

Article

Animals and the Impact of Trade (Law and Policy): A Global Animal

Law Question

Iyan Offor

The author would like to thank the TEL editors and two anonymous reviewers for their thoughtful engagement with this article throughout the review process. I would also like to thank Stephanie Switzer, Antonio Cardesa-Salzmann, Anne Peters, Katie Sykes, and Saskia Vermeulen for their helpful comments on earlier versions of this article.

Abstract: There is a critical research gap regarding the trade and animal welfare interface: we do not know, empirically, what the impact of trade on animal welfare is. This gap exists, in part, due to the paternalism of international trade law and the underdevelopment of global animal law. Firstly, this article addresses the tense collision of dichotomous trade and animal welfare priorities in legal and political systems. Secondly, this article explores attempts at reconciliation by the World Trade Organization and the European Union. This involves an investigation of the empirical impact of trade on animal welfare. This impact is categorised into four component parts: (1) open markets, (2) low animal welfare havens, (3) chilling effect, and (4) lack of labelling. Case studies from the European Union are utilised. Thirdly, this article critiques trade law and policy as ill-suited primary drivers of global governance for animals. Global animal law is identified as a promising alternative, though its early development has been unduly impacted by international trade law.

Keywords: global animal law; trade law; international trade; European union; animal welfare; animal justice.

1. INTRODUCTION: TRANSPLANTING THE TRADE & ANIMAL WELFARE DEBATE

To genuinely engage with a new frontier of justice, for animals or otherwise, requires what bell hooks calls a "radical openness" of mind, of being able to receive new, different, and challenging ideas from a space of learning, teaching, and humility.¹

The frontier of justice for animals is in great need of radical openness to address the impact of trade law and policy on animal welfare. Instead of demonstrating radical openness, trade law and policy is paternalistic toward animals. This means it propagates law *about* animals rather than law *for* animals. It fails to respect and reflect animals' senses of what is in their best interest.² Trade law's paternalism partly stems from the disparity between liberal trade ideology and the normative and ethical underpinnings of the animal liberation movement. Trade law's paternalism also results from the failure of global animal law to establish itself as an effective counter-discourse: it has been deeply infiltrated by trade law's linkage debate.

Radical openness is increasingly lacking amongst commentators to the trade and animal welfare interface. Thus, a critical gap in the research remains: we do not know, empirically, what the impact of trade on animal welfare is. Researchers are increasingly complacent regarding the heavy hand of international trade law in global governance for animals. They are not asking fundamental empirical and critical questions regarding the impact of trade. Therefore, insufficient critique is launched against policymakers in Europe who prove consistently comfortable with prioritizing trade objectives over animal welfare protection. A radical openness is needed which can be facilitated by transplanting the trade and animal welfare debate from the fringes of the trade linkage debate to the core of the emerging academic discourse on global animal law.³

¹ M. Deckha, 'Animal Justice, Cultural Justice: A Posthumanist Response to Cultural Rights in Animals' (2007) 2 *Journal of Animal Law & Ethics*, pp. 189-230, at 198, citing B. Hooks, *Teaching Community: A Pedagogy of Hope* (Routledge, 2003), p. 48.

² T. Regan, *The Case for Animal Rights* (University of California Press, 2004), pp. 104-5.

³ A. Peters, 'Global Animal Law: What It Is and Why We Need It' (2016) 5(1) *Transnational Environmental Law*, pp. 9-23, at 17; and A. Peters, 'Liberté, Égalité, Animalité: Human-Animal Comparisons in Law' (2016) 5(1) *Transnational Environmental Law*, pp. 25-53.

This article addresses the paternalism of trade law and policy towards animals in three parts. Firstly, it sets out the tense collision between dichotomous trade and animal welfare priorities in legal and political systems. This involves an analysis of the linkage debate and the effects of normative divergence between trade liberators and animal liberators.

Secondly, this article elucidates the roles of the World Trade Organization (WTO) and the European Union (EU) in structuring attempts toward the reconciliation of these competing objectives. This section uses empirical research to reveal the continued dominance of trade in European policymaking and its negative impact on animal welfare. Although the impact of trade on animal welfare has amassed some attention from academics and practitioners,⁴ the existing literature typically speculates about potential impacts of trade upon animal welfare without investigating this quantitatively.⁵ This article fills a crucial research gap and identifies four component parts to the impact of trade on animal welfare.

Thirdly, this article reflects on the dominance of trade objectives by critically analyzing the role of trade law and policy as a central driver of global animal law. It situates itself within the global animal law academic space whilst also critiquing that discourse for its complacency regarding and adoption of trade-centric presumptions and practices. This section concludes that research on the impact of trade has been restricted by the force of trade law and its associated research tradition, and that precise empirical research is difficult to conduct because of

⁴ C. Fisher, 'Getting Animal Welfare on to the World Trade Agenda', in R.H. Pedler (ed.), *European Union Lobbying: Changes in the Arena* (Palgrave Macmillan, 2002), pp. 155-75; R. Howse & J. Langille, 'Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values' (2011) 37(2) *Yale Journal of International Law*, pp. 367-432; and K. Sykes, 'Sealing Animal Welfare into the GATT Exceptions: The International Dimension of Animal Welfare in WTO Disputes' (2014) 13(3) *World Trade Review*, pp. 471-98.

⁵ E.g., L. Bollard, 'Global Approaches to Regulating Farm Animal Welfare', in G. Steier & K. Patel (eds), *International Farm Animal, Wildlife and Food Safety Law* (Springer, 2017), pp. 83-109, at 99; A. Lurie & M. Kalinina, 'Protecting Animals in International Trade: A Study of the Recent Successes at the WTO and in Free Trade Agreements' (2015) 30(3) *American University International Law Review*, pp. 431-87, at 433; and Peters, 'Global Animal Law', n. 3 above, p. 17. For a rare exception, see: E. Strader, 'The Future of Horse Slaughter: What Is Best' (2013) 15(2) *Oregon Review of International Law*, pp. 293-314.

limitations in the trade data, owing to the paternalism inherent in trade policy practices. This article aims to inspire radically open research on the impact of trade on animal welfare.

2. TENSIONS AND COLLIDING PRIORITIES IN TRADE AND ANIMAL WELFARE

2.1 Trade and Animals: Bridging the Dichotomy

The practice of trading animals and their products has a deep-rooted history beginning with the export of wool from Crete to Egypt in 2000 to 1500 BC.⁶ Animal trade has significantly benefited humankind, enabling us to evolve from hunter-gatherers to settled agriculturalists.⁷ However, just like animal agriculture, the exploitative dynamic of animal trade has evolved through periods of war, colonization, and industrialization, becoming increasingly harmful over time.⁸ Ancient donkey-trodden trading routes are now found buried beneath modern road infrastructure or serve as hiking trails. The modern vision of trade in animal products is, instead, one of shipping containers filled with leather or seal skin, refrigerated trucks transporting chilled meat cuts, and lorries carrying live animals across borders to slaughter.

Trade in intensively farmed meat, dairy and fish is particularly troubling due to its volume and the suffering it forces upon animals.⁹ Live sheep shipped for slaughter from Australia to Southeast Asia and the middle east regularly perish from heat stress.¹⁰ Scottish salmon exports reached a record high in 2018¹¹ despite recent reports on the industry's negative

⁶ C.J.C. Phillips, *The Animal Trade: Evolution, Ethics and Implications* (CABI Publishing, 2015), p. 2.

⁷ Ibid, p. 1.

⁸ Ibid.

⁹ R. Harrison, *Animal Machines: The New Factory Farming Industry* (Vincent Stuart Publishers Ltd, 1964).

¹⁰ C. Wahlquist, 'RSPCA Accuses Government of Backflip on Welfare for Live Exports from Australia', *The Guardian*, 28 Sept. 2019, available at: <https://www.theguardian.com/australia-news/2019/sep/28/rspca-accuses-government-of-backflip-on-welfare-for-live-exports-from-australia>.

¹¹ 'Salmon exports reach record £600M', *Scottish Salmon Producers Organisation*, 9 Feb. 2018, available at: <http://scottishsalmon.co.uk/salmon-exports-reach-record-600m/>.

impacts on animal welfare.¹² Ukraine has developed a battery cage egg industry for export to the EU, undermining the objectives of the EU's domestic ban on battery cage egg farming.¹³

Trading animals and their products is inherently exploitative in that it treats animals as property.¹⁴ The practices associated with modern animal trade resemble the western factory farming model which is regarded by many animal liberationists as a vampiric, dystopian nightmare.¹⁵ Despite this, trade in animal products continues to grow. Extra-EU trade in animal products almost doubled in the last decade, amounting to over 65 billion euros in 2015 (about 1.9% of all extra-EU trade).¹⁶

This reveals the overwhelmingly economic objectives of the actors involved and the great disparity between the objectives of free trade proponents and animal liberators. Trade in animal products occurs, regardless of the impact on animals, because imported products are cheaper, of better quality, or more readily available than comparable domestic products.¹⁷ This is reflective of the liberal ideology upon which international trade is based: it aims at achieving economic efficiency so as to improve economic growth for states, incomes for individuals, employment rates, and standards of living.¹⁸

¹² R. Edwards, 'Horror photos of farmed salmon spark legal threat', *The Ferret*, 27 Jun. 2018, available at: <https://theferret.scot/pictures-diseases-farmed-fish/>.

