

AN ASSESSMENT OF RECENT TRADE LAW
DEVELOPMENTS FROM AN ANIMAL LAW
PERSPECTIVE: TRADE LAW AS THE
SHEEP IN WOLF'S CLOTHING?

By
Charlotte Blattner*

Further development within the field of animal law seems to be at an impasse, lost among the potential paths presented by its traditional influences: international treaty law, domestic animal welfare regulations, and trade law. First, classical elements of global animal treaty law are limited to preservationist aspirations, insusceptible to the questions of how animals are treated or how they cope with their environment. Second, animal welfare regulation is understood as a matter confined to national territories. In cross-border dialogue, animal matters have been reduced to allegations of imperialism, which is not conducive to furthering animal interests. Third, animals are regarded as commodities in international trade law, rendering their regulation an undesirable barrier to trade. These present deficiencies deprive global animal law of its significance as a dynamic instrument responsive to global challenges, be they ethical, environmental, economic, technological, or social in nature.

The objective of this paper is to demonstrate future ways out of this impasse. Recent developments in trade law, as demonstrated by four examples found within the World Trade Organization's (WTO) 'case law,' mark an important development for animal law. State objectives expressed through trade law are slowly moving away from anthropocentric considerations (i.e., geared to preserve a fraction of animals for human interests) towards sentiocentric animal welfare (i.e., aimed at minimizing animal suffering and focusing on animal interests). Thereby, the quality of animal law that developed on the international scene through trade law exceeded the status quo of global animal treaty law. Although the WTO itself is an inherently inadequate forum to further animal interests, trade law bears considerable potential to catalyze more comprehensive developments in global animal treaty law—most notably by focusing on individual sentient animals, their interests, and their suffering.

* © Charlotte Blattner 2016. Charlotte Blattner is a PhD candidate in the International Law and Animal Law doctoral program, as well as a member of the law faculty, at the University of Basel. Ms. Blattner would like to thank Janine Dumont-Rosas and Alissa Palumbo for their valuable comments to this Article. Her special thanks go to the organizers of the Animal Law Symposium 2016, held in Portland, OR, for giving her the opportunity to present this topic on the occasion, and to the Animal Law Review editors for their invaluable efforts in reviewing this Article.

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I. INTRODUCTION

Animal welfare advocates identify international trade agreements as the principal reason for the lack of progress in animal welfare.¹ For several decades, the World Trade Organization (WTO) has been criticized, even actively despised, for its detrimental effects on ethical standards in many fields ranging from labor law to environmental law, from human rights law to animal law and others; such criticism culminated in the 1998 Seattle conflicts.² The General Agreement on

¹ Edward M. Thomas, *Playing Chicken at the WTO: Defending an Animal Welfare-Based Trade Restriction Under GATT's Moral Exception*, 34 B.C. ENVTL. AFF. L. REV. 605, 608–609 (2007).

² Odell concisely describes the situation as follows: “Early in 1999 member states accounting for a large majority of world trade said they wanted their third ministerial conference in Seattle to launch another large-scale round that would extend the sequence of eight that had liberalized trade and elaborated international rules since World War II. Critics used Seattle to organize a large protest, which became chaotic. Police allowed protestors to block the delegates from entering the convention center the first day. Once they began meeting the 135 ministers had serious problems inside the hall independent of the protests. Four days later they ended their talks in impasse. They left without agreeing even on the usual communiqué pledging to keep working together. A few ministers publicly condemned the organization and the United States for the way they had been treated. The debacle left protestors jubilant, hosts embarrassed, and market participants confused. ‘The WTO’s credibility is lower than it has

Tariffs and Trade's (GATT)³ preamble evidences that members identify "raising standards of living, ensuring full employment and a large and steadily growing volume of real income"⁴ as the main social objectives of the organization. Moral considerations about the welfare of animals, by contrast, are not covered by the preamble. As a regulatory ideal not reflected in this prominent spot, animal welfare is additionally put at a strategic disadvantage compared to other 'social' regulation.

The objective of this Article is to examine and reflect on the WTO's reports of the past few decades from an animal welfare perspective, and to examine the potential for international trade law to influence global animal law as a part of public international law. This Article introduces the hypothesis that WTO law can be viewed as lending a hand to better global animal welfare. The Article first explains what global animal law is and how its constricted focus on the preservation and conservation of animals undermines its problem-solving capacity as a distinct regulatory field. Second, the Article examines how a unique global discourse around animals was initiated as part of international trade, and how the level of consideration for animal issues deemed legitimate in these processes allowed them to surpass the level of protection provided for in international conventions. Third, the importance of this development and its potential to bring about progress in global animal law is explored, including the arguments for why global animal treaty law should be receptive to animal-centered legal considerations.

II. ANIMAL LAW LOST IN THE TRIANGLE OF GLOBAL ANIMAL LAW, TRADE LAW, AND DOMESTIC ANIMAL LAW

Efforts on the international plane to more effectively protect animals meet a number of systemic obstacles. These can be observed in general international law (which I present here from the lens of global animal law), in domestic animal law, and in international trade law.

A. *Global Animal Treaty Law: Preservationism and Conservationism*

Global animal law (GAL) is a branch of international law dealing with the trans-boundary reality of human-animal interactions.⁵ The

ever been,' said The Economist on December 11." John S. Odell, *Breaking Deadlocks in International Institutional Negotiations: The WTO, Seattle, and Doha*, 53 INT'L STUD. Q. 273, 273-74 (2009).

³ General Agreement on Tariffs and Trade, Apr. 15, 1994, 1867 U.N.T.S. 187 [hereinafter GATT].

⁴ *Id.* at pmb1.

⁵ See *Global Animal Law*, MAX PLANCK INST. FOR COMP. PUB. LAW AND INT'L LAW, <http://www.mpil.de/en/pub/research/areas/public-international-law/global-animal-law.cfm> [<https://perma.cc/J3HR-T5SX>] (accessed Jan. 11, 2016) (explaining that "[a]nimal welfare has become a global good which requires global regulation").

term global animal law, as compared to international animal law, takes into account the economic forces involved in the globalized animal industry, as well as the multilevel regulation of it. The sources of GAL can be distinguished on the basis of article 38 of the International Court of Justice's (ICJ) Statute: by GAL treaty law, customary GAL, and general principles of GAL.⁶ GAL treaty law, although not new from a historical perspective, is rather underdeveloped in its substance and reach.⁷ A number of international treaties exist that regulate the use of animals or otherwise have an impact on their welfare.⁸ Yet, the treaties' purposes commonly either lie in facilitating trade⁹ or in preserving animals for future generations. While the former category undeniably has an unprecedented impact on animals' welfare, only the latter forms part of GAL *sensu stricto*.

GAL conventions exist principally for the conservation or preservation of specified categories of species only, namely those threatened by extinction such as whales, seals, and polar bears. Whereas the preservation of species is geared towards protecting animals from any use, conservation seeks a proper use of animals that conserves them for the future.¹⁰ One of the first conventions to address (some) animals globally is the 1946 International Convention for the Regulation of Whaling (ICRW), which established the International Whaling Commission (IWC).¹¹ The Convention's initial role was to promote the conservation

⁶ Statute of the International Court of Justice art. 38, June 26, 1945, 33 U.N.T.S. 993.

⁷ Katie Sykes, *The Appeal to Science and the Formation of Global Animal Law*, EUR. J. OF INT'L LAW (forthcoming), <http://ssrn.com/abstract=2632812> [<https://perma.cc/6992-GGAD>] (accessed Jan. 11, 2016).

⁸ See Paige M. Tomaselli, *Detailed Discussion of International Comparative Animal Cruelty Laws*, ANIMAL LEGAL AND HIST. CTR., <https://www.animallaw.info/article/detailed-discussion-international-comparative-animal-cruelty-laws> [<https://perma.cc/A5UK-DEG8>] (2003) (accessed Jan. 11 2015) (discussing the many laws pertaining to the treatment of animals that are in place all over the world, including international treaties created by the EU and others).

⁹ This is the very purpose of the World Trade Organization's trade law regime. The WTO includes 159 members that account for 97% of the world's trade. WORLD TRADE ORG., ANNUAL REPORT 2014 22 (2014), https://www.wto.org/english/res_e/booksp_e/anrep_e/anrep14_e.pdf [<https://perma.cc/Q6JD-SYJJ>] (accessed Feb. 6, 2016).

¹⁰ See Ulrich Beyerlin & Vanessa Holzer, *Conservation of Natural Resources*, in MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. 9 (Rüdiger Wolfrum ed., online ed., 2013) ("Conservation constitutes one of three general approaches to the protection of natural resources in international law, the two other being preservation and sustainable use. The dividing lines between these concepts are blurry since they may overlap to a certain extent. Preservation is often linked to a threat of extinction faced by certain species and seems to exclude their economic utilization."); see also Nat'l Park Serv., U.S. Dep't of Interior, *Conservation vs. Preservation and the National Park Service*, <http://www.nps.gov/klgo/learn/education/classrooms/conservation-vs-preservation.htm> [<https://perma.cc/G2X7-83Y6>] (accessed Feb. 6, 2016) (providing educational tools regarding the differences between conservation and preservation).

¹¹ International Convention for the Regulation of Whaling, signed Dec. 2, 1946, 161 U.N.T.S. 72. The Convention had been signed by 110 parties as of 2014. *Membership and Contracting Governments*, INT'L WHALING COMM'N, <http://iwc.int/members> [<https://perma.cc/2SPA-DEUB>] (2015) (accessed Feb. 6, 2016).

of whale stocks for the benefit of the whaling industry.¹² Protests throughout the world, sparked by an alarming drop in the whale population over the last decades, have caused the organization to gradually shift its priorities towards protecting, and arguably preserving, whales by means of whaling moratoria.¹³ The 2014 *Whaling in the Antarctic* case, litigated at the ICJ, demonstrates the ongoing internal tensions within the IWC about its role either as a promoter of the use of whales or as a protector of their welfare.¹⁴ The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) of 1973, on the other hand, expresses a mix of conservationist and preservationist concerns.¹⁵ The goal of CITES is to protect certain species from both over-exploitation and from extinction.¹⁶ The Bern Convention on the Conservation of European Wildlife and Natural Habitats of 1979 and Bonn Convention on the Conservation of Migratory Species of Wild Animals of 1979 both stress wild animals population size maintenance in the utilization of wild animals and thereby express conservationist concerns.¹⁷ The Convention on Biological Di-

¹² PETER L. FITZGERALD, *INTERNATIONAL ISSUES IN ANIMAL LAW* 105 (2012).

¹³ Ida Torres, *Protests Against Japan's Whale, Dolphin Hunting to Be Staged Worldwide*, JAPAN DAILY PRESS, Nov. 22, 2012, <http://japandailynews.com/protests-against-japans-whale-dolphin-hunting-to-be-staged-worldwide-2218814/> [<https://perma.cc/G3WD-VJPR>] (accessed Jan. 24, 2016); Cinnamon P. Carlarne, *Saving the Whales in the New Millennium: International Institutions, Recent Developments and the Future of International Whaling Policies*, 24 VA. ENVTL. L. J. 1, 1 (2005).

¹⁴ Carlarne, *supra* note 13, at 1; Jeremy Firestone & Jonathan Lilley, *An Endangered Species: Aboriginal Whaling and the Right to Self-Determination and Cultural Heritage in a National and International Context*, 34 ENVTL. L. REP. 10763, 10763 ff. (2004); *Whaling in the Antarctic (Australia v. Japan)*, Judgment, 2014 I.C.J. Reports of Judgments, Advisory Opinions and Orders (Mar. 31). The IWC is now considering the welfare of whales in fringe meetings and sub-group meetings: David Broom, *International Animal Welfare Perspectives, Including Whaling and Inhumane Seal Killing as a W.T.O. Public Morality Issue*, in *ANIMAL LAW AND WELFARE: INTERNATIONAL PERSPECTIVES* 45, 55 (Deborah Cao & Steven White eds., 2016).

¹⁵ Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES].

¹⁶ The CITES is specifically designed to protect animals and to express valuation for them as an irreplaceable part of the natural system of the earth, protected for the present population and for generations to come. *Id.* at pmbl. In doing so, the CITES is to a large extent contingent on efficient international cooperation. BRUCE A. WAGMAN & MATTHEW LIEBMAN, *A WORLDVIEW OF ANIMAL LAW* 284 (2011). The treaty and its appendices protect 5,600 animal species, which are put into three different categories of protection depending on their level of endangerment: Animals are included either in Appendix I (all species threatened with extinction), Appendix II (all species which are not now threatened with extinction but may foreseeably become so unless trade therein is restricted), or Appendix III (all animals that must be protected from exploitation and therefore require cooperation of all parties to the convention). *The CITES Species*, CITES, <http://www.cites.org/eng/disc/species.php> [<https://perma.cc/SX5M-RQY6>] (accessed Feb. 7, 2015).

