the overall situation of animals will be, especially to the extent that trade in animals and animal products increases.¹⁸⁵

The most important practical conclusion from this chapter is that advocates for animals have the opportunity to affect what happens next. MRTAs with modern environmental provisions and mechanisms for citizen involvement are spreading. Some animal advocates may still be suspicious of trade agreements and may consider their environmental provisions to be just a public relations exercise. But we should not allow the perfect to be the enemy of the good, or even to be the enemy of the very slightly better than the status quo. There is a new way for the interests of animals to be represented in the development of international legal norms, and the animals need every opportunity for representation they can get.

¹⁸⁵ This point is discussed in Chapter One.

Chapter 9 Conclusion

Global animal law scholars have made a convincing case that animals need effective transnational laws to protect them. The growth of global activities that affect animals has made a governance gap, with a lack of global rules and oversight to regulate those activities.¹ In Sabine Brels's words, "[i]n a globalized world, animal protection must be globalized."²

Domestic law, which is weak anyway on animal protection, cannot adequately respond to the many international challenges in animal protection. It is not equipped to handle global animal protections such as those covered in this thesis: the killing of marine animals as fisheries by-catch, an internationally expanding factory farming industry, illegal trafficking in wildlife, shark finning, and many others.

The increasing integration of the global economy through liberalized trade is one of the causes of this governance gap. The legal structures and institutions that regulate international trade may make possible innovative solutions to fill the gap. As discussed in Chapter Five, international trade law, as *law*, is not based solely on a rationale of economic efficiency. According to the theory of comparative advantage, it would be economically efficient to get rid of trade barriers unilaterally, without any framework of reciprocal legal obligations or governance. International trade law is about the infusion

¹ Anne Peters, "Global Animal Law: What It Is and Why We Need It" (2016) 5:1 *Transnat'l Env't'l L* 9 at 16-20.

² Sabine Brels, "A Global Approach to Animal Protection" (2017) 20:1 *J Int'l Wildlife L & Pol'y* 105 at 122.

of global economic integration with rule-of-law principles. To echo Pauwelyn, there is more to life than money, and trade is “an instrument to achieve nobler goals.”³

As the need for effective global animal law grows more acute, practices of legality in the trade-law arena are a promising place to look for signs of its emergence. This is somewhat surprising given the traditional (and far from unfounded) hostility of animal advocates to the project of trade liberalization. But, as the cases and examples covered in this thesis demonstrate, the institutions of international trade are not blind to the governance deficits that globalization creates. They have responded in some creative and progressive ways, with real potential to improve animal protection through global cooperation.

Global animal law scholarship has also generated a rich account of what transnational law for the protection of animals would look like – and does look like, where it already exists. Fundamentally, it is grounded in the philosophical insights of the “animal turn.”⁴ These are most importantly the recognition of animal sentience, the intrinsic moral significance of animals as individuals and fellow creatures, and the ethical implications that follow for regulating human conduct.

A hallmark of global animal law is its holistic understanding of animal protection that leaves behind the traditional bifurcation between conservation of animal species as resources for human use and enjoyment, and the ethical imperatives that ground legal

³ Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003) at xi. See Section 5.6.3.

⁴ See discussion in Section 4.2.2.

protection for animal welfare.⁵ Global animal law reflects an integrated worldview, understanding the “the major interconnections between animals, humans, and the planet” and seeing the legal protection of all these components as part of a broader movement for justice.⁶

Chapter Four outlined some of the places where the elements of global animal law are already manifested in international law, including provisions on wildlife welfare in conservation treaties, and initiatives to adopt international statements that animal welfare matters globally. But advocates for a strong and effective legal framework of global protection for animals are well aware of the deficiencies of the law that exists now. International animal protection law “is still in its very early stages.”⁷ The glimpses of a global animal law sensibility that can be discerned in international law remain fragmented, thin, uncoordinated, and expressed at a high level of generality.⁸

I have applied Brunnée and Toope’s theory of interactional international law⁹ here to bring out more specifically what is missing in global animal law, as it currently exists, when measured against the characteristics it would need to have to emerge as real *law*, in the sense that interactional theory understands it. The central question for interactional theory is what makes international law legitimate.¹⁰ What makes global society arrive at a consensus that norms have the authority of law, and that they are important and

⁵ Werner Scholtz, “Injecting Compassion into International Wildlife Law: From Conservation to Protection?” (2017) 6:2 *Transnat’l Evt’l L* 463.

⁶ Brels, *supra* note 2 at 111.

⁷ *Ibid.*

⁸ Peters, *supra* note 1 at 15; see also Section 4.6.

⁹ See Chapter Three.

¹⁰ Jutta Brunnée & Stephen J Toope. *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010) at 52-55.

legitimate enough to command adherence? The answer, according to interactional theory, is that they must be grounded in shared understandings, they must exhibit the criteria of legality, and they must be articulated, developed, supported and applied through a practice of legality. To the extent that these elements are lacking for the principles of global animal law, then no matter how desirable or morally right we might think those principles are in the abstract, they will continue not to achieve very much in practice.