¹³ See below at 3.4.

¹⁴ G.L. Francione, *Rain without Thunder: The Ideology of the Animal Rights Movement* (Temple University Press, 1996), pp. 3 et seq.

¹⁵ See storied accounts of animal suffering in P. Singer, *Animal Liberation: Towards an End to Man's Inhumanity to Animals* (Jonathan Cape Ltd, 1976); Regan, n. 2 above; and J. Safran Foer, *Eating Animals* (Little, Brown and Company, 2009). On the value of emotional response, see J. Donovan & C.J. Adams (eds), *The Feminist Care Tradition in Animal Ethics* (Columbia University Press, 2007).

¹⁶ Data sourced from Eurostat, 'International trade in goods – detailed data', available at: <http://ec.europa.eu/eurostat/data/database>.

¹⁷ Most commonly explained by reference to varying opportunity cost, division of labour and specialization as posited by David Ricardo's theory of comparative advantage: D. Ricardo, *The Principles of Political Economy and Taxation* (John Murray, 1817).

¹⁸ P. Van den Bossche & W. Zdouc (eds), *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 4th edn. (Cambridge University Press 2017), at ch. 1.2. For the history of liberal and neo-liberal thought, see R.S. Turner, 'The "rebirth of liberalism": The origins of neo-liberal ideology' (2007) 12(1) *Journal of Political Ideologies*, pp. 67-83.

The liberal values and ideologies underpinning trade in animal products is far removed from the posthumanist¹⁹, feminist,²⁰ rights-based,²¹ and welfarist²² ethics that are deployed by animal liberationists to promote the protection of animals in society, in policy, and in law. The gulf between the two is widest when the animal liberationists are critical researchers and abolitionist activists.²³ Their ideologies are fundamentally incompatible with the liberal ideology that supports animal trade. The gulf narrows in the case of policy-oriented animal welfare non-governmental organizations (NGOs) which typically curtail abolitionist leanings in order to promote concrete policy changes in the short to medium term.²⁴

Moderate lawmakers and policy officials working on animal welfare have an even greater likelihood of peacefully coexisting with liberal trade ideology. Animal protection in law typically relies upon a welfarist balancing act between human and animal interests in order to protect animals from unnecessary suffering.²⁵ This is how the EU has attempted to bridge the divergence between animal interests and liberal or free trade ideology.²⁶ However, generally speaking, free trade has been conceptually separated from and prioritized over so called ‘non-trade concerns’ such as animal welfare.

2.2. Prioritizing Free Trade over Trade Impact Concerns

¹⁹ Donna Haraway is a leader here. See D.J. Haraway, *When Species Meet* (University of Minnesota Press, 2008); and D.J. Haraway, *The Companion Species Manifesto: Dogs, People, and Significant Otherness* (Prickly Paradigm Press, 2003)

²⁰ Donovan and Adams, n. 15 above is central. For a modern intersectional take, see M. Deckha, ‘Toward a Postcolonial, Posthumanist Feminist Theory: Centralizing Race and Culture in Feminist Work on Nonhuman Animals’ (2012) 27(3) *Hypatia*, pp. 527-45.

²¹ E.g. Regan, n. 2 above; G.L. Francione, *Animals as Persons* (Columbia University Press, 2008); S.M. Wise, *Rattling the cage: towards legal rights for animals* (Profile, 2000).

²² Singer, n. 15 above is central. For modern commentary, see S.P. McCulloch, ‘On the Virtue of Solidarity: Animal Rights, Animal Welfarism and Animals’ Rights to Wellbeing’ (2012) *Journal of Animal Welfare*, pp. 5-15.

²³ Francione, n. 21 above, p. 150.

²⁴ E.g., Eurogroup for Animals, ‘Model Animal Welfare Provisions for EU Trade Agreements’, 2017, available at: http://www.eurogroupforanimals.org/wp-content/uploads/E4A-MAWP_Report-screen.pdf.

²⁵ R. Garner, *Animals, Politics and Morality*, 2nd edn (Manchester University Press, 2004), pp. 85-6.

²⁶ See 3.1 below.

The linkage debate is a conceptual battleground where the notion of free (or liberal) trade (described as the ‘normative justification for the WTO’)²⁷ and the WTO’s treatment of so-called ‘non-trade concerns’ (primarily environmental and labour concerns) have been dissected and scrutinized. The linkage debate has kept the WTO in check for, at times, providing inadequate regulatory autonomy to its members to enact trade restrictive measures aimed at environmental protection or safeguarding labour rights.²⁸

Liberal economic objectives are at the heart of the General Agreement on Tariffs and Trade (GATT)²⁹ - enacted in the ‘Bretton Woods’³⁰ era of trade - and of the WTO.³¹ Consequently, the restriction of trade in order to protect, for example, animal welfare, goes against the substantive trade liberalization rules of the WTO. This dichotomy is perpetuated in WTO disputes and in much of the linkage debate literature.³² This section sets out this dichotomous thinking before outlining a more critical, nuanced approach. This also justifies and frames the empirical research below.

In the first *US – Tuna* case before a GATT panel, a US dolphin-protection measure was found to discriminate against Mexican fishing fleets.³³ The panel dismissed the US conservation objectives, permitting members to pursue ‘full use of the world’s resources’.³⁴ The GATT panel decision was criticized for failing to give due deference to environmental

²⁷ D.M. Driesen, ‘What is Free Trade? The Real Issue Lurking Behind the Trade and Environment Debate’ (2001) 41(2) *Virginia Journal of International Law*, pp. 279-368, at 284.

²⁸ For an overview, see M. Gonzalez-Garibay, ‘The Trade-Labour and Trade-Environment Linkages: Together or Apart?’ (2011) 10(2) *Journal of International Trade Law & Policy*, pp. 165-84.

²⁹ Geneva (Switzerland), 30 Oct. 1947, in force 1 Jan. 1948, available at: <http://docsonline.wto.org>.

³⁰ The Bretton Woods Agreements of 1944 constituted an important post-war effort to rebuild the international economic system.

³¹ Marrakesh Agreement Establishing the World Trade Organization, Marrakesh (Morocco), 15 Apr. 1994, in force 1 Jan. 1995, available at: <http://docsonline.wto.org>, at Preamble, Recital 3.

³² E.g., references to separate ‘realms’ in D.C. Esty, ‘Bridging the Trade-Environment Divide’ (2001) 15(3) *Journal of Economic Perspectives*, pp. 113-30, at 126.

³³ *United States – Restrictions on Imports of Tuna*, GATT Panel Report, WTO Doc. WT/DS21, unadopted, 3 Sept. 1991.

³⁴ C.J. Archibald, ‘Forbidden by the WTO? Discrimination against a Product When its Creation Causes Harm to the Environment or Animal Welfare’ (2008) 48(1) *Natural Resources Journal*, pp. 15-49, at 18.

objectives and for classifying environment-protecting trade restrictions as extraterritorial measures disallowed by WTO law.³⁵

However, over time a gradual shift has occurred. The WTO now shows more deference to members' objectives regarding trade impact concerns, including the environment and animal welfare.³⁶ *US – Shrimp* diverged from the earlier ruling in *US – Tuna* by stating that extraterritorial measures, which condition market access upon the exporting country adopting a particular policy, is probably a common feature of measures that fall within the scope of the Article XX GATT exceptions.³⁷ Thus, WTO members are not barred *per se* from restricting trade in order to pursue environmental protection. The *US – Tuna* saga has evolved to permit further space for members' trade restrictions with environmental objectives.³⁸

Extensive commentary on these disputes will not be repeated here.³⁹ In sum, the WTO has come much closer to striking a good balance between liberal free trade objectives and issues such as environmental protection.⁴⁰ However, the evolving application of the WTO rules in disputes has revealed the potentially detrimental force of trade law and has given rise to concern amongst academics.⁴¹ This has led to a critique of dichotomous thinking within the linkage debate.

Critical inquiries require asking what it is that 'free trade' is to be free from.⁴² The current trade law regime amalgamates three conceptions of free trade: trade free from

³⁵ S. Harrop & D. Bowles, 'Wildlife Management, the Multilateral Trade Regime, Morals and the Welfare of Animals' (1998) 1(1) *Journal of International Wildlife Law & Policy*, pp. 64-94, at 85-6.

³⁶ R. Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) 27(1) *European Journal of International Law*, pp. 9-77, at 36-8.

³⁷ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, WTO Doc. WT/DS58/AB/R, 12 Oct. 1998, para. 121.

³⁸ R. Howse, 'Last Week's Tuna II WTO Panel Report: Happy Ending to a Hair-raising Adventure on the High Seas', *International Economic Law and Policy Blog*, 2 Nov. 2017, available at: <http://worldtradelaw.typepad.com/ielpblog/2017/11/last-weeks-tuna-ii-wto-panel-reporthappy-ending-to-a-hair-raising-adventure-on-the-high-seas-.html>.

³⁹ Overview and further references in Van den Bossche and Zdouc, n. 18 above, pp. 544-57.