¹⁷ Convention on the Conservation of European Wildlife and Natural Habitats, Sept. 19, 1979, 1284 U.N.T.S. 209, art. 2 (expressing the need to maintain the population of wild fauna and flora); Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 1651 U.N.T.S. 333, art. 1 lit. c [hereinafter CMS] (defining favorable conservation status). The conservationist stance of the CMS is also expressed

versity (CBD) of 1992¹⁸ represents a conservationist treaty that endorses the sustainable use of biological diversity along with the fair and equitable sharing of the benefits from that sustainable yield.¹⁹ In addition, notable international treaties in animal law are found in the Antarctic Treaty System (ATS), namely the 1980 Convention for the Conservation of Antarctic Marine Living Resources,²⁰ the 1972 Convention for the Conservation of Antarctic Seals,²¹ and the 1973 Agreement on the Conservation of Polar Bears.²² Although the ATS is a declared conservationist system, it focuses on maintaining a balance in the ecological system of the Antarctic, and thereby also expresses preservationist tendencies.²³

Even though these treaties seem *prima facie* beneficial to animals (preserving life, notably), conservationist and preservationist aspirations do not endeavor to ensure or improve animal welfare.²⁴ First,

in its preamble, which reminds parties that human generations are responsible “to ensure that this legacy is conserved and, where utilized, is used wisely.” *Id.* at pmb1.

¹⁸ Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79 [hereinafter CBD]. The CBD has notably been supported by 194 parties, and received 168 signatures respectively, as a result of the efforts of the United Nations’ Environment Program. FITZGERALD, *supra* note 12, at 33.

¹⁹ CBD, *supra* note 18, at art. I.

²⁰ Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980, 1329 U.N.T.S. 48.

²¹ Convention for the Conservation of Antarctic Seals, June 1, 1972, 1080 U.N.T.S. 175.

²² Agreement on the Conservation of Polar Bears, Nov. 15, 1973, 27 U.S.T. 3918.

²³ See ARTHUR WATTS, INTERNATIONAL LAW AND THE ANTARCTIC TREATY SYSTEM (1992) (describing the Ecosystem Monitoring Program, which offers a good example of preservationist tendencies).

²⁴ As endangered species, individual animals often are subjected to confinement, suffering from the mental and bodily effects of imprisonment. *Captive Creatures*, THE NAT’L HUMANE EDUC. SOC’Y, <http://www.nhes.org/articles/view/785> (Oct. 2009) (accessed Jan. 14, 2016) (original site no longer available; cached version available at <http://web.archive.org/web/20150711115027/http://www.nhes.org/articles/view/785> [https://perma.cc/M6XK-XBZM]); COLIN GOLDNER, *LEBENSÄNGLICH HINTER GITTERN: DIE WAHRHEIT ÜBER GORILLA, ORANG UTAN & CO IN DEUTSCHEN ZOOS* (2014). This underinclusion has also been noticed by other academics. *A Paradigm Change*, in ANIMAL LAW: REFORM OR REVOLUTION? 18 (Anne Peters, Saskia Stucki & Livia Boscardin eds., 2015); David Bilchitz, *Animal Interests and South African Law: The Elephant in the Room?*, in ANIMAL LAW AND WELFARE: INTERNATIONAL PERSPECTIVES 131, 146 (Deborah Cao & Steven White eds., 2016); David Favre, *An International Treaty for Animal Welfare*, in ANIMAL LAW AND WELFARE: INTERNATIONAL PERSPECTIVES 87, 92 (Deborah Cao & Steven White eds., 2016); Sabrina Cuendet, *Le bestiaire du droit international (ou la fable de l’animal voulant trouver sa place parmi les hommes et les états)*, in MEÉLANGES PIERRE MICHEL EISEMANN: FAUT-IL PRENDRE LE DROIT INTERNATIONAL AU SÉRIEUX? (Sarah Cassella & Lucie Delabie eds., Pedone, forthcoming 2016); Peggy Cuniff & Marcia Kramer, *Developments in Animal Law*, in THE GLOBAL GUIDE TO ANIMAL PROTECTION 230, 230–31 (Andrew Linzey ed., 2013); Anne Peters, *Liberté, Égalité, Animalité: Human–Animal Comparisons in Law*, 5 TEL 25, 29 (2016). Compare, however, Sykes, who argues that animal welfare and conservationism are components of the very same idea of animal protection. She argues that principle of animal protection includes both negative and positive components. Negative components of the principle are expressed in the fact that states are not prohibited from adopting domestic measures to protect

only groups of animals are protected, not individual animals. Second, animals belonging to an endangered species might only be safeguarded from death, while still suffering from cruel conditions.²⁵ Indeed, GAL conventions fail to take into account, and remain indifferent to the questions of how animals are treated or how they cope with their environment, both of which are intrinsic concerns within the concept of animal welfare.²⁶ Third, the majority of animals subjected to trade are not covered by preservationist or conservationist treaties.²⁷

animals, and positive aspects refer to the idea that there are cooperative commitments in matters of animal protection. While animal welfare is covered by the former, conservationism is covered by the latter. As an example she forwards the shooting of Cecil the lion in mid-2015, which not only enraged society because lions are among the animals protected by conservationist treaties, but because of the sheer suffering Cecil had to go through before his death (he was shot by a bow and arrow and wounded badly, but managed to escape, and was then tracked for over forty hours, before being shot by a gun): Katie Sykes, *Globalization and the Animal Turn: How International Trade Law Contributes to Global Norms of Animal Protection*, 5 TEL 55, 56 (2016).

²⁵ *Captive Creatures*, *supra* note 24; CITES art. 3–5, Mar. 3, 1973, 993 U.N.T.S. 244.

²⁶ The Convention on the Conservation of European Wildlife and Natural Habitats, *supra* note 17, for example, only protects wild animals from forms of deliberate killing, deliberate breeding disturbance, or deliberate destruction of eggs (Article 6). Horta argues that “[s]entient animals have interests as sentient individuals that transcend the mere fact of being alive and reproducing that the survival of their species requires, and conservationist measures do not protect these.” Oscar Horta, *Expanding Global Justice: The Case for the International Protection of Animals*, 4 GLOB. POL’Y J. 371, 372 (2013). ‘Animal welfare’ is a term widely used in animal law, but it draws its content from the natural sciences. Animal welfare science is an applied science that touches on various disciplines such as ethology, veterinary pathology and epidemiology, as well as stress physiology. Peter Sandøe, Stine B. Christiansen & Björn Förkman, *Animal Welfare: What Is the Role of Science?*, in FROM ANIMALS, ETHICS AND TRADE: THE CHALLENGE OF ANIMAL SENTIENCE 41, 41 (Jacky Turner & Joyce D’Silva eds., 2006). Article 7.1.1 of the World Organization for Animal Health’s (OIE) Terrestrial Animal Health Code introduces an understanding of animal welfare that takes into account animals’ biological welfare, their affective states, and a species-specific adaptation of the concept. WORLD ORG. FOR ANIMAL HEALTH, TERRESTRIAL ANIMAL HEALTH CODE art. 7.1.1 (23rd ed. 2014), http://www.oie.int/index.php?id=169&L=0&htmf=chapitre_aw_introduction.htm [<https://perma.cc/WCX7-7VTX>] (accessed Feb. 7, 2016). The concept of animal welfare for legal purposes, which ensures physical and psychological well-being of animals, can assume different legal forms. While many people intuitively expect animal welfare provisions to prescribe species-specific regulations about good animal husbandry, animal welfare can also be regulated by prescribing that animals may not be used for human purposes. In animal law, the two positions are referred to as *legal welfarism* and *animal rights*, respectively. Both concepts can be compatible with the goal of ensuring animal welfare. Absolute prohibitions—which today exist in some countries with regard to wild animals in circuses, great apes used for research, dogs utilized in meat production, et cetera—are inherently apt to result in greater well-being of animals and are thus more compatible with the overall objective of improving animals’ welfare. BERNARD E. ROLLIN, ANIMAL RIGHTS & HUMAN MORALITY 256 (Prometheus Books, 3rd ed. 2006); PETER WALDAU, ANIMAL RIGHTS: WHAT EVERYONE NEEDS TO KNOW 206 (Oxford Univ. Press 2011); STEVEN M. WISE, DRAWING THE LINE 33–34 (Perseus Publishing 2002).

²⁷ CYRILLE DE KLEMM & CLARE SHINE, BIOLOGICAL DIVERSITY CONSERVATION AND THE LAW: LEGAL MECHANISMS FOR CONSERVING SPECIES AND ECOSYSTEMS 41, 111, 116 (IUCN Env’tl. Policy and Law Paper No. 29, 1993). In a sense, the fact that the WTO

Present GAL deficiencies, especially a preoccupation with valuing animals only for their instrumental value to humans, deprive it of its significance as a dynamic instrument responsive to global challenges. It comes as no surprise that GAL, which is to a large extent guided and influenced by the insights of animal ethics, is increasingly called to grow into its expected role as a promoter of animal welfare.²⁸ As Oscar Horta points out:

[T]here are other, more particular, practical reasons why the protection of the interests of animals should be brought to the international arena, and not just left for sovereign states to deal with. This is so because currently there are multilateral agreements and supranational institutions that put limits on the ways in which nonhuman animals may be protected domestically. This happens for reasons that have nothing to do with the defence of animals' interests, but rather with the protection of the industries that use animals as resources.²⁹

Although ventures exist, which attempt to globalize legal mechanisms that protect animal welfare—such as the International Convention for the Protection of Animals (ICPA) of 1988 developed by the International Fund for Animal Welfare (IFAW)—there are currently no treaties in force with the specific goal of promoting animal welfare.³⁰

B. Sources of Animal Welfare Law: National and Regional Animal Law

Today, animal welfare is, as a rule, regulated domestically and regionally. On a regional level, five conventions set up by the Council of Europe are relevant to animal welfare: the European Convention for the Protection of Animals During International Transport of 1968 (including duties for the safety of animals, the availability of authorized veterinary officers, and provisions on transportation means);³¹ the Eu-

treats animal welfare issues by the standards of article XX(a) of the GATT instead of article XX(g) of the GATT which supports the idea that animals threatened or endangered by extinction are governed by different sets of rules. However, there is no mutual exclusivity among the GATT exceptions, and the policy objective of protecting endangered or threatened species has never been defended by a member by relying on article XX(a) of the GATT.

²⁸ Horta, *supra* note 26, at 371; THOMAS G. KELCH, GLOBALIZATION AND ANIMAL LAW: COMPARATIVE LAW, INTERNATIONAL LAW AND INTERNATIONAL TRADE 294 (Ross Buckley & Andreas Ziegler eds., 2011); David Fraser, *Toward a Global Perspective on Farm Animal Welfare*, 113 APPLIED ANIMAL BEHAV. SCI. 330, 335–36 (2008); Rex Horgan & Andrea Gavinelli, *The Expanding Role of Animal Welfare in EU Legislation and Beyond*, 103 LIVESTOCK SCI. 303, 303 (2006).

²⁹ Horta, *supra* note 26, at 372.

³⁰ David Favre, *An International Treaty for Animal Welfare*, 18 ANIMAL L. 237, 245, 264 (2012). See also Favre, *An International Treaty for Animal Welfare*, in ANIMAL LAW AND WELFARE: INTERNATIONAL PERSPECTIVES, *supra* note 24.

³¹ European Convention for the Protection of Animals During International Transport, Dec. 13, 1968, C.E.T.S. No. 065; European Convention for the Protection of Animals During International Transport (revised), Nov. 6, 2003, C.E.T.S. No. 193.

ropean Convention for the Protection of Animals Kept for Farming Purposes of 1976 (encompassing principles on the keeping, care, and housing of animals);³² the European Convention for the Protection of Animals for Slaughter of 1979 (regulating, for example, the transport and delivery of animals to slaughterhouses, lairaging, care, and slaughtering);³³ the European Convention for the Protection of Vertebrate Animals Used for Experimental and Other Scientific Purposes of 1986 (enshrining principles on care and accommodation, conduct of procedure, breeding, education, training, and statistical information);³⁴ and the European Convention for the Protection of Pet Animals of 1987 (regulating the use of pet animals, with supplementary measures for stray animals).³⁵ In deciding to regulate animal welfare, the Council was led by a “belief that *respect for animals was a common heritage of European countries* closely linked to human dignity, and that harmonisation between countries was necessary.”³⁶ Aside from regional developments, animal welfare is usually subject to states’ domestic regulatory authority, embodied in their national animal welfare acts, animal protection acts, animal cruelty acts, animal care acts, and others.³⁷ The regulation of animal welfare is therefore often understood as a matter confined to national or regional territories, leaving the functional influence of public international law to protect animal interests at the global level relatively slim. The major shortcoming associated with this is that in cross-border dialogue, animal matters have been reduced to allegations of imperialism. Instead of accounting for procedural or substantive law harmonization, these dialogues have been generally unproductive at furthering animal interests.³⁸

³² European Convention for the Protection of Animals Kept for Farming Purposes, Mar. 10, 1976, C.E.T.S. No. 087.

³³ European Convention for the Protection of Animals for Slaughter, May 10, 1979, C.E.T.S. No. 102.

³⁴ European Convention for the Protection of Vertebrate Animals Used for Experimental and Other Scientific Purposes, Mar. 18, 1986, C.E.T.S. No. 123; *e.g.*, *id.* at art. 5 para. 3 (“The well-being and state of health of animals shall be observed sufficiently closely and frequently to prevent pain or avoidable suffering, distress or lasting harm.”)

³⁵ European Convention for the Protection of Pet Animals, Nov. 13, 1987, C.E.T.S. No. 125.