Interactional theory also helps to shed more light on why the trade law arena can be a place to develop GAL in a way that builds up the features of interactional law. The trade law regime is the site of robust international practices of legality. The most important of these is the adjudication process at the WTO. Also, in modern preferential trade agreements, new and intriguing practices of legality are taking shape, as described in Chapter Eight. In addition to the process of negotiating trade rules and rules on trade-linked governance matters (including the protection of wild animals in a number of contexts), there are structures for information-seeking, participation and oversight that could support collaborative approaches to animal protection, and to some extent already have done.

Such mechanisms and fora for negotiating, articulating and applying specific norms on animal protection are one of the most important ingredients that global animal law has been missing so far. Much of what constitutes global animal law today consists of hortatory words and statements of abstract principle. It is in the process of interaction in the context of a practice of legality that difficult compromises are hammered out, consensus positions are identified, and concrete rules are written and implemented.

This thesis has set out a detailed account of how practices of legality in the trade context are helping to shape international animal protection norms as legal norms that fit the criteria of interactional theory.

The GATT and WTO disputes before *EC – Seal Products*,¹¹ reviewed in Chapter Six, recognized the importance of animal protection as a legitimate policy objective domestically and as a matter with global significance. The cases, especially *US-Tuna III*,¹² exhibit tentative moves towards an approach that sees conservation and welfare as holistic and integrated, and animal wellbeing as a valid justification for regulation that affects trade.

EC – Seal Products, discussed in Chapter Seven, is a much more significant landmark. It is important not only because of the WTO panel’s endorsement of animal welfare is “an ethical responsibility for human beings in general” and “a globally recognized issue.”¹³ An at least equally important aspect of the case is that the WTO dispute settlement body held animal protection principles to a tough standard of legitimacy, insisting that difficult cultural clashes over welfare and traditional animal-use practices could not be sidestepped through a “strategy of avoidance”¹⁴ (in Kymlicka and

¹¹ *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (Complaints by Canada and Norway) (2013), WTO Docs WT/DS400/R, WT/DS401/R, WT/DS400/R/Add1, WT/DS401/R/Add1 (Panel Report) [*EC – Seal Products Panel Report*], as modified by *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (Complaints by Canada and Norway)* (2014) WT/DS401/AB/R (Appellate Body Report).

¹² *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (2011), WT/DS381/R (Panel Report), as modified by *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (2012), WT/DS381/AB/R (Appellate Body Report).

¹³ *EC – Seal Products Panel Report*, *supra* note 11 at paras 7.409, 7.420.

¹⁴ Will Kymlicka & Sue Donaldson. “Animal Rights and Aboriginal Rights” in Peter Sankoff, Vaughan Black & Katie Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin, 2015) 159.

Donaldson's term) that introduced incoherence and arbitrariness into the EU's law on trade in seal products.

The new structures for global governance in MRTAs go further. Here, unlike in WTO law, there are affirmative obligations to protect animals that are part of the legal regime. The emphasis is on environmental conservation, but environmental commitments like those in the CPTPP Environment Chapter also exhibit elements of the holistic sensibility and ethical orientation that are the hallmarks of global animal law.

More globalization may mean more suffering for animals. But, as Peter Singer and Miyun Park have argued, it does not have to.¹⁵ At the same time that global trade in animals and animal products is increasing, their welfare is becoming recognized as a matter of international concern.¹⁶ Globalization makes it difficult to ignore the need for international cooperation to mitigate the worst harms of animal exploitation and to protect animals. Globalization, in particular the evolution of transnational forms of governance and law, can also provide the tools that are needed to build effective global animal law. The international trade regime is an important part of this picture. It can be the crucible for developing the consensus-based, concrete, workable and enforceable animal protection principles that so far are mostly absent at the global level.

Perhaps most importantly of all, there are opportunities here for animal advocates and proponents of global animal law to shape what happens next. Trade law is not, of course, the only or even the most important international arena where international legal

¹⁵ Miyun Park & Peter Singer. "The Globalization of Animal Welfare: More Food Does Not Require More Suffering" (2012) 91:2 Foreign Affairs 122.

¹⁶ *Ibid.*

protection for animals can evolve. The analysis set out here suggests three important conclusions that may inform future efforts on this front. First, international trade law does not necessarily block the development of progress on animal protection at the international level, as critics like Peter Stevenson once feared.¹⁷ Second, international law that protects animals can be more effective – and more grounded in an ongoing practice of legality – if linked to meaningful accountability mechanisms (including in the form of trade sanctions) and cooperation frameworks, as the example of new trade agreements with linked positive environmental obligations illustrates.¹⁸ And finally, environment side chapters in new trade agreements like the CPTPP include potentially useful tools, such as the ability to request information and to initiate complaints, that may prove useful to animal advocates – both in bringing about practical changes that help animals, and in enabling ongoing international interactions concerning principles of animal protection.

¹⁷ See discussion of these concerns in Section 2.2.

¹⁸ See discussion in Chapter Eight.

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