⁴⁰ *Ibid.*

⁴¹ See particularly on the sprawling *US – Tuna* saga: C. Coglianese & A. Sapir, 'Risk and Regulatory Calibration: WTO Compliance Review of the US Dolphin-Safe Tuna Labeling Regime' (2017) 16(2) *World Trade Review*, pp. 327-48, at 336.

⁴² Driesen, n. 27 above, p. 300.

discrimination;⁴³ trade free from international coercion whereby one state may try to influence another to adopt particular policies;⁴⁴ and trade ‘free of national regulation under a broad laissez-faire conception’.⁴⁵ So called ‘non-trade concerns’ such as animal welfare are regarded as exceptions to free trade rather than as encompassed within the scope of free trade.⁴⁶ This conceptual dichotomy lies at the heart of the WTO’s reluctance to legitimize ‘non-trade issues’.

However, the meaning of free trade is not static or pure.⁴⁷ Rather, it is a highly contextual concept that ‘varies in meaning across time and across political cultures’.⁴⁸ Law can be used to ‘renew and re-imagin[e]’ that concept.⁴⁹ In this way, developments within global animal law could impact upon the normative underpinnings of trade law.

Unfortunately, contributors to the linkage debate have largely embraced the dichotomous thinking introduced above, accepting concerns such as animal welfare to be ‘non-trade issues’.⁵⁰ Andrew Lang has pointed out that ‘it is not self-evident, of course, that the major international institution presiding over the global trade system has no business addressing the social and environmental impacts of that system, and that such impacts are not “trade issues”’.⁵¹

It is not an inevitability that ‘free trade’ must exclude animal protection, permitting it only as an exception. It is simply that the current system of trade law and policy accepts and perpetuates this dichotomous thinking. This is in spite of strong indications that free trade, in its current formulation, will fail to remain a democratically viable concept if it continues to neglect fundamental ethical dilemmas within and amongst communities regarding the use and

⁴³ Ibid.

⁴⁴ Ibid, p. 285.

⁴⁵ Ibid.

⁴⁶ Ibid, p. 286.

⁴⁷ A. Lang, ‘Reflecting on ‘Linkage’: Cognitive and Institutional Change in The International Trading System’ (2007) 70(4) *Modern Law Review*, pp. 523-49.

⁴⁸ Ibid, pp. 524-5.

⁴⁹ Ibid, p. 547.

⁵⁰ E.g. Esty, n. 32 above.

⁵¹ Lang, n. 47 above, p. 537.

treatment of animals. This is reflected in the public opposition to the WTO at the Battle in Seattle⁵² and, more recently, in the public backlash to the negotiations for the EU-US Transatlantic Trade and Investment Partnership (TTIP).⁵³ Indeed, this article rejects the presupposition of a conceptual division between ‘non-trade issues’ and trade policy, as well as the presupposed economy-centric conception of what EU and WTO trade policy is centrally and importantly *about*. For this reason, the article will refer to issues typically dubbed ‘non-trade issues’ as ‘trade impact issues’.

3. TRADE LAW AND POLICY TO THE DETRIMENT OF GLOBAL GOVERNANCE FOR ANIMALS

The significance of trade as a global animal law question is great but should not be overstated. Other factors also impact the effectiveness of animal law. These include poor enforcement⁵⁴ and lack of political will to fill gaps in animal law.⁵⁵ Some of these factors impact animal welfare in tandem with trade and, thus, make proving causality difficult. However, others partly *result* from the impact of trade, reinforcing arguments for causality. For example, consumer awareness is harmed by WTO restrictions on the use of labels.

Other forms of transnational cooperation also have the potential to impact animal welfare. These include the negotiation of non-binding animal welfare standards, multilateral environmental agreements and international investment agreements⁵⁶ However, only trade can

⁵² K. Oldham, ‘WTO Meeting and Protests in Seattle (1999) – Part 1’, *HistoryLink.org*, 13 Oct. 2009, available at: <http://www.historylink.org/File/9183>.

⁵³ S. Treat & S. Sharma, *Selling off the Farm: Corporate Meat’s Takeover through TTIP* (Institute for Agriculture and Trade Policy, 2016), available at: <https://www.ciwf.org.uk/media/7428251/report-sellingoffthefarm-final-july-2016.pdf>.

⁵⁴ European Court of Auditors, ‘Special Report: Animal welfare in the EU: closing the gap between ambitious goals and practical implementation’, 14 Nov. 2018, available at: <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=47557>.

⁵⁵ See below at 3.5.

⁵⁶ World Organization for Animal Health, ‘Terrestrial Animal Health Code’, 28th edn., 2019, available at: <https://www.oie.int/standard-setting/terrestrial-code/>, s. 7; S. Harrop. ‘Climate Change, Conservation and the Place for Wild Animal Welfare in International Law’ (2011) 23(3) *Journal of Environmental Law* pp. 441-62; and Bollard, n. 5 above, p. 95.

directly alter citizens' consumption by permitting new products into their market.⁵⁷ Trade is one of the most challenging ways in which a domestic, ethical, political agenda may be threatened by an extra-jurisdictional or transnational force. Thus, the impact of trade law and policy on animal welfare must be understood and counteracted if animal protection efforts are to be effective.

3.1 Roles in Reconciliation

In this regard, it is problematic that WTO law's rule-exception approach has, for much of the WTO's history, minimized trade impact issues and excluded them from the concept of free trade.⁵⁸ For environmental issues, that balance has shifted through a series of disputes.⁵⁹ There is also reference to sustainable development in the WTO treaty⁶⁰ and numerous multilateral environmental agreements with institutional mechanisms that cooperate with the WTO.⁶¹ Animal issues have neither of these advantages.

The WTO treaties are silent on the issue of animal welfare.⁶² Thus there is no basis upon which to pursue the harmonization of animal welfare standards through the WTO. Even if such grounding did exist, the risk of lowest common denominator results would be high⁶³ and effective dual-purpose regulation which might, for example, promote the adoption of an animal welfare-encompassing free trade policy, tends to be elusive.⁶⁴

⁵⁷ This impact is also demonstrated in the nutrition transition: A.M. Thow et al, 'Trade and the Nutrition Transition: Strengthening Policy for Health in the Pacific' (2011) 50(1) *Ecology of Food and Nutrition*, pp. 18-42.

⁵⁸ See 2.2 above.

⁵⁹ Ibid.

⁶⁰ WTO Agreement, n. 31 above, preamble recital 1.

⁶¹ Non-WTO international law can impact interpretations of WTO law: *US – Shrimp*, n. 37 above, para. 130-2. On WTO-MEA cooperation, see G. Marín Durán, 'The Role of the EU in Shaping the Trade and Environment Regulatory Nexus: Multilateral and Regional Approaches' in B. Van Vooren, S. Blockmans and J. Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (Oxford University Press, 2013), pp. 228-33.

⁶² But not, however, on animal health. Agreement on the Application of Sanitary and Phytosanitary Measures, Marrakesh (Morocco), 15 Apr. 1994, in force 1 Jan. 1995, available at: <http://docsonline.wto.org>,

⁶³ S. Harrop, 'The International Regulation of Animal Welfare and Conservation Issues through Standards Dealing with the Trapping of Wild Mammals' (2000) 12(3) *Journal of Environmental Law*, pp. 333-60, at 360.

⁶⁴ S. Kingston, V. Heyvaert & A. Čavoški, *European Environmental Law* (Cambridge University Press, 2017), at pp. 449-50 & 488.

Animal welfare has been the subject of negative integration through the WTO's dispute settlement body. In the landmark *EC – Seal Products* case, Norway and Canada challenged the EU's seal regime, which bans the placing on the market of seal products.⁶⁵ There is moral concern regarding these hunts owing to the inhumane suffering sealing often entails.⁶⁶ The Appellate Body ruled that banning trade to protect animal welfare was provisionally justified under Article XX(a) GATT as a matter of public morality.⁶⁷ However, the EU's seal regime ultimately failed to comply with the chapeau to Article XX GATT because exceptions to the trade ban were found to entail discriminatory treatment.⁶⁸ The EU implemented the recommendation of the WTO dispute settlement body to limit the exceptions to its trade ban, thus strengthening the measure's impact on animal welfare.⁶⁹

This case proves the traditional narrative – of the EU as a leader on animal welfare and the WTO as its primary obstacle – to be oversimplified.⁷⁰ Further, the collision of trade and animal welfare policy in the EU reveal that the EU hardly acts like the global leader in the legal protection of animals which it claims to be.⁷¹

Indeed, the EU's animal protection efforts are frequently undermined by its own trade policy. For example, the EU has vast ambitions with regard to its bilateral trade policy, including trade in animal products, but it has poorly implemented its 2008-2015 Animal Welfare Strategy.⁷² The EU made a proposal on animal welfare to the WTO but swiftly

⁶⁵ Regulation (EC) 1007/2009 of the European Parliament and of the Council on Trade in Seal Products [2009] OJ L 286/36.

⁶⁶ Ibid, at para. 4.

⁶⁷ *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, Panel Report, WTO Doc. WT/DS400/R, WT/DS401/R, 25 Nov. 2013; *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, Appellate Body Report, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R, 22 May 2014.