³⁶ Isabelle Veissier et al., *European Approaches to Ensure Good Animal Welfare*, 113 APPLIED ANIMAL BEHAV. SCI. 279, 280 (2008) (emphasis added).

³⁷ This can be implemented on a federal level (*e.g.*, Act on Welfare and Management of Animals, Law No. 105 of 1973 (Japan)), or on a state level (*e.g.*, *Animal Welfare Act 1992* (ACT) (Austl.)).

³⁸ Catherine Sykes, in her renowned 2011 master’s thesis, thoroughly examines the emergence of a common, universal norm with regard to the treatment of animals in light of allegations of imperialism, by focusing on international law. In her conclusion, she argues that that “point of view is itself the product of a particular cultural moment and situatedness, and it disregards a deep and widespread ethic, manifest across the world’s various civilizations, that takes human obligations to animals seriously and posits limits on what human beings can justifiably do to our fellow creatures.” Catherine Sykes, *Beasts in the Jungle: Animal Welfare in International Law 157* (Aug. 8, 2011) (unpublished LL.M. thesis, Dalhousie University), <http://dalspace.library.dal.ca/bitstream/handle/10222/14087/>

C. *Anticipated Inutility of Trade Law for Animal Welfare Purposes*

Furthering animal interests on the international plane seems additionally hampered by the generic make-up of international trade law. Trade law emphasizes the fact that animals are regarded as goods and that every regulation aspiring to increase the level of welfare provided represents an undesirable barrier to trade.³⁹

1. *Animals as Goods*

Animals, though sentient and having complex minds and needs, are subject to the concept of ownership as legal objects that can be possessed.⁴⁰ They are treated as commodities that are bought and sold on the market.⁴¹ In the treaty regime of the WTO, animals are regulated as goods in an implicit manner only. The term ‘goods’ is not defined in the General Agreement on Tariffs and Trade (GATT),⁴² the Agreement on Technical Barriers to Trade (TBT),⁴³ or the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS),⁴⁴ which represent the most pertinent treaties with a view on animals.⁴⁵ Scholars have come to define things as ‘goods’ where: (1) they are listed as goods in the member’s Schedules of Concessions on Goods; (2) they possess monetary value and are thus tradable; and (3) they have experienced a certain level of processing as set up in the Harmonized System (HS) Nomenclature.⁴⁶

The Schedules of Concessions, which are binding on the members, cover animals and their processed body parts or liquids in multiple sec-

Sykes,%20Catherine,%20LLM,%20LAW,%20August%202011.pdf [https://perma.cc/PFD3-HZNA] (accessed Jan. 19, 2016). Peter Sandøe and Katherine Hauge Madsen make the case against animal welfare imperialism. Peter Sandøe & Katherine Hauge Madsen, *Agricultural Food Ethics in the Western World: A Case of Ethical Imperialism?*, in ETHICS, HUNGER AND GLOBALIZATION 201, 203 (Per Pinststrup-Andersen & Peter Sandøe eds., 2007).

³⁹ WAGMAN & LIEBMAN, *supra* note 16, at 297.

⁴⁰ Wendy A. Adams, *Human Subjects and Animal Objects: Animals as “Other” in Law*, 3 J. ANIMAL L. & ETHICS 29, 29 (2009).

⁴¹ WAGMAN & LIEBMAN, *supra* note 16, at 297.

⁴² General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 197 [hereinafter GATT].

⁴³ Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 [hereinafter TBT].

⁴⁴ Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 493 [hereinafter SPS].

⁴⁵ The annexes to these treaties also do not define “good.” See GATT, *supra* note 42, at Annexes A–G; TBT, *supra* note 43, at Annex 1; SPS, *supra* note 44, at Annex A (excluding any definition of “good” in each).

⁴⁶ Melaku Desta, *To What Extent Are WTO Rules Relevant to Trade in Natural Resources?*, WORLD TRADE ORG., https://www.wto.org/english/res_e/publications_e/wtr10_forum_e/wtr10_desta_e.htm [https://perma.cc/5LH9-CAKH] (2010) (accessed Jan. 15, 2016).

tions.⁴⁷ Section I deals with “live animals and animal products,” section III refers to animal fats and oils, and section VIII encompasses leather goods.⁴⁸ A number of additional sections refer to ingredients made from animal bodies.⁴⁹ However, given the structural set up of the HS, it is evident that most animals and animal products will be included in section I. Section I is structured as follows: chapter 1 classifies “live animals;” chapter 2 “meat and edible meat offal;” chapter 3 “fish and crustaceans, mollusks and other aquatic invertebrates;” chapter 4 “dairy produce, birds’ eggs, natural honey, edible products of animal origin;” and chapter 5 refers to “products of animal origin, not elsewhere specified or included.”⁵⁰ Accordingly, animals and animal products form part of the members’ Schedules of Concessions on Goods (element 1) and have experienced a level of processing as laid out in the HS Nomenclature (element 3). Additionally, most animals and their processed body parts or liquids are freely tradable. Yet, animals’ tradability is not always apparent. On the one hand, it is not self-evident that sentient beings with their own distinct interests are reducible to their monetary value.⁵¹ On the other hand, the tradability of certain species is reduced in number or excluded based on, *inter alia*, the ICRW, the CITES, the CBD, the Convention on the Conservation of Antarctic Marine Living Resources, the Convention for the Conservation of Antarctic Seals, or the Agreement on the Conservation of Po-

⁴⁷ *Current Situation of Schedules of WTO Members*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm [<https://perma.cc/7BRB-87LG>] (accessed Jan. 15, 2016). See GATT art. 2, ¶ 7 (“The Schedules annexed to this Agreement are hereby made an integral part of Part 1 of this Agreement.”).

⁴⁸ The WTO’s Harmonized System consists of twenty-one sections including ninety-nine chapters. See International Convention on the Harmonized Commodity Description and Coding System (with annex), June 14, 1983, Hein’s No. KAV 2260, 1503 U.N.T.S. 168 (categorizing and assigning six-digit codes to goods to facilitate international trade and tariffs).

⁴⁹ Upon closer look, many more sections include animal ingredients: section XII includes footwear, section XVIII includes watches, section XX includes furniture, and section XXI includes works of art. *Id.*

⁵⁰ *HS Nomenclature 2012 Edition*, WORLD CUSTOMS ORG., http://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs_nomenclature_2012/hs_nomenclature_table_2012.aspx [<https://perma.cc/9CV2-97FL>] (accessed Jan. 15, 2016).

⁵¹ The monetary value of animals is even asserted where they are not obviously objects of trade. Pets, for instance, are determined by their market value in private law disputes. See Geordie Duckler, *The Economic Value of Companion Animals: A Legal and Anthropological Argument for Special Valuation*, 8 ANIMAL L. 199, 209–11 (2001) (explaining how damage awards for pet owners are calculated in various tort actions involving their pets). Even rare species are monetarily evaluated for conservation considerations. See R.M. Engeman et al., *Monetary Valuation of Rare Species and Imperiled Habitats as a Basis for Economically Evaluating Conservation Approaches*, 21 USDA NAT’L WILDLIFE RES. CTR. 66, 67–68 (2004), http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1115&context=icwdm_usdanwrc [<https://perma.cc/H433-5CFK>] (accessed Jan. 15, 2016) (discussing methods that are used to estimate the monetary value of rare species).

lar Bears.⁵² Most animals introduced into trade are, however, farmed animals bereft of protection and thus generally freely tradable (element 2).

It can, therefore, be concluded that animals listed as goods in the WTO members' Schedules of Concessions on Goods (1) have been given a certain monetary value, (2) are generally tradable, and (3) experience a certain level of processing as laid out in the HS Nomenclature. Accordingly, live animals and animal products are classified as goods. As animals are legally considered to be goods, their worth beyond monetary valuation is difficult to introduce, especially in a system designed to restrict regulatory requirements.

2. *Animal Welfare Regulation as a Barrier to Free Trade*

Because animal welfare is perceived as a barrier to trade, international trade law has become notorious for hampering the development of effective GAL.⁵³ The forces involved in globalization have created an approximation of traditional domestic markets on a global scale through the steadily increasing free transfer of goods, services, and finances. As a consequence of this process, states' regulatory particularities are easily contrasted and thereby more frequently emphasized.⁵⁴ Moreover, as most obvious barriers to trade have been eliminated, the remaining regulatory differences appear in sharper contrast from a trade law perspective. Different regulatory requirements with regard to animals—for example, how animals are treated, raised, transported; how much social interaction they experience; or whether they can behave naturally in natural environments—are identified as obstacles to the typically desired principles of the free market and trade liberalization.⁵⁵ The rules of regulatory competition, upon which the free market principle relies, equate any regulatory requirements with unnecessary costs and barriers.⁵⁶ Accordingly, the relationship between animal law (as a field of law preoccupied with ameliorating the substantial and procedural legal position of animals) and trade law is antagonistic.⁵⁷ Animal welfare considerations and economic values

⁵² See discussion *supra* Section II.A (expounding on the exception to animals' tradability in these treaties).

⁵³ Favre, *An International Treaty for Animal Welfare*, *supra* note 24, at 246.

⁵⁴ Mathias Koenig-Archibugi, *Global Regulation*, in *THE OXFORD HANDBOOK OF REGULATION* 407, 413 (Robert Baldwin, Martin Cave & Martin Lodge eds., 2010).

⁵⁵ These laws are inefficient regulation that should, from an economic perspective, not remain in effect. William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 *GEO. L. J.* 201, 211 (1997); Joel P. Trachtman, *International Regulatory Competition, Externalization and Jurisdiction*, 34 *HARV. INT'L L. J.* 47, 65–66 (1993).

⁵⁶ William W. Bratton et al., *Regulatory Competition and Institutional Evolution*, in *INTERNATIONAL REGULATORY COMPETITION AND COORDINATION* 1, 1 (William W. Bratton et al. eds., 1996); DALE D. MURPHY, *THE STRUCTURE OF REGULATORY COMPETITION: CORPORATIONS AND PUBLIC POLICIES IN A GLOBAL ECONOMY* (2004).

⁵⁷ María Alejandra Calle-Cook, *International Trade Law and Emerging Trade-Related Issues: The Case of Animal Welfare Concerns*, 2 *EAFIT J. INT'L L.* 8, 9 (2010).

seem diametrically opposed to one another, forming part of the trade vs. non-trade dispute.⁵⁸

For example, under the GATT, the main principles encompassed are the most-favored-nation obligation (MFN obligation), the national treatment obligation (NT obligation), the principle of reducing quantitative restrictions (QRs), and the binding nature of schedules of concessions.⁵⁹ Sticking to or introducing better protection for animals has in this regard often been seen as operating discriminatorily and thereby violating the main GATT principles. Naturally, in trade-dominated contexts, non-trade objectives are given less priority. Unsurprisingly, therefore, animal advocates have identified global free trade agreements as the principal reason for the lack of progress in animal welfare.⁶⁰ Due to the increasing importance of non-trade issues—not only for special interest groups, but for the public in general and, accordingly, for states⁶¹—and WTO members' growing discontent about the prevalence of free trade over important regulatory ideals, the WTO's Dispute Settlement Body (DSB) has increasingly come to deal with these topics.⁶²

III. A REINFORCED ROLE FOR SENTIENTIST ANIMAL LAW IN TRADE LAW

Given the strained relationship between free trade and animal law, one might question whether the DSB is the right forum to seek progress in animal law. Because animal law is a non-trade issue, which stands opposed to many of the objectives of international trade law, public international law would have to induce a change in international trade law that allows for the issue of the proper treatment of animals to be considered. For instance, if an international treaty were signed that evidenced states' general and uniform commitment to ensure or to improve animal welfare, such as the International Convention for the Protection of Animals (ICPA),⁶³ such a commitment would presumably cause considerable repercussions in WTO law. Paradoxically, the DSB's 'case law' of the last decade has initiated a global

⁵⁸ Peter L. Fitzgerald, "Morality" May Not Be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law, 14 J. INT'L WILDLIFE L. & POL. 85, 85–86 (2011).

⁵⁹ In the GATT, the MFN treatment obligation is enshrined in article I, the NT obligation is found in article III, the principle of QR reduction is in article XI, and the binding nature of schedules of concessions is in article II. GATT, *supra* note 42, at arts. I–III, XI.

⁶⁰ *E.g.*, Thomas, *supra* note 1, at 609.

⁶¹ *See, e.g.*, EUROPEAN COMMISSION, ATTITUDES OF CONSUMERS TOWARDS THE WELFARE OF FARMED ANIMALS 9 (2016), file:///Users/charlotteblattner/Downloads/ebs_442_en%20(4).pdf [https://perma.cc/UQT3-8N4U] (accessed Jun. 26, 2016) (showing that 94% of all Europeans express that it is important to protect farm animal welfare).

⁶² Andrew Lurié & Maria Kalinina, *Protecting Animals in International Trade: A Study of the Recent Successes at the WTO and in Free Trade Agreements*, 30 AM. U. INT'L L. REV. 431, 451–52 (2015).

⁶³ Favre, *An International Treaty for Animal Welfare*, *supra* note 24, at 238.

animal welfare discourse and allowed its members in its adjudicatory-like processes to move a step beyond global animal treaty law on the international stage.

A. *Putting Animal Welfare on the Trade Table*

A simple look at the pending and closed disputes at the WTO shows that animals are frequently at the center of dispute settlement. Trade disputes involving animals and the law have arisen from the following: import restrictions of chicken meat and chicken products,⁶⁴ anti-dumping and countervailing duty measures on broiler products,⁶⁵ import restrictions of live pigs,⁶⁶ safeguard measures on imports of lamb,⁶⁷ anti-dumping duties on frozen meat from fowl,⁶⁸ import restriction of bovine meat,⁶⁹ anti-dumping measures on beef,⁷⁰ import restrictions of milk and other dairy products,⁷¹ coercive economic measures regarding herring, the importation of tuna,⁷² anti-dumping measures on salmon,⁷³ import prohibition and anti-dumping measures on shrimp,⁷⁴ import restrictions of seal products,⁷⁵ measures affecting the

⁶⁴ Request for Consultations by Brazil, *Indonesia—Measures Concerning the Importation of Chicken Meat and Chicken Products*, WTO Doc. WT/DS484/1 (Oct. 23, 2014).

⁶⁵ Request for Consultations by the United States, *China—Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WTO Doc. WT/DS427/1 (Sept. 23, 2011).

⁶⁶ Request for Consultations by the European Union, *Russian Federation—Measures on the Importation of Live Pig, Pork and Other Pig Products from the European Union*, WTO Doc. WT/DS475/1 (Apr. 14, 2014).

⁶⁷ Request for Consultations by New Zealand, *United States—Safeguard Measure on Imports of Fresh, Chilled, or Frozen Lamb from New Zealand*, WTO Doc. WT/DS177/1 (July 16, 1999); Request for Consultation by Australia, *United States—Safeguard Measure on Imports of Fresh, Chilled, or Frozen Lamb from Australia*, WTO Doc. WT/DS178/1 (July 23, 1999).

⁶⁸ Request for Consultations by Brazil, *South Africa—Anti-Dumping Duties on Frozen Meat of Fowls from Brazil*, WTO Doc. WT/DS439/1 (June 21, 2012).

⁶⁹ Request for Consultations by Canada, *Korea, Republic of—Measures Affecting the Importation of Bovine Meat and Meat Products from Canada*, WTO Doc. WT/DS391/1 (Apr. 9, 2009).

⁷⁰ Request for Consultations by the United States, *Mexico—Definitive Anti-Dumping Measures on Beef and Rice*, WTO Doc. WT/DS295/1 (June 16, 2003).

⁷¹ Request for Consultations by the United States, *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WTO Doc. WT/DS103/1 (Oct. 8, 1997).

⁷² Request for Consultations by Denmark, *European Union—Measures on Atlanto-Scandian Herring*, WTO Doc. WT/DS469/1 (Nov. 4, 2013).

⁷³ Request for Consultations by Norway, *European Communities—Anti-Dumping Measure on Farmed Salmon from Norway*, WTO Doc. WT/DS337/1 (Mar. 17, 2006).

⁷⁴ Request for Consultations by Ecuador, *United States—Anti-Dumping Measure on Shrimp from Ecuador*, WTO Doc. WT/DS335/1 (Nov. 17, 2005); Request for Consultations by India et al., *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/1 (Oct. 8, 1996).

⁷⁵ Request for Consultations by Norway, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS401/1 (Nov. 5, 2009).

transit and importation of swordfish,⁷⁶ import ban on pet food,⁷⁷ tariff quotas and subsidies affecting leather,⁷⁸ and the importation of pharmaceutical products,⁷⁹ to name a few. The fact that the number of reports adopted at the DSB regarding animals is comparatively high itself speaks to the trend of an increasing prevalence of animal law matters at the WTO. This trend, however, might solely be an expression of the predominantly economic value ascribed to animals by humans in exploiting them.

Evidence against this conclusion can be found in the fact that states adopt trade measures to protect animal welfare, especially against the background of preventing the inhumane transport of animals,⁸⁰ the import of meat from animals slaughtered inhumanely,⁸¹ the import of furs from animals that were inhumanely trapped,⁸² of cosmetics tested on animals,⁸³ of products from inhumanely killed seals,⁸⁴ and of seal pup products.⁸⁵ Moreover, members increasingly push for better animal welfare outside strict dispute settlement. In June 2000, the European Union (EU) submitted a proposal on animal welfare and trade in agriculture to the WTO Committee on Agriculture (CoA) to directly address animal welfare standards in the WTO frame-

⁷⁶ Request for Consultations by European Communities, *Chile—Measures Affecting the Transit and Importing of Swordfish*, WTO Doc. WT/DS193/1 (Apr. 19, 2000).

⁷⁷ Request for Consultations by Hungary, *Turkey—Import Ban on Pet Food from Hungary*, WTO Doc. WT/DS256/1 (May 3, 2002).

⁷⁸ Request for Consultations by European Communities, *Japan—Tariff Quotas and Subsidies Affecting Leather*, WTO Doc. WT/DS147/1 (Oct. 8, 1998).

⁷⁹ Request for Consultations by India, *Argentina—Measures Affecting the Import of Pharmaceutical Products*, WTO Doc. WT/DS233/1 (May 25, 2001).

⁸⁰ 18 U.S.C. § 42(c) (2012).

⁸¹ Federal Meat Inspection Act of 1994, 21 U.S.C. § 620(a) (2012) (“No such carcasses, parts of carcasses, meat or meat food products shall be imported into the United States unless the livestock from which they were produced was slaughtered and handled in connection with slaughter in accordance with the Act of August 27, 1958 (72 Stat. 862; 7 U.S.C. §§ 1901–1906).”).

⁸² Council Regulation 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 Certain Wild Animal Species Originating in Countries that Catch them by Means of Leghold Traps or Trapping Methods Which Do Not Meet International Humane Trapping Standards, 1991 O.J. (L 308) 1 (EC).

⁸³ See Regulation 1223/2009 of the European Parliament and of the Council of 30 November 2009 on Cosmetic Products, 2009 O.J. (L 342) 59, 71 (EC) (implementing regulations for using animal testing for cosmetic products).

⁸⁴ Regulation 1007/2009, of the European Parliament and of the Council of 16 September 2009 on Trade in Seal Products, 2009 O.J. (L 286) 36 (EC).

⁸⁵ Council Directive 83/129/EEC of 28 March 1983, Concerning the Importation into Member States of Skins of Certain Seal Pups and Products Derived Therefrom, 1983 O.J. (L 91) 30 (EC). This directive has been indefinitely extended. Council Directive 89/370/EEC of 8 June 1989, Amending Council Directive 83/129/EEC Concerning the Importation into Member States of Skins of Certain Seal Pups and Products Derived Therefrom, 1989 O.J. (L 163) 37 (EC).

work.⁸⁶ In its proposal, the EU argues that there is a growing importance of animal welfare as a policy issue, both to EU and non-EU countries, as well as an increasing awareness among consumers and producers about the effects of how animals are treated. The EU's objectives are to ensure that trade does not undermine its efforts to improve animal welfare protection and to avoid trade protectionism. Based on these objectives, the EU proposes that "animal welfare should be globally addressed in a consistent manner within the WTO."⁸⁷ The EU's proposal continues to form part of the ongoing trade negotiations and debate.⁸⁸ Within the EU, such proposals are increasingly driven by EU members pushing for better animal welfare at the supranational level. In their "Joint Declaration on Animal Welfare," Denmark, Germany, and the Netherlands urge the EU member states and the European Commission "to acknowledge the need for better regulation, better animal welfare[,] and to promote awareness, EU-standards and knowledge."⁸⁹

B. Recent Developments in Trade Law: Four Examples of the WTO's Positive Response to a Reinforced Role of Animal Protection in Trade

The increasing push by members for better animal welfare in trade realms is surely evidence in itself of the growing importance of the topic within the WTO. Yet, the reports adopted by the DSB over the last decades not only reveal that states increasingly ask for higher animal welfare in the regulatory framework of the WTO, but they demonstrate that the WTO has responded positively to reinforcing the role of animal issues in trade law.

⁸⁶ Special Session of the Committee on Agriculture, *European Communities Proposal: Animal Welfare and Trade in Agriculture*, WTO Doc. G/AG/NG/W/19, at 3 (June 28, 2000).

⁸⁷ To achieve this objective, the EU expounds three possibilities. First, multilateral agreements on the protection of animal welfare could be developed to bring about greater clarity regarding the relationship between WTO rules and animal welfare protection. Second, appropriate labeling under article 2.2 of the TBT could enable consumers to make informed choice. Third, members should be enabled to provide monetary compensation to producers adhering to higher animal welfare standards if trade rules produce unequal conditions of competition. *Id.* at *passim*.

⁸⁸ JESSICA VAPNEK & MEGAN CHAPMAN, FAO LEGAL OFFICE, LEGISLATIVE AND REGULATORY OPTIONS FOR ANIMAL WELFARE 17 (2010), <http://www.fao.org/docrep/013/i1907e/i1907e00.pdf> [<https://perma.cc/TH5D-UW86>] (accessed Feb. 11, 2016).

⁸⁹ These members call for the introduction of animal based welfare indicators, the improvement of consumer information, improvement of transportation regulation for animals (space allowance, transportation hours), the phasing-out of mutilation such as tail-docking and beak-trimming, considering laws that apply to domesticated birds (broiler, pullets, etc.), an EU platform for animal welfare so the topic can gain momentum and promote discussion among all stakeholders, etc. Joint Declaration on Animal Welfare – Denmark, Germany and the Netherlands, Dec. 14, 2014, http://www.bmel.de/SharedDocs/Downloads/EN/Agriculture/AnimalProtection/JointDeclarationAnimalWelfare.pdf?__blob=publicationFile [<https://perma.cc/42CQ-YBWQ>] (accessed Jan. 19, 2015).

The DSB has proven to be increasingly receptive to members' concerns about the proper treatment of animals, as can be observed in four examples. First, in *Tuna/Dolphin III*, the panel extended the classical view of species protection to individual animal protection.⁹⁰ Treaty references that justify violating trade obligations for "animal life or health" do not, according to the panel, have to be "tied to a broader conservation objective," but allow members to adopt measures designed to "protect[] *individual animals or species whose sustainability as a group is not threatened.*"⁹¹

Second, in the *Shrimp/Turtle* dispute, it was decided that states can be justified in distinguishing products on the basis of the level of animal welfare protection in the production of a product (as opposed to relying on the mere appearance of a product).⁹² This point requires some explanation. Nearly all regulatory initiatives that aim to improve animal welfare are concerned with the way animals are treated.⁹³ Thus, they refer to the methods of producing and processing animal goods. In the WTO legal framework, which seeks to eliminate discrimination and enable market access for products, a judgment on whether a measure violates substantive trade rules is often based on a comparison of products. In the case of animal welfare regulation, eggs produced in battery cages are compared to eggs from so-called 'free range hens.'⁹⁴ In the process and production methods (PPMs) debate, it is highly disputed whether such products are sufficiently 'like' each other. If they are 'like' products, members may not distinguish between them through national laws that have any distortive effect on international trade and, therefore, animal welfare regulation inhibiting free movement of goods produced at low welfare is excluded from the trade regime. Especially problematic are those measures adopted for PPM reasons that do not alter the physical characteristics of a good, thus non-product-related PPMs (NPR-PPMs).⁹⁵ Commonly, free range eggs (as NPR-PPMs) and battery cage eggs are presumed to be physically identical products, and, therefore, like products, regardless of how they were produced. Whereas the (unadopted) *Tuna/Dolphin I*

⁹⁰ Panel Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 1.1, 7.437, WTO Doc. WT/DS381/R (adopted Sept. 15, 2011).

⁹¹ *Id.* (emphasis added).

⁹² Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 112–113, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998).

⁹³ Peter Stevenson, *The World Trade Organization Rules: A Legal Analysis of Their Adverse Impact on Animal Welfare*, 8 ANIMAL L. 107, 111 (2002).

⁹⁴ See Ike Sharpless, *Farm Animal Welfare and WTO Law, Assessing the Legality of Policy Measures*, 4, 18–19, 37–38 (Apr. 22, 2008) (unpublished M.A. thesis, Tufts University) (on file with the Tufts Digital Library), <http://hdl.handle.net/10427/52892> [<https://perma.cc/JY2E-59AV>] (accessed Jan. 19, 2016) (discussing labeling to compare the quality of life between battery and free range hens to inform consumer choice).

⁹⁵ Product-related PPMs, in contrast, impact the physical characteristics of the final product. Thomas, *supra* note 1, at 611; Alex B. Thiermann & Sarah L. Babcock, *Animal Welfare and International Trade*, 24 REV. SCI. TECH. OFF. INT. EPIZ. 747, 748 (2005).

and *II* panel reports declined the possibility of having NPR-PPMs restrict trade in the 1990s,⁹⁶ subsequent reports recognized it.