⁶⁸ *EC – Seal Products*, Appellate Body Report, *ibid*, paras 5.337-9.

⁶⁹ Dispute Settlement Body, 'Minutes of Meeting – Held in the Centre William Rappard on 28 October 2015', WTO Doc. WT/DSB/M/369, 20 Jan. 2016, para. 144-8.

⁷⁰ M. Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (Oxford University Press, 2001), pp. 133-7.

⁷¹ P. Fitzgerald, 'Morality may not be Enough to Justify the EU Seal Products Ban: Animal Welfare meets International Trade Law' (2011) 14(2) *Journal of International Wildlife Law & Policy*, pp. 85-136, at 88.

⁷² Court of Auditors, n. 54 above.

abandoned it following resistance.⁷³ The EU unilaterally restricts trade in *some* controversial animal products like seal or cat and dog fur but it permits and promotes trade in most animal products without conditioning this on animal welfare protection.⁷⁴ The EU now maintains a policy to include animal welfare in all bilateral trade agreements but it does so with variable success.⁷⁵ Arguably, the EU's feeble attempts at integrating animal welfare concerns in its trade policy are mere attempts at green-washing, since it effectively continues to liberalize trade in animal products and permit harmful industrialized farming practices within its member states.⁷⁶

The remainder of this section empirically explores the impact of trade on animal welfare in the EU. The following section will show that, on the basis of this analysis, neither the EU nor the WTO have succeeded in reconciling these two policy areas in a way that gives adequate consideration to animal welfare. However, emerging research on global animal law is relatively blind to this shortcoming because of the disproportionately large contribution of trade law to the 'tentative and embryonic' global governance for animals.⁷⁷

3.2 Mapping the Impact of Trade

The impact of trade on animal welfare can be broken down into four component parts: (1) open markets, (2) low animal welfare havens, (3) a chilling effect, and (4) a lack of labelling.

⁷³ Committee on Agriculture, 'Special Session – European Communities Proposal: Animal Welfare and Trade in Agriculture', WTO Doc. G/AG/NG/W/19, 28 Jun. 2000.

⁷⁴ Regulation 1523/2007 of the European Parliament and of the Council banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur [2007] OJ L343/50; Seals Regulation, n. 66 above.

⁷⁵ Communication from the Commission to the European Parliament, The Council and European Economic and Social Committee, 'European Union Strategy for the Protection and Welfare of Animals 2012-2015', COM/2012/6 final/2, 19 Jan. 2012, p. 10. On implementation, see C. Cabanne, 'The EU-Chile association agreement: A booster for animal welfare' (2013) 7(1) *Bridges Trade & Biological Resources News Digest*, available at: <https://www.ictsd.org/bridges-news/biores/news/the-eu-chile-association-agreement-a-booster-for-animal-welfare>.

⁷⁶ A useful tool to help visualize industrialized harm is available at: <https://vaci.voiceless.org.au>.

⁷⁷ K. Sykes, 'Globalisation and the Animal Turn: How International Trade Law Contributes to Global Norms of Animal Protection' (2016) 5(1) *Transnational Environmental Law*, pp. 55-79, at 57.

The open markets condition allows low welfare imports to enter a liberalized marketplace. This marketplace may itself enact more advanced animal welfare rules, but these rules do not apply to imported animals and animal products. If production shifts to states with poor regulation, low animal welfare havens will arise. This occurs because trade favours cheap, ‘efficient’ production.⁷⁸

There are two forms of chilling effect that may follow, one of which will be investigated in this article. Firstly, domestic producers now find themselves in a situation where they must comply with high welfare standards, but at the same time they must compete with cheaper, low welfare imported products.⁷⁹ A chilling effect or even a race to the bottom may occur if strained domestic producers attempt to regain competitiveness by pressuring governments to halt development of, weaken, or abandon domestic welfare standards. There is not enough space to tackle this chilling effect in this article. Instead, the focus will be on a second chilling effect: the pressure that has been felt by WTO members to refrain from restricting trade in order to protect animal welfare, thus facilitating low welfare imports.

Finally, the lack of effective product labelling for animal welfare ensures that this negative cycle will continue.⁸⁰ Animal welfare labels on the market are ineffective because they are voluntary, with poor market capture and low recognisability.⁸¹ Requiring labelling of imports is potentially compatible with WTO law but has rarely been pursued as part of WTO

⁷⁸ H. Grethe, ‘High animal welfare standards in the EU and international trade - How to prevent potential “low animal welfare havens”?’ (2007) 32(3) *Food Policy*, pp. 315-33.

⁷⁹ P. Stevenson, ‘The World Trade Organisation Rules: A Legal Analysis of their Adverse Impact on Animal Welfare’ (2002) 8 *Animal Law*, pp. 107-42, at 109; P. Thomas, ‘Playing Chicken at the WTO: Defending an Animal Welfare-Based Trade Restriction under GATT’s Moral Exception’ (2007) 34(3) *Boston College Environmental Affairs Law Review*, pp. 605-37, at 609.

⁸⁰ E.g. Regulation (EC) No. 589/2008 laying down detailed rules for implementing Council Regulation (EC) No. 1234/2007 as regards marketing standards for eggs [2008] OJ L163, Art. 32.

⁸¹ Food Chain Evaluation Consortium et al, ‘Feasibility study on animal welfare labelling and establishing a Community Reference Centre for Animal Protection and Welfare: Part 1: Animal Welfare Labelling: Final Report’, 26 Jan. 2009, available at: https://ec.europa.eu/food/sites/food/files/animals/docs/aw_other_aspects_labelling_feasibility_study_report_part1.pdf, pp. 14-7; and Farm Sanctuary, ‘The Truth Behind the Labels: Farm Animal Welfare Standards and Labelling Practices: A Farm Sanctuary Report’, Apr. 2009.

members' trade policies.⁸² If consumers who are concerned about animal welfare do not know what conditions animals are reared in, they are more likely to unwittingly purchase cheap, low welfare products. This constitutes a market failure caused by insufficient availability of information.

The first three components of impact will be analyzed empirically in the paragraphs that follow. The fourth component, the lack of labelling, is well documented and will not be analyzed here.

3.3 The First Component: Open Markets

Three case studies were selected to quantify the problem of low welfare imports and low animal welfare havens. These are: the EU-wide bans on the use of battery cages for laying hens, on the use of sow stalls, and on the use of veal crates. The three case studies were selected because their clear implementation dates facilitate assessments of changes in trade levels, as well as for their relevance to animal welfare policy. Close confinement systems impose lifelong suffering upon animals. Oppressive cages make most natural behaviours impossible, reducing unique sentient creatures to productive automatons.

Laying Hen Battery Cage Ban

On 1 January 2012, an EU ban on the use of battery cages for laying hens came into force.⁸³ The directive permits battery caged eggs to be imported from non-EU countries – thus prioritizing trade objectives over animal welfare objectives - and it permits the continued use of 'enriched cages' in the EU.⁸⁴

⁸² The present author's research on this is summarised in Eurogroup for Animals, 'Policy Brief - Method-of-Production Labelling: The Way Forward to Sustainable Trade', 2019, pp. 9-14.

⁸³ Directive 99/74/EC laying down minimum standards for the protection of laying hens [1999] OJ L203/53, Art. 5(2).

⁸⁴ Ibid, Art 6.

In 2012, the first year of the ban's implementation, the EU imported 15,572 tonnes⁸⁵ of egg products (both in-shell and non-shell). Available data does not indicate the production method of imported eggs. This masks the impact on animal welfare and supports arguments that trade policy is ill-suited as a primary driver of the governance for animals. It is possible, for our purposes, to extrapolate estimates based on the methods of production in the exporting states.

The United States (US) accounted for almost half of EU egg imports in 2012. In 2018, around 18% of the US laying flock were housed in cage-free systems.⁸⁶ This is compared to 44% of EU hens kept in non-cage ('alternative') systems.⁸⁷ The marginal production of cage-free eggs in the US coupled with the permissibility of exporting caged eggs to the EU would suggest that most US exports to the EU are from battery caged hens.

Following the US, the EU imported 2,362 tonnes of eggs from Albania, 1,745 tonnes from Argentina, 1,541 tonnes from India, and 1,133 tonnes from Bosnia & Herzegovina. Compassion in World Farming cites a World Poultry study from 2008 that found 100% of Argentinian laying hens and 78% of Indian laying hens were reared in cage systems.⁸⁸ As unenriched battery cages are the global standard in the absence of contrary legislative requirements, it is reasonable to assume that the caged systems used in these states are unenriched battery cages.

Sow Stall Ban

Sow stalls house pigs individually, in a restrictive way to protect piglets from suffocation. The restrictions in mobility and socialization entail poor welfare and the inhibition of natural

⁸⁵ Unless otherwise stated, all trade data is sourced from Eurostat, n. 16 above.

⁸⁶ 'Facts and Stats', *United Egg Producers*, 2019, available at: <https://unitedegg.com/facts-stats/>.

⁸⁷ European Commission, 'Eggs – Market Situation - Dashboard', 13 Nov. 2019, available at: https://ec.europa.eu/info/sites/info/files/food-farming-fisheries/farming/documents/eggs-dashboard_en.pdf.