Notably, the report of the Appellate Body (AB) in *Shrimp/Turtle* accommodated the NPR-PPM legality by allowing the distinction between shrimp harvested with methods aimed at reducing the incidental killing of turtles, and shrimp harvested without such measures.⁹⁷ Upon a closer analysis, however, the AB did not explicitly rule that products adhering to better NPR-PPMs are unlike products produced without regard to higher standards. In the case at hand, the U.S. required all importers of tuna to use “turtle excluder devices” (TEDs) or certified “comparable” measures when harvesting shrimp in order to reduce the incidental killing of endangered turtles.⁹⁸ The panel called upon to adjudicate the matter established a violation of article XI of the GATT (prohibition of quantitative restrictions) and did not address whether PPMs are discriminatory within the meaning of article III of the GATT (national treatment obligation).⁹⁹ Thereby, the panel essentially sidestepped the PPM debate. However, by having the measure provisionally justified under article XX(g) of the GATT, the AB overruled the per se inadmissibility of NPR-PPM measures.¹⁰⁰ Put positively, the AB held that NPR-PPM-based measures are in principle justifiable under the GATT treaty regime.¹⁰¹

⁹⁶ The United States’ import restriction under its Marine Mammal Protection Act of 1972 (MMPA) have been challenged at the DSB for being in violation of substantive rules of the GATT by not allowing tuna or tuna products to enter U.S. territory if harvested by the means of purse seine nets in the eastern tropical Pacific (ETP), unless the state can prove that its program is comparable to the U.S. in terms of preventing dolphin kills. The regulation lying down standards of tuna fishing methods have been identified as referring to the production method of the product tuna. The panel in *Tuna/Dolphin I* found that the Note Ad to article III, operating as a guide to the limitation of both articles’ scope, allowed no distinction between products on the basis of their process or production methods, as Note Ad article III solely referred to products as such. Thus, in essence, the rulings in the Tuna/Dolphin disputes interpreted the WTO treaty language to allow members to draw regulatory distinctions based on a product’s physical appearance, but not based on the manner and method in which it was produced or processed. See Panel Report, *United States—Restrictions on Imports of Tuna*, GATT B.I.S.D. 39S/155 *passim* (Sept. 3, 1991); Panel Report, *United States—Restrictions on Imports of Tuna*, GATT DS29/R *passim* (adopted June 16, 1994).

⁹⁷ Fitzgerald, *supra* note 58, at 122 (2011); Catherine J. Archibald, *Forbidden by the WTO? Discrimination Against a Product When Its Creation Causes Harm to the Environment or Animal Welfare*, 48 NAT. RES. J. 15, 17 (2008).

⁹⁸ Act of Nov. 21, 1989, Pub. L. No. 101-162, § 609, 103 Stat. 1037, 1038 (1989).

⁹⁹ Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 7.22, WTO Doc. WT/DS58/R (adopted May 15, 1998).

¹⁰⁰ CHRISTIANE R. CONRAD, PROCESSES AND PRODUCTION METHODS (PPMs) IN WTO LAW 20, 24 (2011); Lurié & Kalinina, *supra* note 62, at 443-44.

¹⁰¹ The AB additionally rejected the idea that all living natural resources are renewable and hence non-exhaustible. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 128, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998). Moreover, it determined that article XX(g) of GATT—which allows violating trade obligations if the measures relate to the conservation of exhaustible natural resources—not only applies to nonliving natural resources, but also to living resources, i.e., animals. *Id.* at ¶¶ 128, 130.

The PPM debate dodged review by the WTO DSB in *Seals* as well, since the EU regulatory differentiations between indigenous communities and commercial hunting were qualified as producer-related measures, rather than process-related measures.¹⁰² A third example of increased levels of animal welfare in trade law, the *Seals* dispute evidenced that laws which violate trade rules for animal welfare considerations are justifiable, even if they demand restrictive means such as a complete ban on trade in certain products. In 2009, the EU introduced a comprehensive ban on the import and export of seal products.¹⁰³ The regulation recognized that seals are “sentient beings that can experience pain, distress, fear and other forms of suffering.”¹⁰⁴ Accordingly, cruel seal hunting methods that disregard the goals of instantaneous death and the avoidance of animal suffering, and products derived therefrom, were banned in the EU.¹⁰⁵ The import ban was challenged at the DSB by Canada, Norway, and Iceland, which alleged violations of both the TBT (articles 2.1 and 2.2) and the GATT (articles I and III(4)).

In its defense, the EU relied on the public morals exception, among others, as enshrined in article XX(a) of the GATT. Based on the policy motives laid out in its regulation, the EU argued that the import ban was necessary to achieve the objective of reducing EU and global demand for seal products killed inhumanely and having suffered unnecessarily.¹⁰⁶ The panel concluded that the EU Seal Regime was “capable of making a contribution” to addressing public moral concerns relating to the EU public’s participation as consumers in the market for products derived from inhumanely killed seals, and that its measures do in fact “make[] a contribution” to reducing EU and global demand for seal products.¹⁰⁷ The panel’s findings that the global reduction of unnecessary animal suffering is a legitimate goal under article XX(a) of the GATT and that the proposed measures contributed to achieving this goal were upheld by the AB.¹⁰⁸ In doing so, the AB gave preference to national convictions about the proper treatment of animals. Article XX(a) of the GATT allowed the DSB to sidestep the fact that no global animal law (GAL) treaty or provision exists that aims at reducing global animal suffering, and to rely directly on the

¹⁰² CONRAD, *supra* note 100, at 12.

¹⁰³ Council Regulation 1007/2009 of the European Parliament and of the Council of 16 September 2009, on Trade in Seal Products, 2009 O.J. (L286), at 36 (2009).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Panel Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 7.460, WTO Doc. WT/DS400/R, WT/DS4001/R (adopted Nov. 25, 2013).

¹⁰⁷ *Id.*

¹⁰⁸ Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.279, WTO Doc. WT/DS400/AB/R, WT/DS4001/AB/R (adopted May 22, 2014).

state of animal law at the national level.¹⁰⁹ Also, the TBT can be aligned with article XX(a) of the GATT in this matter. In its preamble, the TBT recognizes that no country should be prevented from taking measures necessary to ensure the protection of human, animal or plant life or health, the environment, or the prevention of deceptive practices *at the levels it considers appropriate*.¹¹⁰ Remarkable in this respect is that the animal welfare level autonomously determined by members seems to go as far as to overrule exceptions to them, if they run counter to its essence. In *Seals*, the panel ruled that the exceptions to the EU Seals regime—designed to pay deference to marine research management and indigenous communities’ hunting—undermines the EU’s overall objective to reduce seal suffering.¹¹¹ Considerations not to let free trade sabotage efforts to introduce and maintain laws that better the treatment of animals have therefore incrementally been given preference over substantive, ‘hard’ trade obligations.

Fourth, and this might be the most astounding observation, the WTO DSB has not only conceded that animal welfare might be an issue for members that invoke the public morals exception, but it has also made general statements on this topic irrespective of member preference. The panel in *Seals* held:

[W]e are . . . persuaded that the evidence as a whole sufficiently demonstrates that animal welfare is an issue of ethical or moral nature in the European Union. 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*.¹¹²

C. How the Quality of Animal Welfare Law, Channeled Through International Trade Law, Exceeded the Status Quo of Global Animal Treaty Law

Paradoxically, the way in which WTO law addresses animal issues is much more progressive than animal protection under global animal treaty law. More specifically, the way in which members can incorpo-

¹⁰⁹ Häberli agrees by stating that “the rulings of the panel and of the AB are not based on the international standards for the rights of indigenous people or for animal welfare invoked by the EU.” CHRISTIAN HÄBERLI, *SEALS AND THE NEED FOR MORE DEFERENCE TO VIENNA BY WTO ADJUDICATORS 17* (Society of International Economic Law 2014).

¹¹⁰ TBT, *supra* note 43, at pmb. 1868 U.N.T.S. 120.

¹¹¹ Panel Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 7.638, WTO Doc. WT/DS400/R, WT/DS4001/R (adopted Nov. 25, 2013). *See also* Broom, *International Animal Welfare Perspectives, Including Whaling and Inhumane Seal Killing as a W.T.O. Public Morality Issue*, in ANIMAL LAW AND WELFARE: INTERNATIONAL PERSPECTIVES, *supra* note 14, at 58.

¹¹² Panel Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 7.409, WTO Doc. WT/DS400/R, WT/DS4001/R (adopted Nov. 25, 2013) (emphasis added).

rate animal welfare law into the international forum of the WTO exceeds the status quo of treaty GAL.

The majority of states have developed animal laws on the basis of recognizing animal sentience.¹¹³ In accordance with states' broad recognition of animal sentience, animal welfare is guided by a sentientist ethic. According to sentientism—also referred to as pathocentrism or sentiocentrism—the importance given to animals and their well-being is founded in their intrinsic value. Their well-being matters because it matters to them.¹¹⁴ Preserving or conserving species of animals, on the other hand, is not founded on the recognition of an intrinsic value of animals, but mainly on the human valuation of the species for human purposes.

In *Seals*, the EU's efforts to spare seals from unnecessary suffering through outmoded killing methods emphasized taking into account an animal perspective. The *Seals* case enabled sentientist ethics based upon national tendencies, and rejected the attitude of merely keeping a few seals alive for future generations. This judgment marks a clear

¹¹³ *E.g.*, *Federal Act on the Protection of Animals 2005*, s 6(1) (Austl.) (arguing that animals should be viewed as fellow creatures); C.E.T.S. No. 123, *supra* note 34, at pmb. (arguing that humans have a moral responsibility to respect animals); *Tierschutzgesetz* [Animal Welfare Act], July 24, 1972, § 1 (Ger.) (arguing for animals to be regarded as man's fellow creatures); *Nomos* (2012:4039) Για τα δεσποζόμενα και τα αδεσποτα ζώα συντροφιάς και την προστασία των ζώων από την εκμετάλλευση ή τη χρησιμοποίηση με κερδοσκοπικό σκοπό [Concerning Domestic and Stray Companion Animals and the Protection from Any Exploitation or Use for Economic Profit], art. 1 (Greece); *Animal Protection Law of 1999*, pmb. (Lat.) (2012) ("The ethical obligation of humankind is to ensure the welfare and protection of all species of animals, because every unique being is in itself of value. A human being has a moral obligation to honour any creature, to treat animals with empathic understanding and to protect them"); *Wet van 19 mei 2011, houdende een integraal kader voor regels over gehouden dieren en daaraan gerelateerde onderwerpen* [Animals Act], Stb. 2011, p. 345, pmb. (Neth.) (containing an integrated framework for rules on animals kept and related subjects); *Animal Welfare Act 1999*, s 80(2)(b) (N.Z.) (arguing for the promotion of non-sentient alternatives to replace animals for research and testing); *O Ochronie Zwierząt* [Act Regarding Animal Protection], Aug. 21, 1997, *DZIENNIK USTAW RZECZYPOSPOLITEJ POLSKIEJ* [JOURNAL OF LAWS OF THE REPUBLIC OF POLAND], No. 111 Item 724 (Pol.) (2012) ("The animal as a living creature, capable of suffering, is not an object."); *Tierschutzgesetz* [TSchG] [Federal Act on Animal Protection], Dec. 16, 2005, SR 455, art. 4 para. 2 (Switz.) (arguing for the respect of an animal's dignity); *On the Protection of Animals from Cruelty*, Law of Ukraine No. 3447-IV, at pmb. (Ukr.) (2006) (arguing for the protection of animals' natural rights). The U.S. territory of Puerto Rico has also developed laws pertaining to animals based on a recognition of animal sentience. *Animal Protection and Welfare Act of 2008*, P.R. LAWS ANN. tit. 5, ch. 58, Statement of Motives (P. R.) ("The 21st century poses countless challenges for Puerto Rican society, among which is a change in the perception and treatment of animals. For the past few years, the world vision on animals has changed dramatically; animals have become an essential part of our lives, and therefore, of society. It must be acknowledged that animals are sensitive beings that are entitled to humane treatment.")

¹¹⁴ See Richard Ryder, *Sentientism*, in *THE GREAT APE PROJECT* 220–22 (Paola Cavalieri & Peter Singer eds., 1993); Andrew Linzey, *Sentientism*, in *ENCYCLOPEDIA OF ANIMAL RIGHTS AND ANIMAL WELFARE* 311 (Marc Bekoff & Carron A. Meaney eds., 1998). The term *sentiocentrism* was coined by Marc Bekoff. *ENCYCLOPEDIA OF ANIMAL RIGHTS AND ANIMAL WELFARE* 159 (Marc Bekoff & Carron A. Meaney eds., 1998).

departure from the preservationist motivations present in the GAL conventions, such as the Convention for the Conservation of Antarctic Seals.¹¹⁵ Through the *Seals* case, national animal law pervaded international obligations and laid the groundwork for a higher level of animal welfare than is currently accorded by international treaty law. The suffering experienced by seals was classified by the WTO's AB as being so contrary to the values of the EU's public that setting an overall number of seals to be killed or simply labeling seal products would "not meaningfully contribute to addressing EU public moral concerns regarding seal welfare."¹¹⁶

Not only is the GATT receptive to this trend, so are interpretations of other conventions to the WTO. In *Tuna / Dolphin III*, the panel held that "[a]rticle 2.2 [of the TBT] refers to 'animal life or health' in general terms, and does not require that such protection be tied to a broader conservation objective. We therefore read these terms as allowing Members to pursue policies that aim at *also protecting individual animals or species whose sustainability as a group is not threatened*."¹¹⁷ The WTO disputes were thus directly concerned with animal welfare, as opposed to animal conservation or preservation. As laudable as this development may be, focusing on animal welfare in the production of animal products instead of the preservation or conservation of species also does not represent the optimal goal from an animal ethics perspective. Using animals for human ends generally disregards their interests and capabilities.¹¹⁸ The focus by trade law on the well-being of individual animals is therefore best seen as a small, but very important, step on a scale towards more sentiocentric animal law.

Through these developments in WTO dispute resolutions, national concerns about animals (namely animal welfare) have been given a more effective voice internationally. It is then possible to argue that international trade law has allowed WTO members to have better animal welfare standards employed on an international level than was possible through global animal treaty law, since the latter has been unreceptive to animal welfare concerns. To this effect, Simon Lester contends that the EU seals ban is in violation of established trade rules, as no international agreement prohibits seal hunting or explicitly allows members to consider seals' welfare.¹¹⁹ Yet, it is the expressly declared goal of article XX(a) of the GATT to have certain

¹¹⁵ Convention for the Conservation of Antarctic Seals, *supra* note 21.

¹¹⁶ Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.279, WTO Doc. WT/DS400/AB/R, WT/DS4001/AB/R (adopted May 22, 2014).

¹¹⁷ Panel Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 7.437, WTO Doc. WT/DS381/R (adopted Sept. 15, 2011) (emphasis added).

¹¹⁸ See *supra* note 28.

¹¹⁹ Simon Lester, *The WTO Seal Products Dispute: A Preview of the Key Legal Issues*, 14 ASIL INSIGHT 4, 4 (2010).

(domestic) public morals trump international trade rules under certain circumstances.¹²⁰ As the AB stated in *Shrimp/Turtle*: “Paragraphs (a) to (j) comprise measures that are recognized as exceptions to substantive obligations established in the GATT 1994, because the domestic policies embodied in such measures have been *recognized as important and legitimate* in character.”¹²¹

IV. THE RELEVANCE OF ANIMAL WELFARE IN INTERNATIONAL TRADE LAW

The above developments in trade law are notable, since an international body’s authority to decide the limits of states’ regulatory authority amounts to substantive international law making. Every topic under states’ prescriptive jurisdiction that impacts trade—ranging from social to environmental, from anti-trust to farmland regulation, from animal welfare to human rights issues—are subject to limits laid down in the provisions of WTO agreements.¹²² Considering that trade and nontrade matters cannot generally be completely separated from one another, the impact and influence of trade on non-trade issues is practically unlimited. The treaty language of the WTO agreements pay homage to this fact by allowing states to have certain specified non-trade issues prevail over the tenets of trade liberalization and tariff policy, notably through article XX of the GATT. Only where members meet the conditions set out in the provision are they allowed to legislate on non-trade matters that impact trade. Accordingly, the limits set by the WTO on states’ authority to prescribe domestic animal law are considerable from the perspective of global animal law (GAL).

Endowing states with the discretion to set and pursue their own levels of animal welfare in trade matters shows that the WTO has contributed to the achievement of certain animal welfare objectives. The recent *Seals* case has not only legitimized animal welfare policies that operate nationally, but it has introduced the possibility of legitimizing the global protection of animal interests. While Canada and Norway contested whether the EU seals import ban really contributed to a reduction of EU or global demand for seal products, and therefore to a reduction in the number of inhumanely killed seals, they did not contest the validity of the EU’s objective to reduce animal suffering glob-

¹²⁰ GATT, *supra* note 42, at art. XX(a).

¹²¹ Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 121, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998) (emphasis added).

¹²² Members therefore established a form of *lex specialis* whereby jurisdictional treaties are trumped by the WTO agreements as regards trade aspects, or, as Godt labels it, “a substitution of the verdict of jurisdiction by trade disciplines[.]” Christine Godt, *The So-Called “Waiver Compromise” of Doha and Hong Kong: About Contested Concepts of the Nature of the International Intellectual Property System*, in INTELLECTUAL PROPERTY, PUBLIC POLICY, AND INTERNATIONAL TRADE 201–28, 221 (Inge Govaere & Hanns Hullrich eds., 2007).

ally.¹²³ Having said this, members can individually determine the exceptions provided for in the GATT themselves, and the exceptions are thereby irreducible in their level of protection.¹²⁴ Moreover, since the WTO is one of the most effective institutional bodies internationally, it has significant potential to effectively promote animal welfare policies more broadly.¹²⁵

The WTO's stance, which allows members to introduce high standards of animal welfare in trade matters, is a welcomed movement. 'Non-trade trade regulations,'¹²⁶ i.e., trade regulations not primarily focused on the regulation of the world market or competition per se, can be differentiated as to the *degree* of support they enjoy. Subjective trade regulations are laws of moral, cultural, or security concern that are particular to certain nations. Objective trade regulations, by contrast, protect values shared by a large number of states, such as the regulation of health or the environment.¹²⁷ The higher the degree of shared values, the more objective the non-trade trade regulations are and the higher the chances of their acceptance and approval in the WTO's dispute settlement mechanism.

Non-trade trade regulations can further be characterized on the basis of the *direction* in which they operate. Employing regulations of this kind can be used positively (by striving for better ethics) or misused (by stressing particularities that are especially damaging). Krista Nadakavukaren Schefer has established three groups that categorize the ethical direction of non-trade (or social) trade regulations: law-disabling, law-supporting, and law-creating. First, regulations that pursue less commendable policy goals represent law-disabling trade

¹²³ Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.244, WT/DS400/AB/R, WT/DS4001/AB/R (adopted May 22, 2014).

¹²⁴ The AB confirmed that Members cannot reasonably be expected to employ measures that preclude achieving the desired level of protection set by the domestic policy objective. Although the extent to which a measure contributes to the objective can be challenged, the level of protection pursued by the measure cannot. Appellate Body Report, *European Communities—Measures Affecting Asbestos and Products Containing Asbestos*, ¶ 168, WT/DS135/AB/R (adopted Mar. 12, 2001); PETER VAN DEN BOSSCHE & WERNER ZDOUC, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 558 (3d. ed. 2013).

¹²⁵ See Keisuke Iida, *Is WTO Dispute Settlement Effective?*, in 10(2) *GLOBAL GOVERNANCE: A REVIEW OF MULTILATERALISM AND INTERNATIONAL ORGANIZATIONS* 207, 222 (2004) (discussing the institutional and extra-institutional effectiveness of the WTO). Iida argues that the effectiveness of the WTO is primarily marked by its ability to deter unilateralism and its effective facilitation of dispute resolution. Brown, on the other hand, arguing from an economic perspective, sees the effectiveness of the WTO as mainly attributable to the threat of retaliation. See Chad P. Brown, *On the Economic Success of GATT/WTO Dispute Settlement*, 86 *REV. ECON. & STAT.* 811, 822 (Aug. 2004).

¹²⁶ Asif H. Qureshi, *International Trade and Human Rights from the Perspective of the WTO*, in *INTERNATIONAL ECONOMIC LAW WITH A HUMAN FACE* 159, 166 (Friedl Weiss, Erik Denters, & Paul de Waart eds., 1998).

¹²⁷ KRISTA NADAKAVUKAREN SCHEFER, *SOCIAL REGULATION IN THE WTO: TRADE POLICY AND INTERNATIONAL LEGAL DEVELOPMENT* 2 (2010).

regulations. The goals are subjectively oriented and are conducive to creating adverse effects on the international level by imposing assumed benefits on non-consenting parties.¹²⁸ Second, trade laws that encourage law-abiding behavior of other members by coercing or convincing them to adhere to international obligations are referred to as law-supporting trade regulations.¹²⁹ Through these laws, benefits are created for the international community without creating new formal obligations. The third category, law-creating trade regulations, are laws that further ideals and goals beneficial to the international community by supporting the emergence of legal norms. While these laws might currently seem too progressive, novel, or costly, a community-oriented point of view would support the pursuit of these ideas because they are long-term welfare oriented.¹³⁰

Animal-welfare-oriented trade laws that impact international trade were often regarded as trade disabling for many decades. For example, the prohibition of dog meat imports by Western cultures can arguably be equated with cultural parochialism.¹³¹ Further, the imposition of better animal regulation could be regarded as evidence of modern-day colonialism. With the global developments in recent years regarding the increasingly accepted responsibility of humans towards animals, there are now more grounds for asserting that a general consensus on the proper treatment of animals exists.¹³² This is also why the EU's goal to globally reduce seal suffering was upheld by the dispute resolution body (DSB). Nadakavukaren Schefer regards animal-welfare-related trade regulations as both law-supporting and law-creating.¹³³ The legislation underlying the *Shrimp/Turtle* dispute, whereby the U.S. sought trade sanctions based on other parties' refusals to protect animals, is labeled as law-supporting.¹³⁴ The law aims to encourage other states to adhere to international obligations entered into in order to protect endangered species, a goal shared by the states.¹³⁵ The U.S. prohibition of tuna imports represented a response to the increasing mortality of dolphins from commercial fishing practices. It is law-creating because it developed guidelines for sustainable fishing practices.¹³⁶ The European Community (EC) import ban on

¹²⁸ *Id.* at 3.

¹²⁹ *Id.*

¹³⁰ *Id.* at 3–4.

¹³¹ During the 2002 Olympic games held in South Korea, protesters around the world demanded the country to cease killing dogs for food purposes. Minjoo Oh & Jeffrey Jackson, *Animal Rights vs. Cultural Rights: Exploring the Dog Meat Debate in South Korea from a World Polity Perspective*, 32 *J. INTERCULTURAL STUD.* 31, 33 (2011): "Koreans—both government officials and citizens—accused protestors of cultural imperialism for their attempt to impose Western values on Koreans."

¹³² See discussion *infra* Section V (discussing why GAL should move toward protection of sentient species).

¹³³ NADAKAVUKAREN SCHEFER, *supra* note 127, at 5.

¹³⁴ *Id.* at 5.

¹³⁵ *Id.*

¹³⁶ *Id.*

furs caught by leghold traps is also law-creating and an important step toward the establishment of the “rights of animals to humane treatment.”¹³⁷

Other scholars support Nadakavukaren Schefer’s distinction. Christoph Feddersen argues that core public morals, where public morals are shared universally, are more acceptable than the variable meanings of public morals that express cultural particularities.¹³⁸ The WTO itself has given weight to whether the policy goals behind an article XX exception cause adverse or positive effects. By allowing the protection of certain values,¹³⁹ the securing of compliance with those values,¹⁴⁰ and the pursuit of adherence to obligations,¹⁴¹ the WTO evidences a tendency towards law-creating and law-supporting trade regulations, as opposed to law-disabling trade laws. Also, the exceptions do not expressly allow the avoidance of usual trade obligations in the pursuit of less commendable goals. No reports exist that would provide support for an article XX exception under a law that is ethically harmful in nature.

Explicit in the preamble to the Marrakesh Agreement is the goal that trade law should be developed “with a view to raising standards of living . . . allowing the optimal use of the world’s resources in accordance with the objective of sustainable development, [and] seeking both to *protect* and to preserve the environment and to enhance the means for doing so in a manner consistent with [the members’] needs and concerns.”¹⁴² As a general rule, then, the WTO provides a relaxed means whereby better regulation, including regulations informed by sentientism, can be developed through an objective law-supporting and law-creating trade regulation. The differentiation of trade rules based on the direction they pursue is required as trade law continues to have profound impacts on the conditions of individuals—human or nonhuman. Appreciating the broad implications of these impacts, in cases of uncertainty and doubt, policy is better steered towards higher welfare and higher ethics.¹⁴³ Considering that animals are produced and exploited in unprecedented numbers,¹⁴⁴ the future development of trade law is game changing for billions of sentient beings.

¹³⁷ *Id.*

¹³⁸ Yet, his approach is blind to the ethical direction of the common consensus. Thus, where adverse impacts are formed by a universal accord, it should be blindly followed according to Feddersen’s approach. CHRISTOPH T. FEDDERSEN, *DER ORDRE PUBLIC IN DER WTO* 249 (2002).

¹³⁹ GATT, *supra* note 42, at art. XX, ¶¶ (a)–(b), (f)–(g).

¹⁴⁰ *Id.* at ¶ (d).

¹⁴¹ *Id.* at ¶ (h).

¹⁴² Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement] (emphasis added).

¹⁴³ See NADAKAVUKAREN SCHEFER, *supra* note 127, at 8 (discussing ethical indicator in WTO law).

¹⁴⁴ Between 1980 and 2006, the trade in meat has increased three-fold, dairy exports have doubled, and trade in eggs has doubled. In the future, this number is expected to rise even more. Not only has the cross-border trade increased, but the animal industry

In the same vein, it is crucial to acknowledge the WTO's limits as a forum in which global animal welfare can be furthered. Firstly, WTO law applies only in cross-border instances; it does not apply in a purely domestic framework where the treatment of animals is questioned. This leads directly to its second limitation, namely that under WTO law, members are not required to provide a certain level of welfare for animals in the production of goods. Nor does the WTO put any pressure on countries not supporting animal welfare. Third, WTO law itself does not establish animal welfare levels, and can therefore not be regarded as a form of animal law. WTO merely concedes to its members a space in which they can effectuate their ethical views on whether animals shall be treated with due moral respect. Fourth, the WTO provides a forum to further animal welfare only in exceptional circumstances, namely by relying on the exceptions cataloged in articles XX, 5.4 TBT, 2.2 SPS, et cetera. An indicator that the WTO does not possess enough capacity to fully deal with such social, non-trade-related claims is the growing number of bilateral free trade agreements (FTAs) being entered into—an alternative means that members have used to further animal interests. While some of the FTAs only lay out a duty to exchange information on the topic,¹⁴⁵ others aim at developing common animal welfare standards.¹⁴⁶

has experienced a notable worldwide growth in production due to rising demand, especially by developing countries. See FAO, *FOOD AND NUTRITION IN NUMBERS 30 (2014); 2050: A Third More Mouths to Feed*, FAO, <http://www.fao.org/news/story/en/item/35571/icode/> (Sept. 23, 2009) (accessed Jan. 19, 2016) (discussing how the demand for meat on the market has increased dramatically between 1990 and 2011).