⁸⁸ Compassion in World Farming, 'Statistics: laying hens', 28 Aug. 2013, available at: <https://www.ciwf.org.uk/media/5235021/Statistics-Laying-hens.pdf>, p. 8.

behaviours. The EU imposed a partial ban on the use of sow stalls that came into effect on 1 January 2013.⁸⁹ This bans the use of sow stalls except for the first four weeks of pregnancy and for one week before farrowing. The directive does not regulate imports.

The EU imported 34,487 tonnes of pork in 2013, the first year of the ban's implementation. The majority of these imports come from Switzerland where sow stalls are banned completely.⁹⁰ Thus, the issue of low welfare imports of pork to the EU is not pressing.

Veal Crate Ban

Veal crates severely restrict the movement of calves by tying their necks (in some cases, for their entire lives). The use of veal crates was banned from 31 December 2006 for all calves older than eight weeks in EU holdings.⁹¹

In 2007, the first year of the implementation of the veal crate ban, the EU imported 305,480 tonnes of beef and veal. Amongst the top exporters to the EU are Brazil, Uruguay, Argentina, Australia and the US. Veal crates are not used in Australia.⁹² Industry in the US has also moved away from veal crates following a vote of the American Veal Association.⁹³ However, intensive farming methods such as veal crates are commonly used in the Latin American countries that provide the highest number of veal products to the EU.⁹⁴

Note, however, that beef and veal are treated as a single category in all the readily available trade statistics. This practice disregards and masks the suffering of animals that are

⁸⁹ Directive 2008/120/EC laying down minimum standards for the protection of pigs [2008] OJ L47, Art. 3.

⁹⁰ Animal Welfare Ordinance 455.1 2008 (Switzerland), Art. 48.

⁹¹ Directive 2008/119/EC laying down minimum standards for the protection of calves [2008] OJ L10, Art. 3.

⁹² 'What is veal?', *RSPCA Australia*, 23 Sept. 2019, available at: http://kb.rspca.org.au/What-is-veal_273.html.

⁹³ R. Smith, 'Veal group housing approved' (2007) 79(32) *Feedstuffs*, available at: <https://go.gale.com/ps/i.do?p=AONE&u=ustrath&id=GALE|A169023539&v=2.1&it=r&sid=AONE&asid=a69b9b39>; and American Veal Association, 'AVA Confirms "Mission Accomplished"' (2018), available at: <https://static1.squarespace.com/static/56b1263940261d30708d14b4/t/5a53ac7e53450a19f3a2fefb/1515433086810/AVA+Group+Housing+Mission+Accomplished+2018+.pdf>.

⁹⁴ Irish Farmers Association, 'EU Trade Commissioner is Undermining EU Policies on Climate Change and Animal Welfare in MERCOSUR Negotiations', 29 Jan. 2018, available at: <https://www.ifa.ie/eu-trade-commissioner-is-undermining-eu-policies-on-climate-change-and-animal-welfare-in-mercosur-negotiations/>.

reared in crates. On the basis of the available data, it is impossible to distinguish veal from beef or high welfare from low welfare meat. This frustrates research efforts aimed at exposing the extent of animal suffering in veal farming.

Discussion of Existing Trade Flows

EU imports of eggs, pork and beef and veal account for a small proportion of total EU consumption, but they are not insignificant. The continuation of import practices would show a negative impact of the prioritization of trade objectives over animal welfare because it permits low welfare animal products onto the EU market. However, one can only reach this conclusion speculatively because of the lack of trade data regarding method of production. This severely restricts the ability of researchers to quantify the impact of trade on animal welfare and, thus, recommend and work towards improvements. If we are to assume at least some low welfare animal products are imported into the EU, an absence of mandatory labelling would mean that concerned consumers cannot counteract this negative impact of EU trade policy by choosing high welfare products. Therefore, the potential welfare gains for animals offered by the relevant legislation are at risk of being diluted.

3.4 The Second Component: Low Animal Welfare Havens

Laying Hen Battery Cage Ban

Production costs for enriched cage eggs in compliance with EU law are estimated to be 7% higher than for conventional battery-caged eggs.⁹⁵ Anticipating this, academics communicated concerns about low animal welfare havens arising due to the ban.⁹⁶ The trade figures

⁹⁵ P.L.M. van Horne, 'Competitiveness of the EU egg sector; International comparison base year 2013', *LEI Wageningen UR*, 2014, available at: https://www.wur.nl/upload_mm/6/5/f/8f9e79f4-9f56-4149-ab6a-f9f718d8e934_2014-041%20vHorne_web.pdf, p. 20.

⁹⁶ Grethe, n. 81 above.

demonstrate a slight stagnation in growth of EU egg production following the ban, which was set off by a compensatory rise in imports. However, both developments were modest in scope and temporary.

EU egg production has been growing consistently. Some stagnation occurred in 2012, the first year of implementation of the battery cage ban,⁹⁷ but production rates continued their long-term growth trajectory thereafter and amounted to 7.7 million tonnes in 2016.⁹⁸ Prior to the ban, EU imports had dropped from 6,864kg of eggs in 2010 to only 3,792kg in 2011. This number increased dramatically to 7,210kg in 2012, the first year in which the ban was implemented. However, this stabilized quickly, dropping to 3,203kg in 2013.

These figures do not clearly support the assumption that the EU ban resulted in the development of animal welfare havens. However, a number of factors may have contributed to an overall drop in imports.⁹⁹ Further, the total import statistics mask particularities that could be suggestive of the existence of low animal welfare havens.

For example, the EU authorized Ukraine to begin exporting eggs to the EU after the ban's implementation. Ukraine can export eggs to the EU tariff free under two generous quotas granted following the ban's enforcement.¹⁰⁰ This is not conditional upon the eggs meeting EU welfare standards and all Ukrainian laying hens are caged.¹⁰¹

Controversially, Dutch companies and the Dutch government also began investing in the large-scale poultry company in Ukraine called Myronivsky Hilboproduct (MHP).¹⁰² It is

⁹⁷ H. Windhorst, 'The EU egg industry', *Zootecnica International*, 25 May 2017, available at: <http://zootecnicainternational.com/focus-on/eu-egg-industry/>.

⁹⁸ Data available at: https://ec.europa.eu/agriculture/eggs/presentations_en.

⁹⁹ These factors include demand, price fluctuation of end product and animal feed (etc), and the impact of animal health and disease outbreaks. Also, compliance costs including environmental regulations and animal health rules and offsetting by the EU's Common Agricultural Policy (CAP).

¹⁰⁰ Implementing Regulation (EU) 2015/2077 opening and providing for the administration of Union import tariff quotas for eggs, egg products and albumins originating in Ukraine [2015] OJ L302/57, annex I.

¹⁰¹ N. Morton, 'Global Poultry Trends: Russia and Ukraine Produce One in Three of Europe's Eggs', *The Poultry Site*, 3 Apr. 2013, available at: <https://thepoultrysite.com/articles/global-poultry-trends-russia-and-ukraine-produce-one-in-three-of-europes-eggs>.

¹⁰² T. Steinweg, 'Chicken Run: The business strategies and impacts of poultry producer MHP in Ukraine', *SOMO*, Sept. 2015, pp. 5, 12, & 21-2.

contrary to the spirit of the ban on battery cages that an EU member state benefits financially from battery farming outside of the EU, especially when those products are exported to the EU.

Ukraine only began exporting eggs to the EU in 2014, but it is now the second biggest exporter of eggs to the EU. While Ukraine exported a modest 36 tonnes of eggs to the EU in 2014, these exports have increased to 2,125 tonnes in 2016 and they continue to rise.¹⁰³ EU trade policy further exposes its consumers to low welfare Ukrainian eggs.

In other cases, the EU has acted more conscientiously regarding low-welfare egg imports. For example, the EU proposed to grant the US favourable trade terms in TTIP only for those eggs that met European welfare standards and the EU has reportedly imposed the same condition on imports of eggs in an agreement with the MERCOSUR countries.¹⁰⁴

Sow Stall Ban

The EU sources most of its imported pork from Switzerland where pig welfare standards provide better legal protection than in the EU. Thus, low animal welfare havens have been avoided in this case because the EU has a reliable flow of group-housed pork from Switzerland. If the EU further liberalizes trade in pork with other countries, this situation could change.

Veal Crate Ban

Noting the combined category of beef and veal, it is impossible to closely scrutinize veal trade. Following implementation of the veal crate ban, production of beef and veal fell in the EU to a low of 7.2 million in 2013. However, imports of beef and veal also fell in the first year

¹⁰³ V. Vorotnikov, 'MHP drives up Ukraine poultry exports to EU', *Global Meat News*, 28 Sept. 2018, available at: <https://www.globalmeatnews.com/Article/2018/09/28/Ukraine-poultry-exports-rise#.W64CtI-OaVc.twitter>.

¹⁰⁴ Eurogroup for Animals, 'Transatlantic Trade and Investment Partnership: What's in it for Animals', 2016, available at: <http://www.eurogroupforanimals.org/wp-content/uploads/TTIP-Report-External.pdf>, p. 14; and M. Busby, 'EU Imposes Hen Welfare Standards on Egg Imports for First Time', *The Guardian*, 2 Oct. 2019), available at: <https://www.theguardian.com/environment/2019/oct/02/eu-imposes-hen-welfare-standards-on-egg-imports-for-first-time>.

following implementation from 376,885 tonnes in 2006 to 305,840 tonnes in 2007 and to 191,910 tonnes in 2008.