¹⁴⁵ *E.g.*, 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, art. 12, Nov. 18, 2002, 2002 O.J. (L 346) 3 [hereinafter EU–Chile Agreement]; EU–Singapore Free Trade Agreement, EU–Sing., June 29, 2015, art. 5.15 para. 5, http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151738.pdf [<https://perma.cc/5G9Z-QT8D>] (according to which parties agreed to exchange information, expertise, and experiences in the field of animal welfare). Also the recently signed EU–Canada FTA, known as the Comprehensive Economic and Trade Agreement (CETA), allows its parties to exchange information in matters touching on animal welfare. This exchange, however, is not mandatory. Article X.4 paragraph 19 provides: “The Parties endeavour to fulfill the objectives set out in Article X.3 by undertaking regulatory co-operation activities. These activities may include: exchanging information, expertise and experiences in the field of animal welfare in order to promote collaboration on animal welfare between the Parties.” Comprehensive Economic and Trade Agreement (CETA), EU–Canada, art. X.4, ¶ 19 (pending entry into force), http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf [<https://perma.cc/6CYA-7BUZ>] (accessed Feb. 12, 2016).

¹⁴⁶ In article 89, paragraph 1, of the FTA between Chile and the European Commission, considerations regarding animal welfare standards are explicitly stated as an objective of the agreement. EU–Chile Agreement, *supra* note 145, at art. 89 para. 1. “The objective of this section is to facilitate trade between the Parties in the field of sanitary and phytosanitary legislation, whilst safeguarding public, animal and plant health by further implementing the principles of the [SPS]. An additional objective of this section is to consider animal welfare standards.” Euro Group for Animals, *The EU–Chile Free Trade Agreement—A Boost for Animal Welfare*, http://trade.ec.europa.eu/doclib/docs/2013/december/tradoc_151962.pdf [<https://perma.cc/VF9X-N64Y>] (Mar. 2013) (accessed

V. WHY GLOBAL ANIMAL TREATY LAW SHOULD BE RECEPTIVE TO SENTIENTISM

Even though the WTO is not expressly empowered with an active role in the furtherance of animal interests, the fact that its settlement bodies recognized the legality of animal welfare norms might be of value for the future development of global animal treaty law. The fact that animal-related trade rules are law-supporting and law-creating might have a significant bearing on global animal treaty law, catalyzing movement away from the mere preservation of species towards actual protection of sentient individuals—thus, from anthropocentrism towards sentientism.¹⁴⁷

Future movements towards comprehensive animal treaty law being receptive to animal-centered considerations are welcomed, as similar developments already exist on a general-principles level. The universal recognition of animal sentience¹⁴⁸ has sparked initiatives by states to regulate animals more in line with the way they should be treated. A great number of states have expressed their aspirations to treat animals humanely, not to let them suffer unnecessarily or undergo cruelty. The list of states that have adopted a principle of avoiding animal suffering and cruelty includes, but is not limited to, the following: the European Union,¹⁴⁹ the Council of Europe,¹⁵⁰ Argentina,¹⁵¹ Australia,¹⁵² Austria,¹⁵³ Belgium,¹⁵⁴ Bulgaria,¹⁵⁵ Canada,¹⁵⁶

Jan. 31, 2016). Also, article 1, paragraph 1, of the agreement between the United States and the Oriental Republic of Uruguay states that “this Agreement aims at reaching a common understanding between the Parties concerning animal welfare standards.” Treaty Between the United States and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, Oct. 25, 2004, Annex IV, http://www.sice.oas.org/BITS/URYUSA2005_e.pdf [<https://perma.cc/FAB3-8J6G>] (accessed Feb. 12, 2016).

¹⁴⁷ See discussion *supra* Section III.C (discussing the fundamental distinctions between anthropocentrism and sentientism).

¹⁴⁸ *Id.*

¹⁴⁹ Council Directive 98/58, art. 3, 1998 O.J. (L 221) 24.

¹⁵⁰ European Convention for the Protection of Animals Kept for Farming Purposes, arts. 4, 6–7, Mar. 10, 1976 E.T.S. No. 087.

¹⁵¹ Law No. 14346, Dec. 27, 1954, B.O 1.

¹⁵² *Animal Welfare Act 1992* (ACT) s 8, pt 1.

¹⁵³ BUNDESGESETZ ÜBER DEN SCHUTZ DER TIERE [TSCHG] [FEDERAL ACT ON THE PROTECTION OF ANIMALS] BUNDESGESETZBLATT [BGBl] No. 1/2005, § 6 ¶ 1.

¹⁵⁴ Loi relative à la protection et au bien-être des animaux [Animal Welfare and Protection Act] of Aug. 14, 1986, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Mar. 12, 1986, 16382, art. 1, art. 4 § 2.

¹⁵⁵ Zakon za Zashchita na Zhivotnite [Law on the Protection of Animals] of Jan. 31, 2008, DURZHAVEN VESTNIK [D.V.] [State Gazette], Feb. 8, 2008, 13, art. 14 ¶ 2, art. 17 ¶1, art. 20.

¹⁵⁶ Criminal Code, R.S.C. 1985, c. C-46, 445(1).

Costa Rica,¹⁵⁷ Croatia,¹⁵⁸ Estonia,¹⁵⁹ Fiji,¹⁶⁰ Finland,¹⁶¹ France,¹⁶² Germany,¹⁶³ Gibraltar,¹⁶⁴ Greece,¹⁶⁵ Iceland,¹⁶⁶ India,¹⁶⁷ Israel,¹⁶⁸ Latvia,¹⁶⁹ Lithuania,¹⁷⁰ Malaysia,¹⁷¹ Malta,¹⁷² Myanmar,¹⁷³ the Netherlands,¹⁷⁴ New Zealand,¹⁷⁵ Norway,¹⁷⁶ Papua New Guinea,¹⁷⁷ the Philippines,¹⁷⁸ Poland,¹⁷⁹ Portugal,¹⁸⁰ Puerto Rico,¹⁸¹ Slovenia,¹⁸²

¹⁵⁷ Ley de Bienestar de los Animales [Law on Animal Welfare], June 20, 2012, No. 7451, art. 1 (a), (c).

¹⁵⁸ Zakona o Zaštiti _ivotinja [Animal Protection Act], Dec. 7, 2006, No. 71-05-03/1-06-2, art. 4 ¶ 1.

¹⁵⁹ Lomakaitseeadus [Animal Protection Act] of Dec. 13, 2000, RIIGI TEATAJA [R.T.], 2001 no. 3, item 4, § 4 ¶ 1.

¹⁶⁰ Animals (Control of Experiments) Act, May 13, 1957, c. 161, Ordinance No. 11 of 1957, art. 6 ¶. 2 (a), *translated in Fiji Legislation: Animals (Control of Experiments) Act [Cap 161]*, PACIFIC ISLANDS LEGAL INFORMATION INSTITUTE, http://www.paclii.org/fj/legis/consol_act_OK/aoea329/ [<https://perma.cc/CT3B-9UDY>] (accessed Jan. 21, 2016).

¹⁶¹ 247/1996 Djurskyddslag [Animal Welfare Act], § 1 ¶ 1, § 33 ¶ 1.

¹⁶² CODE PÉNAL [C.PÉN.] art. 521-1.

¹⁶³ Tierschutzgesetz [Animal Welfare Act], May 18, 2006, BUNDESGESETZBLATT, Teil I [BGBl. I] at 1206, § 1.

¹⁶⁴ Animal Experiments (Scientific Procedures) Act, Mar. 3, 1999, Principal Act No. 1999-03, § 7 ¶ 5(b).

¹⁶⁵ Nomos (2012:4039) Gia Ta Deopozomena Kai Ta Adeopota Zoa Syntrophias kai Ten Zoonapote Ekmetalleuse e Te Chresimottoiесе me Kerdookopikookotto [Concerning Domestic and Stray Companion Animals and the Protection of Animals from any Exploitation or Use for Economic Profit], EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS [E.K.E.D.] 2012, A:15, art. 1 (b).

¹⁶⁶ Animal Health and Protection Act, c. A-11.1, art. 8 ¶ 1 lit. b, art. 8.1 ¶ 1.

¹⁶⁷ The Prevention of Cruelty to Animals Act, 1960, No. 59, Acts of Parliament, 1960, ch. 3.

¹⁶⁸ LCA 1684/96 Let the Animals Live v. Hamat Gader Recreation Enterprises, IsrLR 1, 2, 4, 47 [1997].

¹⁶⁹ Dzīvnieku aizsardzības likums [Animal Protection Law], Dec. 9, 1999, LATVIJAS VESTNESIS [LATVIAN HERALD], 444/445, Dec. 29, 1999, pmbi., § 2 ¶ 6, § 26 ¶ 3, § 46.

¹⁷⁰ Gyvunu Geroves ir Apsaugos Istatymas [Law on Welfare and Protection of Animals], Oct. 3, 2012, No. XI-2271, VALSTYBES _INIUS [OFFICIAL GAZETTE], Oct. 20, 2012, No. 122-6216, art. 6.

¹⁷¹ Animals Act, Apr. 30, 1953, last amended Nov. 1, 2006, LAWS OF MALAYSIA, Act 647, § 44(d)–(e).

¹⁷² Animal Welfare Act, Feb. 8, 2002, c. 439, Act No. XXV of 2001, art. 8 ¶ 2.

¹⁷³ Animal Health and Development Law, Nov. 25, 1993, No. 17/93, § 18.

¹⁷⁴ Wet van 19 mei 2011, houdende een integraal kader voor regels over gehouden dieren en daaraan gerelateerde onderwerpen [Animals Act], Stb. 2011, p. 345, art. 1.3.

¹⁷⁵ Animal Welfare Act 1999, s 3 ¶ 2 (b)–(c), s 9 ¶ 2(b), s 11, s 12(c), s 14 ¶ 1.

¹⁷⁶ Lov Om Dyrevelferd [Animal Welfare Act], Dec. 20, 1974 No. 73, § 3.

¹⁷⁷ Animals Act 1952, ch. 329, part. VI.

¹⁷⁸ An Act to Promote Animal Welfare in the Philippines, Rep. Act No. 8485, § 6 (1998).

¹⁷⁹ O Ochronie Zwierzat [Act Regarding Animal Protection], Aug. 21, 1997, DZIENNIK USTAW RZECZYPOSPOLITEJ POLSKIEJ [JOURNAL OF LAWS OF THE REPUBLIC OF POLAND], No. 111 Item 724, art. 4 ¶ 3, art. 6 ¶ 2, art. 14 ¶ 1.

¹⁸⁰ Proteção aos Animais [Protection of Animals Act], September 12, 1995, No. 92/95, DIARIO DA REPUBLICA Ser. 1, p. 5722, art. 1 ¶ 1.

¹⁸¹ P.R. LAWS ANN. tit. 5, § 1668(a) (2013).

¹⁸² Zakon o Zašciti _ivali [Animal Protection Act], Nov. 18, 1999, URADNI LIST No. 98/1999, p. 14645, art. 3.

South Africa,¹⁸³ South Korea,¹⁸⁴ Sweden,¹⁸⁵ Switzerland,¹⁸⁶ Taiwan,¹⁸⁷ Tonga,¹⁸⁸ Turkey,¹⁸⁹ Uganda,¹⁹⁰ Ukraine,¹⁹¹ the United Kingdom,¹⁹² the United States,¹⁹³ Vanuatu,¹⁹⁴ and Zambia.¹⁹⁵ According to this principle, no animal shall endure unnecessary pain, suffering, or harm. While the implementation technicalities vary from state to state, such as the legal means employed, the hierarchy of norms, the kind of prohibitions, or the penalties faced, they leave unaffected “the recognition that animals are sentient and capable of suffering, that their suffering counts morally to some degree, and that it is a factor that should be weighed in the balance in the course of pursuing human needs and desires.”¹⁹⁶ The principle has such a worldwide application that it has arguably become an international policy.¹⁹⁷

International organizations provide evidence for this trend. The World Organization for Animal Health, in its original name the Office International des Epizooties (OIE), an intergovernmental organization aimed at ensuring sanitary and phytosanitary safety in the trade of animals and animal products, has been committed since 2003 to the establishment of international animal welfare principles and to the

¹⁸³ Animals Protection Act 71 of 1962, § 2 (S. Afr.).

¹⁸⁴ Dongmulbohobeob [Animal Protection Law], Act. No. 8282, Jan. 26, 2007, art. 13 ¶ 5, *translated in Korea's Animal Protection Law*, INTERNATIONAL AID FOR KOREAN ANIMALS, <http://www.koreananimals.org/animals/apl/2007apl.htm#a13> [https://perma.cc/G4K2-JNY5] (accessed Jan. 23, 2016).

¹⁸⁵ Djurskyddslag (Svensk författningssamling [SFS] 1988:534).