The top exporters of beef and veal to the EU are Brazil, Uruguay, Argentina, Australia, the US, Namibia, Botswana, New Zealand and Paraguay. Despite the inadequate data available, the fall in imports to the EU of beef and veal suggests that no animal welfare haven has arisen in this case. However, the EU's bilateral trade negotiations with the MERCOSUR countries creates a risk of increased low welfare imports.¹⁰⁵

Discussion of Low Animal Welfare Havens

The data presented here fails to demonstrate a mass shift of production to non-EU countries following enactment of the bans discussed. However, while low animal welfare havens are not a widespread problem, the case of Ukrainian egg production indicates that low animal welfare havens can arise in the existing regulatory environment. The available trade data, which does not specify method of production, does not make this immediately clear.

It is fortunate that the EU has a reliable supply of high welfare Swiss pork at present. However, the EU's ambitious bilateral trade policy puts this situation at risk. The EU routinely offers sizeable pork tariffs in trade negotiations.¹⁰⁶ This may lead to new or enhanced export markets to the EU in pork reared through intensive confinement.

Sophisticated economic modelling would be required to analyse all the forces acting upon the trade in animal products in order to determine why low animal welfare havens have not yet arisen. This is neither possible nor necessary here. The fundamental conclusion to be drawn here regards the way in which the available data masks animal harm and the dangers

¹⁰⁵ EU-Mercosur Trade Agreement, agreement in principle, Brussels (Belgium), 1 Jul. 2019, https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157964.pdf.

¹⁰⁶ E.g. Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the Other Part [2017] OJ L 11/23, p. 237; and New EU-Mexico Agreement, agreement in principle, Brussels (Belgium), 23 Apr. 2018, available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1833>, p. 2.

posed by EU trade policy to animals, making precise analyses of trade impact impossible. This is true of the data for egg and veal trade.

Tariff classification systems, relied upon to categorize trade data, are very precise.¹⁰⁷ They divide animal products according to weight, bone content, temperature (chilled, frozen, etc), and so on. And yet, these classifications ignore method of production and welfare considerations. This makes it impossible for researchers to observe the rate of low welfare imports and the occurrence of low animal welfare havens. In turn, this hinders the development of research aimed at improving the negative impact of animal welfare on trade.

On the basis of this conclusion, it is hoped that this initial investigation will inspire further research into the relevant trade data in order to predict how and when low animal welfare havens may arise.

3.5 The Third Component: Chilling Effect

The Impact of Trade in the WTO's Formative Years

The establishment of the WTO in 1995 caused concerns in the animal welfare community that it would 'inhibit the development of animal welfare protection legislation'.¹⁰⁸ Indeed, a chilling effect can be observed on the use of trade policy to protect animal welfare by the EU. EU trade measures that were drafted around this time and that directly addressed animal welfare were subject to renegotiation, delay, and limitation. Three examples in this regard are the 1999 Laying Hens Directive, the 1991 Leghold Traps Regulation, and the 2009 Cosmetics Regulation.

¹⁰⁷ The Harmonized System, a tariff classification nomenclature developed by the World Customs Organization, available at: <http://www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx>.

¹⁰⁸ Harrop and Bowles, n. 35 above, p. 64; and Fisher, n. 4 above.

The 1999 Laying Hens Directive bans the use of battery cages for laying hens in the EU without restricting imports.¹⁰⁹ The EU knew this would competitively disadvantage its producers.¹¹⁰ At EU parliamentary questions, the Commission gave no clear indication as to how it would handle the threat of cheap, unregulated imports.¹¹¹

The 1991 Leghold Traps Regulation bans the use of cruel leghold traps within the EU and the importation of particular furs, unless the exporting state regulates trapping methods to meet internationally agreed 'humane trapping standards'.¹¹² Leghold traps capture animals with a steel jaw that does not kill the animal but restrains them, causing severe injury and distress.

The import restriction has had little practical effect. Enforcement of the regulation was delayed and weakened. The US and Canada threatened to challenge the regulation under the WTO rules.¹¹³ In response, the European Commission postponed the start date of the ban from 1 January 1995 to 1 January 1996.¹¹⁴ It proposed another year long delay.¹¹⁵ This was apparently due to 'doubts as to the legality of the ban'.¹¹⁶ The ban went into effect on 1 January 1996 but the Commission blocked implementation by 'asking customs authorities not to

¹⁰⁹ Laying Hens Directive, n. 88 above.

¹¹⁰ Harrop and Bowles, n. 35 above, p. 80.

¹¹¹ European Commission, 'Answer to written question E-0546/2000 by William Newton Dunn (ELDR) to the Commission on Welfare of laying hens', 12 May 2000, available at: <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2000-0546&language=EN>.

¹¹² Regulation 3254/91 prohibiting the use of leghold traps and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards [1991] OJ L308/34, Arts. 2 & 3.1.

¹¹³ A. Nollkaemper, 'The Legality of Moral Crusades Disguised in Trade Laws: an Analysis of the EC 'Ban' on Furs from Animals Taken by Leghold Traps' (1996) 8(2) *Journal of Environmental Law*, pp. 237-56, at 238.

¹¹⁴ Regulation 1771/94 laying down new provisions on the introduction into the Community of pelts and manufactured goods of certain wild animal species [1994] OJ L184/3.

¹¹⁵ Commission Proposal COM/1995/737 for a Council Regulation (EC) amending Council Regulation (EEC) No 3254/91 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 which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards [1995] OJ C58/17, Art. 4(1)-(2).

¹¹⁶ Nollkaemper, n. 124 above, p. 243.

implement it'.¹¹⁷ The Commission counterintuitively described implementation of the ban by member states as illegal.¹¹⁸

Further, the EU failed to apply the fur import ban to the US, Canada, and Russia (the main fur exporting countries) for many species.¹¹⁹ A tripartite agreement was negotiated instead which did 'little to discourage the use of leghold traps'.¹²⁰

The 1976 Cosmetics Directive (now re-implemented as the 2009 Cosmetics Regulation) bans the performance of animal testing for cosmetic products and ingredients in the EU or the placing on the market of such products (including imports).¹²¹

Enforcement was postponed multiple times from 1 January 1998 to 11 September 2004, 11 March 2009 and 11 March 2013 for different parts of the regulation.¹²² The proposal for the second postponement notes doubts regarding the WTO legality of the measure.¹²³ This reveals that the EU's reservations regarding the WTO rules impacted the decision to delay implementation. The literature is critical of the Commission's 'cautious analysis' of the WTO rules.¹²⁴

The EU was aware of the potential for diverging animal welfare standards to negatively impact high welfare producers in the EU. This was recognized in the preamble and Article 8 to the 1998 Farming Directive.¹²⁵ However, the three examples discussed in this section suggest that concern regarding the GATT panel's history of unfavourable treatment toward

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Commission Decision of 14 October 1998 amending Council Decision 97/602/EC concerning the list referred to in the second subparagraph of Article 3(1) of Regulation (EEC) No 3254/91 and in Article 1(1)(a) of Commission Regulation (EC) No 35/97 [1998] OJ L 286/56.

¹²⁰ Nollkaemper, n. 124 above, p. 243.

¹²¹ Regulation 1223/2009 of the European Parliament and of the Council on cosmetic products [2009] OJ L342/52, Art 18(1)(a)-(d).

¹²² Commission Proposal COM/2000/0189 for a directive of the European Parliament and of the Council amending for the seventh time Council Directive 76/768/EEC on the approximation of the laws of the Member States relating to cosmetic products [1976] OJ C 311/E/134, para. 1.2.

¹²³ Ibid.

¹²⁴ G. de Búrca & J. Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (Hart Publishing, 2001), p. 8.

¹²⁵ Directive 98/58/EC concerning the protection of animals kept for farming purposes [1998] OJ L221/23, preamble & Art. 8.

environmental objectives and the potential for costly challenge under the WTO's new dispute settlement mechanism were strong enough to override concerns for the competitiveness of producers in the EU.

The Impact of Trade in the Early 2000s

The chilling effect surrounding the WTO's establishment has persisted. This fact has been largely ignored by those commentators who were critical of the WTO's impact around the time of its establishment.

Most EU animal welfare legislation enacted following the WTO's establishment does not contain trade restrictions.¹²⁶ For example, when proposing higher welfare standards for broiler chickens, the European Parliament proposed to regulate and prohibit imports that did not comply.¹²⁷ However, the final version of the measure contains no such import ban.¹²⁸ There are exceptions where the EU restricts trade to pursue conservation and animal health objectives.¹²⁹ Also, in two cases (cat and dog fur, and seal products), the EU enacted trade restrictions to protect animal welfare.¹³⁰

However, the EU displays an overall hesitance. This may have been caused, in part, by the EU's failed attempt to initiate a multilateral dialogue on animal welfare and trade through a proposal to the WTO.¹³¹ WTO members were not enthused, arguing that this was an issue for

¹²⁶ I. Offor, 'The Chilling Effect of the World Trade Organisation on European Union Animal Welfare Protection' (LLM Thesis, The University of Aberdeen, April 2017), pp. 76 & 89.