¹⁸⁶ Tierschutzgesetz [TSchG] [Federal Act on Animal Protection], Dec. 16, 2005, SR 455, art. 4 para. 2.

¹⁸⁷ Animal Protection Act, Nov. 4, 1998, XIANXING FAGUI HUIBIAN, art. 30 para. 1.

¹⁸⁸ Pounds and Animals Act, Tonga Consolidated Legislation 1988, ch. 147, art. 23 para. 1, *translated in Pounds and Animals Act*, PACIFIC ISLANDS LEGAL INFORMATION INSTITUTE, http://www.pacii.org/to/legis/consol_act/paaa182/ [https://perma.cc/CD6Q-5JAA] (accessed Jan. 23, 2016).

¹⁸⁹ Hayvanlari Koruma Kanunu [Animal Protection Bill Law], June 24, 2004, No. 5199, RESMİ GAZETE, July 1, 2004 No. 25509, art. 1.

¹⁹⁰ The Animals (Prevention of Cruelty) Act, Dec. 5, 1957, ch. 220, art. 3 para. 1.

¹⁹¹ Pro Zakhyst Tvaryn Vid Zhorstokoho Povodzhennya [On the Protection of Animals from Cruelty], Feb. 21, 2006, No. 3447 – IV, pmb. and art. 17.

¹⁹² Animal Welfare Act, 2006, ch. 45, § 4.

¹⁹³ David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 MARQ. L. REV. 1021, 1029 (2010) (describing the breakthrough of state laws throughout the U.S. following the New York model in the late 19th century that emphasized animals' interests in being free from pain and suffering).

¹⁹⁴ Prevention of Cruelty to Animals Act, Feb. 13, 1974, Laws of the Republic of Vanuatu Consolidated Edition 2006, ch. 78, JR 58 of 1973, art. 3 para. 1, art. 4, *translated in Prevention of Cruelty to Animals Act*, PACIFIC ISLANDS LEGAL INFORMATION INSTITUTE, http://www.pacii.org/vu/legis/consol_act/poactaa360/ [https://perma.cc/VQY2-L884] (accessed Jan. 23, 2016).

¹⁹⁵ Prevention of Cruelty to Animals Act (1921), Cap. 245, LAWS OF REP. OF ZAMBIA (1994) § 3 para. 1(a)–(b).

¹⁹⁶ Katie Sykes, *Sealing Animal Welfare into the GATT Exceptions: The International Dimension of Animal Welfare in WTO Disputes*, 13 WORLD TRADE REV. 471, 480 (2014).

¹⁹⁷ Sykes, *Beasts in the Jungle*, *supra* note 38, at 134.

furtherance thereof.¹⁹⁸ In its Terrestrial Code, the OIE addresses animal welfare issues during the transport of animals, the slaughter of animals, the killing of animals for purposes of disease control, stray dog population control, the use of animals in research and education, in “beef cattle production systems,” and in “broiler chicken production systems.”¹⁹⁹ Also, the United Nations (UN) 1991 Second World Conservation Strategy states that “[p]eople should treat all creatures decently, and protect them from cruelty, avoidable suffering, and unnecessary killing.”²⁰⁰ Moreover, the UN, in its 2012 Conference on Sustainable Development held in Rio de Janeiro, addressed animal welfare through “sustainable consumption and production.”²⁰¹ Furthermore, the Bonn Declaration expresses that safeguarding animal welfare is a fundamental goal of sustainable development and poverty eradication, that the Millennium Consumption Goals should respect animal welfare, and that global agricultural production should ensure good animal welfare.²⁰² The document serves as crucial input to ongoing negotiations within the UN.

These national and international developments evidence the increasing focus laid on the intrinsic value of animals, as opposed to their mere objectification. The widespread existence of domestic legal systems providing “some kind of broad legal prohibition of unnecessary cruelty to animals”²⁰³ demonstrates a core consensus that unnecessary suffering should be prohibited.²⁰⁴ The largely normative consensus is interwoven into the cultures of both developing and developed states, relaxing some deeply entrenched fears of value imperialism.²⁰⁵ While the core principle of animal welfare has not risen to customary international law status, it is said to form part of the general principles of

¹⁹⁸ *About Us*, WORLD ORG. FOR ANIMAL HEALTH, <http://www.oie.int/about-us/> [<https://perma.cc/6GNX-6LX3>] (accessed Jan. 17, 2016).

¹⁹⁹ WORLD ORG. FOR ANIMAL HEALTH, *TERRESTRIAL ANIMAL HEALTH CODE VOLUME I* (23rd ed. 2014); see Peter Davies, Director General of World Society for the Protection of Animals, Work of Non-Governmental Organizations Supporting the Implementation of the OIE Standards, Presentation to the Second OIE Global Conference on Animal Welfare: “Putting the OIE Standards to Work” 1–5 (Oct. 21, 2008) (transcript available at http://www.oie.int/fileadmin/Home/eng/Conferences_Events/sites/A_AW2008/PDF/Session%20IV/16_OIE_AWCairo_P_Davies_EN.pdf [<https://perma.cc/8BS9-LDWP>]) (addressing progress in international animal welfare standards).

²⁰⁰ WORLD CONSERVATION UNION, UNITED NATIONS ENVIRONMENT PROGRAMME & WORLD WIDE FUND FOR NATURE, *CARING FOR THE EARTH: A STRATEGY FOR SUSTAINABLE LIVING 14* (1991), <https://portals.iucn.org/library/efiles/documents/CFE-003.pdf> [<https://perma.cc/3MGC-TEsQl>] (accessed Jan. 19, 2016).

²⁰¹ UNITED NATIONS, REPORT OF THE UNITED NATIONS CONFERENCE ON SUSTAINABLE DEVELOPMENT, RIO DE JANEIRO, BRAZIL (June 20–22, 2012), http://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.216/16&Lang=E (accessed Jan. 19, 2016).

²⁰² Bonn Declaration, G.A. Res. 66/750, U.N. GAOR, 66th Sess., U.N. Doc. A/66/750, at 8, 15, 18 (Mar. 20, 2012).

²⁰³ Sykes, *Sealing Animal Welfare into the GATT Exceptions*, *supra* note 196, at 471, 480.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 479–80.

international law pursuant to article 38, paragraph 1, litera c, of the International Court of Justice (ICJ) Statute.²⁰⁶ The consensus that animal cruelty and needless suffering must be remedied, and ideally, avoided, is so broadly shared among the international community as a whole that it mandates application as a “meta-principle[] relevant to the interpretation and amplification of norms established by other means,”²⁰⁷ within the meaning of article 31 of the Vienna Convention on the Law of Treaties.²⁰⁸ It follows that, being part of the general principles of international law, the general principle of animal welfare embodies “legitimate concerns or internationally recognized ethical positions”²⁰⁹ that require systemic integration in the WTO framework, and hopefully also in future global animal treaty law.

VI. CONCLUSION

From the animals’ perspective, international trade law has no good reputation to lose. For 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. New developments in trade law might point towards a conclusion that trade law is less of a wolf in this game. Rather, it might turn out to be the sheep in wolf’s clothing.

The further development of animal law is seen as being impeded by three systemic forces. First, global animal law (GAL), as a branch of international law that encompasses all trans-boundary aspects of human-animal interactions, has been shown to lack a general commitment to better animal welfare in its treaty form. GAL conventions aim to conserve and preserve species, but they fail to ensure or improve animal welfare since only groups of animals are protected (turning a blind eye to individual animals), endangered animals can only be safeguarded from death (turning a blind eye to the living conditions of animals), and the majority of all animals subjected to trade are not covered by them.

Second, animal welfare regulation is usually confined to states’ national jurisdiction, where cross-border dialogue has so far not been sufficiently conducive to furthering animals’ interests. Third, considering that trade law emphasizes the fact that animals are regarded as

²⁰⁶ *Id.*; Statute of the International Court of Justice art. 38 ¶ 1(c), June 26, 1945, 33 U.N.T.S. 993); MICHAEL BOWMAN ET AL., *LYSTER’S INTERNATIONAL WILDLIFE LAW* 681 (2d ed. 2010); Neil Trent et al., *International Animal Law, with a Concentration on Latin America, Asia, and Africa*, in *THE STATE OF THE ANIMALS III*: 2005 65–77 (Deborah J. Salem & Andrew N. Rowan eds., 2005); Kyle Ash, *International Animal Rights: Speciesism and Exclusionary Human Dignity*, 11 *ANIMAL L.* 195, 196 (2005); Sabine Breils, *Animal Welfare Protection: A Universal Concern to Properly Address in International Law*, *J. OF ANIMAL WELFARE L.* 34, 37 (2012).

²⁰⁷ BOWMAN ET AL., *supra* note 206, at 681.

²⁰⁸ Vienna Convention on the Law of Treaties art. 31, ¶ 3(c), May 23, 1969, 1155 U.N.T.S. 331.

²⁰⁹ Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 *EUR. J. OF INT’L L.* 483, 511 (2006).

goods and that every regulation aspiring to increase the level of welfare represents an undesirable barrier to trade, goals to ameliorate the position of animals internationally seem lost in the triangle of global animal treaty law, domestic animal law, and trade law.

Paradoxically, the WTO Dispute Settlement Body's (DSB) reports renew hope for its capacity to positively influence the development of animal welfare internationally. Members frequently enter disputes over animal products, and they initiate discourses outside the WTO to discuss ways to bring about better animal welfare standards internationally, such as the 2000 EU proposal on animal welfare and trade in agriculture to the WTO Committee on Agriculture.²¹⁰ In addition, recent developments indicate that the WTO has positively responded to claims for reinforcing the role of animal issues in trade law, namely in the panel report in *Tuna/Dolphin III*, the AB report in *Shrimp/Turtle*, and the panel and AB reports in *Seals*.²¹¹ The reliance on exceptions to substantive obligations under the WTO Agreements, especially through article XX of the GATT, has enabled members to bring national animal welfare standards to application on the international level, which exceed the level of protection provided for animals by global animal treaty law.

Instead of merely preserving or conserving species for anthropocentric purposes, WTO law has opened the doors to the application of sentientist ethics that give due regard to an animal's capacity to feel pleasure and pain. Such a movement is welcomed since WTO law continues to dominate states' prescriptive jurisdiction to protect animals in all matters in which those animals are subject to trade—which amount to the majority of all animal welfare topics. Although the panel report in *Seals* made a valuable statement independent of the public sentiments about animals that are prevalent in specific member states, namely that “animal welfare is a matter of ethical responsibility for human beings in general,”²¹² the WTO is an inherently inadequate forum to further develop animal law. This is mainly because the WTO remains a facultative means through which national animal law can be channeled, but it does not provide its own animal welfare standards, nor does it encourage members to adopt or enhance their own. This conclusion is further supported by the fact that states tend to view bilateral FTAs as more adequate means through which information duties and common animal welfare standards can be established.

Nonetheless, animal law within the WTO forum was shown to be *law-supporting*, by encouraging members to adhere to existing obligations in international law, and to be *law-creating*, working towards goals deemed beneficial to the international community. The WTO's

²¹⁰ *European Communities Proposal: Animal Welfare and Trade in Agriculture*, *supra* note 86.

²¹¹ See discussion *supra* Section IV (describing the WTO's response to national animal welfare regulation).

²¹² Panel Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 7.409, WT/DS400/R, WT/DS4001/R (Nov. 25, 2013).

recognition of the legitimacy of animal welfare might in the future contribute to efforts in the creation of global norms, notably a comprehensive inclusion of animal interests in treaty law not just for the preservation of species but for actual protection of sentient individuals—thus moving from anthropocentrism towards sentientism, and thereby playing the sheep in wolf's clothing. If global animal treaty law were to move in this direction, it would be supported by existing general principles of international law. According to scholars, the fact that the majority of all states positively provide that animals should be treated humanely and that they should not suffer unnecessarily or undergo cruelty means that there is a core consensus among states to that effect, which represents a general principle of international law pursuant to article 38, paragraph 1, *litera c*, of the ICJ Statute. It is hoped that the legitimate concerns expressed through this practice, as well as through WTO practice, operate as catalysts to form sentientist animal treaty law in the near future. Enshrining ethical duties owed to animals as ends in themselves would undoubtedly be of fundamental, even seismic, magnitude. It would constitute the “animal turn” in international law.²¹³

²¹³ The phrase “animal turn” was coined by Sarah Franklin speaking at the Cultural Studies Association of Australasia in 2003. Helena Pedersen, *Knowledge Production in the “Animal Turn”: Multiplying the Image of Thought, Empathy, and Justice*, in *EXPLORING THE ANIMAL TURN: HUMAN-ANIMAL RELATIONS IN SCIENCE, SOCIETY AND CULTURE* 13–19 (Erika Andersson Cederholm et al. eds., 2014); Harriet Ritvo, *On the Animal Turn*, 136 *DAEDALUS* 118, 118 (2007); Anne Peters, Saskia Stucki & Livia Boscardin, *The Animal Turn—What Is It and Why Now?*, *VERFASSUNGSBLOG: ON MATTERS CONSTITUTIONAL*, <http://www.verfassungsblog.de/the-animal-turn-what-is-it-and-why-now/> [<https://perma.cc/Q63J-3Z9U>] (Apr. 14, 2014) (accessed Jan. 19, 2016).