¹²⁷ European Parliament legislative resolution COM 2005/0221 on the proposal for a Council directive laying down minimum rules for the protection of chickens kept for meat production [2005] OJ C290E/86, amendment 8.

¹²⁸ Ibid.

¹²⁹ Offor, n. 137 above, p. 89.

¹³⁰ Cat and Dog Fur Regulation n. 77 above; Seals Regulation n. 66 above.

¹³¹ WTO Committee on Agriculture, n. 76 above.

the OIE.¹³² As a result, the EU shifted its focus to including animal welfare in its bilateral trade policy.¹³³

The cat and dog fur import ban and the seal product import ban do not strike at the most pressing animal welfare issues impacted upon by trade. Intensive livestock farming for meat and dairy production causes more significant and long-lasting harm to welfare than the killing of wild seals for fur.¹³⁴ Further, the cat and dog fur import ban justifies its limited scope by reference to societal preferences regarding animal husbandry.¹³⁵ This choice has nothing to do with welfare science.

The EU deals with animal welfare inconsistently in its trade policy. However, such inconsistency has been found to be compliant with the WTO rules.¹³⁶ This is because requiring moral consistency would paralyze states, making animal welfare regulation impossible until they could regulate ‘every aspect of animal welfare to an equally high standard’ in a ‘perfectly simultaneous and consistent fashion’.¹³⁷ Thus, regulating animal welfare for public moral reasons in an inconsistent fashion may not be disingenuous per se.

Nonetheless, the EU’s inconsistency has been regarded as extreme caution in the face of uncertainty regarding WTO law.¹³⁸ Peter Stevenson, Chief Policy Adviser at Compassion in World Farming, notes that EU officials often cite incompatibility with WTO rules as the reason for failing to take policy actions on animal welfare.¹³⁹ Further, the EU’s willingness to tackle

¹³² A. Swinbank, ‘Like Products, Animal Welfare and the World Trade Organization’ (2006) 40(4) *Journal of World Trade*, pp. 687-711, at 690; A.L. Hobbs et al, ‘Ethics, domestic food policy and trade law: assessing the EU animal welfare proposal to the WTO’ (2002) 27(5) *Food Policy*, pp. 437-54, at 440.

¹³³ Commission, Animal Welfare Strategy n. 78 above, p. 10.

¹³⁴ Harrison, n. 9 above.

¹³⁵ Cat and Dog Fur Regulation, n. 77 above, preamble recital 1.

¹³⁶ *EC – Seal Products*, Appellate Body Report, n. 68 above, paras. 5.199-201.

¹³⁷ R. Howse, J. Langille & K. Sykes, ‘Pluralism in Practice: Moral Legislation and the Law of the WTO after Seal Products’ (2015-2016) 48(1) *The George Washington International Law Review*, pp. 81-150, at 114-5.

¹³⁸ K. Cook & D. Bowles, ‘Growing Pains: The Developing Relationship of Animal Welfare Standards and the World Trade Rules’ (2010) 19(2) *Review of European Community & International Environmental Law*, pp. 227-38, at 228; S. Charnovitz, ‘The Law of Environmental PPMs in the WTO: Debunking the Myth of Illegality’ (2002) 27(1) *Yale Journal of International Law*, pp. 59-110, at 76-80; and Fitzgerald, ‘Morality may not be Enough’, n. 74 above, p. 102.

¹³⁹ Stevenson, n. 82 above, p. 1.

some animal welfare issues more strongly than others may reveal other motivating factors such as a desire to satisfy moral appetite for animal welfare without negatively impacting European farmers. The EU's response to the legal certainty provided by *EC – Seal Products* is revealing in that respect.

The Impact of Trade after EC – Seal Products

EC – Seal Products is a landmark case for animal welfare. It is the first case to rule that public moral concern for animal welfare is a legitimate justification for trade restrictions under WTO law.¹⁴⁰ As such, *EC – Seal Products* provides a rebuttal of the EU's caution regarding trade restrictions for animal welfare.¹⁴¹ Academics have noted that *EC – Seal Products* opens 'the door to future animal welfare defenses'.¹⁴²

However, the EU has failed to use this legal clarity to rectify the chilling effect on animal welfare legislation that followed the establishment of the WTO. The EU has not amended the measures that were scaled back and no new welfare-based trade restrictions have been proposed.

Key officials have, at times, downplayed the significance of *EC – Seal Products*. In 2015, in the context of a debate concerning trade restrictions of horse blood products to alleviate animal suffering, Commissioner Vytenis Andriukaitis stated that the 'EU cannot impose its animal welfare standards on third countries due to very stringent requirements under WTO law'.¹⁴³ His statement indicates a lack of understanding of the legal issues at hand. *EC – Seal Products* confirms that the EU can restrict trade to protect the public morality of its own citizens. It can use unilateral measures, such as the seals regime, to protect the welfare of

¹⁴⁰ I. Offor & J. Walter, 'GATT Article XX(a) Permits Otherwise Trade-Restrictive Animal Welfare Measures' (2017) 12(4) *Global Trade and Customs Journal*, pp. 158-66.

¹⁴¹ For foreshadowing, see Cook and Bowles, n. 149 above, p. 228.

¹⁴² Howse, Langille & Sykes, n. 148 above, p. 113.

¹⁴³ Letter from Commissioner Vytenis Andriukaitis to Reineke Hameleers, Director at Eurogroup for Animals (8 December 2015).

animals both domestically and abroad in the pursuit of this objective. This does not amount to the imposition of standards on third countries. Of course, one cannot assume the outcome of *EC – Seal Products* would be replicable in disputes regarding other animal products. However, the EU has shown no ambition to explore what the outcome of this case might mean for other trade restrictions aimed at protecting public morality related to animal welfare.

A recent European Commission report on the impact of the EU’s animal welfare international activities on the competitiveness of European livestock production highlights the limited role the EU envisages for trade policy in tackling animal welfare goals. It also highlights a focus on bilateral trade policy as opposed to unilateral or multilateral mechanisms.¹⁴⁴ The limited role for trade policy is further evidenced by the neglect of trade policy demonstrated in the early work of the EU’s new Animal Welfare Platform.¹⁴⁵ The EU has, in fact, inspired some improvements to animal welfare regulation through its bilateral trade policy, such as with the EU-Chile Free Trade Agreement.¹⁴⁶ However, the EU has demonstrated that it is not updating its policy regarding trade and animal welfare in the light of *EC – Seal Products*.

Discussion of the Chilling Effect

Trade, linked to the establishment of the WTO, has had a chilling effect on the EU’s animal welfare legislation. This impact has persisted despite the *EC – Seal Products* dispute which provided regulatory autonomy for WTO members to restrict trade in order to protect animal welfare. Thus, arguably the EU continues to prioritize trade over animal welfare objectives

¹⁴⁴ European Commission, ‘Report from the Commission to the European Parliament and the Council on the impact of animal welfare international activities on the competitiveness of European livestock producers in a globalized world’, COM(2018)42 final, 26 Jan. 2018, available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52018DC0042>, p. 4.

¹⁴⁵ Commission Decision establishing the Commission Expert Group “Platform on Animal Welfare” [2017] OJ C 31. Meeting documents available at :https://ec.europa.eu/food/animals/welfare/eu-platform-animal-welfare/meetings_en.

¹⁴⁶ Cabanne, n. 78 above.

without the excuse of WTO restrictions and without sustained attention and criticism in academic circles.

The sporadic nature of the EU's legislation on animal welfare and trade could be attributed to the subjective nature of legislating on moral issues and the moral schizophrenia common in moral attitudes towards different species of animal.¹⁴⁷ It could also point to a problematic balancing of political priorities and legal objectives. Indeed, the persistence of the chilling effect supports arguments that the WTO has been used as a scapegoat to mask low political will for strong animal welfare protection in the EU.¹⁴⁸

4. PATERNALISTIC TRADE LAW AND POLICY AS ILL-SUITED PRIMARY DRIVERS OF GLOBAL GOVERNANCE FOR ANIMALS

Attempted reconciliations of trade and animal welfare have had a limited impact on the lives and wellbeing of animals. While this partly owes to the chilling effect of the WTO, this policy failure has persisted despite the favourable ruling in *EC – Seal Products*. Thus, trade policy is a poor domain in which to pursue the legal protection of animals.

Traditionally, animal law researchers were alert to the dangers posed to animals by trade policy, particularly the WTO.¹⁴⁹ However, as the WTO has proven itself capable of incorporating animal interests into dispute settlement proceedings, researchers have grown complacent. Most commentators avoid dwelling on the fact that, despite the favourable ruling

¹⁴⁷ Howse, Langille & Sykes, n. 148 above, p. 114-5; and G. Francione, *Animals as Persons* (Columbia University Press, 2008), p. 150.

¹⁴⁸ E.g. Fitzgerald, 'Morality may not be Enough', n. 74 above, p. 102.

¹⁴⁹ E.g. P. Fitzgerald, *International Issues in Animal Law: The Impact of International Environmental and Economic Law upon Animal Interests and Advocacy* (Carolina Academic Press, 2012), p. 172; Grethe, n. 81 above, p. 318; and Stevenson, n. 82 above, pp. 107-42.

set out in *EC – Seal Products*, trade policy continues to take precedence over animal protection.¹⁵⁰

EC – Seal Products has been hailed as a great success for animals.¹⁵¹ Thomas Kelch and Lurie and Kalinina have argued the case provides members with a solid footing on which to protect animal welfare.¹⁵² Charlotte Blattner, while noting the limitations of the WTO as a forum for animal protection, argues that the WTO has progressed the international conversation on animal welfare more than any ‘global animal treaty law’.¹⁵³ Katie Sykes argues that developments in trade law have the ‘potential to materially improve the level of effective legal protection for animals around the world’.¹⁵⁴

These points are well made. For example, the present author shares Katie Sykes’ view that the WTO has become an important context for the development of animal protection norms.¹⁵⁵ However, a strong critique ought to be launched against situating the development of animal norms within trade policy contexts so as to transcend the liberal conception of animal protection which goes no further than forbidding ‘unnecessary’ suffering. This liberal conception diverts attention from the harm that continues to be caused by animal trade. It is reasonable for animal welfare NGOs to seek to influence trade policy within the existing structures of EU policy as restricted by WTO law.¹⁵⁶ However, the academic literature should provide more critical thought. While trade law and policy have been the primary drivers of a global discussion regarding animal welfare, they are inappropriate drivers for the following reasons.

¹⁵⁰ *EC – Seal Products*, n. 68 above, pp. 26-7.

¹⁵¹ Howse, Langille & Sykes, n. 148 above, p. 113.

¹⁵² T.G. Kelch, *Globalization and Animal Law: Comparative Law, International Law and International Trade*, 2nd edn. (Kluwer Law International ed, 2017), p. 265; and Lurie & Kalinina, n. 5 above.

¹⁵³ C. Blattner, ‘An Assessment of Recent Trade Law Developments from an Animal Law Perspective: Trade Law as the Sheep in Wolf’s Clothing’ (2016) 22(2) *Animal Law*, pp. 277-310, at 289 & 299.

¹⁵⁴ Sykes, ‘Globalisation’, n. 80 above, p. 57.

¹⁵⁵ *Ibid.*

¹⁵⁶ E.g. Eurogroup for Animals, n. 111 above.

Firstly, it is not positive for the long-term advancement of animal welfare that the WTO anchors animal protection to the fickle and geographically variable concept of public morality. Also, relying on dispute settlement for progress is problematic because it depends upon WTO members deciding which disputes to raise. Thus, *EC – Seal Products* could improve wild seal welfare but there is silence regarding trade that facilitates more long-lasting harms, such as unregulated imports of battery caged eggs.

Secondly, regulating trade of animals and their products presupposes and reinforces a cultural understanding of animals as property.¹⁵⁷ Trade policy fails to recognize the special status of animals afforded by other legal regimes. For example, the product classification systems relied upon by trade policy categorize animal products according to their use by humans.¹⁵⁸ Trade in animals and animal products is also frequently measured by monetary value or by weight, not by headcount.¹⁵⁹ These practices brutalize and objectify animals, encouraging a self-reinforcing culture of disregard for animal interests. Thus, trade law is more primitive than animal welfare laws which afford animals a *sui generis* legal status:¹⁶⁰ they are owned like property but they are also afforded certain special protections.¹⁶¹

Trade law and policy have disproportionately impacted the normative underpinnings of global governance for animals or “global animal law”. This is both due to the force of trade law and the absence of animal-centric global law. Global animal law is in very early development. Animal law has taken hold in most domestic jurisdictions.¹⁶² However, there is no international treaty on animal welfare and efforts to enact a Universal Declaration on Animal Welfare at the UN have not met with success.¹⁶³ The closest thing to an animal law

¹⁵⁷ For consequences, see G.L. Francione, *Animals, Property and the Law* (Temple University Press, 1995).

¹⁵⁸ The Harmonized System, n. 117 above.

¹⁵⁹ *Ibid.*

¹⁶⁰ E.g. Animal Welfare Act 2006 c 45 (United Kingdom), s. 4.

¹⁶¹ M. Bowman, P. Davies & C. Redgwell (eds), *Lyster’s International Wildlife Law*, 2nd edn. (Cambridge University Press, 2010), pp. 673-6.

¹⁶² *Ibid.*

¹⁶³ For support, though nothing has been enacted or seriously contemplated at the UN, see M. Gibson, ‘The Universal Declaration of Animal Welfare’ (2011) 16(2) *Deakin Law Review*, pp. 539-67.

treaty is soft law in the form of non-binding animal welfare standards in the World Organization for Animal Health's terrestrial animal health code.¹⁶⁴

Despite its underdevelopment, global animal law *is* emerging, at least as an academic discourse. There is now a global animal law section at the Max Planck Institute,¹⁶⁵ a Global Animal Law Project,¹⁶⁶ two published symposiums on global animal law,¹⁶⁷ and a conference series.¹⁶⁸ This academic discourse must build its own voice and worldview, distinct from the trade linkage debate. Otherwise, the pre-eminence of trade law is likely to result in a balancing of interests that weighs in favour of a liberal conception of free trade.

WTO law has attained a degree of legal enforceability that is unmatched by most other issues of global governance.¹⁶⁹ Thus, it is not negative, *per se*, that animal welfare should find a place within the WTO.¹⁷⁰ However, it is detrimental that the most influential pronouncements on animal welfare at the global level have emanated from trade officials using trade-centric language in pursuit of economic objectives. There is no expertise on issues of animal welfare at the WTO.¹⁷¹ Thus, the WTO legal structure should be rejected as the absolute limit and framework for research on trade and animal welfare.¹⁷² Instead, the WTO system should be examined for 'evidence of its larger effects' in order to inspire reform.¹⁷³ This requires transplanting trade and animal welfare research into the global animal law academic space.

The pre-eminence of trade law and the linkage debate partly explains why empirical research on the impacts of trade on animals has not been forthcoming. Growing complacency

¹⁶⁴ E.g., OIE, n. 56 above, s. 7.

¹⁶⁵ Information available at: <http://www.mpil.de/en/pub/research/areas/public-international-law/global-animal-law.cfm>.

¹⁶⁶ Information available at: <https://www.globalanimallaw.org>.

¹⁶⁷ 'Symposium: Global Animal Law' (2016) 5(1) *Transnational Environmental Law*; and 'Symposium on Global Animal Law' (2017) 111 *American Journal of International Law Unbound*.

¹⁶⁸ Information available at: <https://law.lclark.edu/live/events/283980-global-animal-law-conference-iii>.

¹⁶⁹ S. Dillon, 'A Farewell to Linkage: International Trade Law and Global Sustainability Indicators' (2002) 55(1) *Rutgers Law Review*, pp. 87-154, at 94.

¹⁷⁰ Sykes, 'Globalisation', n. 80 above.

¹⁷¹ Howse & Langille, n. 4 above, p. 372.

¹⁷² Dillon, n. 181 above, p. 91-2.

¹⁷³ *Ibid*, p. 97.

amongst animal liberators regarding trade law has slowed the output of critical research. Further, the pre-eminence of trade policy and its negligible treatment of animal welfare has made empirical research on trade and animal welfare particularly difficult. Thus, future research on trade and animal welfare ought to be conducted within a research tradition separate from the linkage debate.

Situating such research within the global animal law discourse permits critical commentary on the treatment of animals as property and of the WTO as a governor of animal interests. It allows for a more animal-centric perspective. This perspective leads to a critical conception of free trade – a conception which includes trade impact concerns – and the rejection of the centrality of economic stakeholders’ objectives.

5. CONCLUSION

The precise, empirical impact of European trade policy on animal welfare protection remains elusive. Imports of animal products clearly continue and they are not conditioned on meeting EU welfare standards. Trade data hides whether these imports include low welfare products, though it seems very likely. Investigating low animal welfare havens raises the same issues, creating a vulnerability of over-reliance on particular cases, such as Ukrainian egg exports. This case provides potential evidence of a negative impact of trade and clear evidence of a prioritization of trade policy over animal welfare objectives. With regard to the chilling effect, WTO-wariness clearly persists amongst key officials within the European Commission and the resulting impact on regulation is observable. This conclusion paves the way for further research into policymaking at the European institutions regarding trade and animal welfare.

The conclusions of this article make the case for further critical research into the empirical impact of trade on animal welfare. Clearly trade policy is prioritized over animal

welfare. However, quantifying impact is made impossible by the ignorance to animal harm displayed by the trade sphere. This leads to the conclusion that research on the trade and animal welfare interface alternatively must be situated amongst emerging research on global animal law.

The conception of free trade adopted by the linkage debate, which reinforces unhelpful dichotomies, is obstructive to progress toward better treatment of animals. Trade law is restricted because animals' property status is deep-rooted within its infrastructure. Conversely, global animal law could centre upon animal interests and so has the potential to elevate beyond viewing animals' property status as an inevitability.

To conclude, if animals are to be protected effectively, we must begin debating the trade and animal welfare interface within the context of global animal law, maintaining a radical openness of mind at every step.