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The Intersection of Animal Welfare with International Trade Law

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ABSTRACT

Can animal welfare be prioritized over trade? This paper explores the relationship between animal rights and international trade law, and the challenges and opportunities that arise when these two areas intersect. Global animal treaty law focuses on preserving animal populations but neglects their treatment and adaptation to their environment. Animal welfare regulations are seen as domestic issues, limiting cross-border dialogue, and hindering efforts to regulate animal treatment in international trade. Animals are also treated as commodities, making it difficult to regulate their treatment without impeding trade. The paper argues for a balance between free trade and animal welfare standards, with stronger regulations and enforcement mechanisms to ensure animal welfare is considered in international trade. Despite limitations, trade law has the potential to drive changes in global animal treaty law by prioritizing animal needs and injustices. The paper concludes that although the WTO is not ideal for advancing animal interests, trade law has the potential to encourage more extensive transformations in global animal treaty law by centering attention on animals, their needs, and the injustices they face without legal protections.

Keywords: Animal welfare, WTO, International trade law.

I. INTRODUCTION

Since 1995, when protesters dressed as endangered sea turtles at the Seattle WTO protests, animal welfare has been linked to international trade governance. Animals conservation and morality were often confused with threats to species conservation and overshadowed in trade and environmental debates but the landmark WTO *EC – Seal Products* decision² confirmed that animal welfare, a moral issue which is distinguishable from animal species conservation, is an important issue in international trade discourse. The WTO upheld the EU's right to ban seal skins and other cruel seal hunting products in EC seal Products case. It first recognized animal welfare as a moral issue and a serious policy goal that can justify trade bans.³ The WTO

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² Sykes, K., 2019. Global Animal Law and International Trade Law after EC-Seal Products: An Interactional Analysis.

³ Ibid.

arbitration panel that initially decided the case made the most important animal welfare statement in international jurisprudence. The panel called animal welfare “an ethical responsibility for humans in general” and “a globally recognized issue.”⁴ The point is not that animal welfare is a major concern for WTO, but the argument is that WTO has turned out to become the foundation for development of global animal law. There is embryonic presence of animal welfare under trade law and WTO has both positive and negative impact which we will analyze in the following subsections.

II. A BARRIER TO FREE TRADE- ANIMAL WELFARE

International trade law has been criticized for hindering the development of a Global Animal Law, as animal welfare is often viewed as a barrier to trade⁵. Even though many visible trade barriers have been eliminated, regulatory inconsistencies regarding animal treatment, transportation, and social interaction are still considered obstacles to free trade⁶. This creates an antagonistic relationship between animal law and trade law as trade agreements aim to increase the trade of animal products and other goods that affect animals and their habitats.

Recently, some free trade agreements have included provisions related to wildlife conservation and animal welfare⁷. However, these provisions can vary greatly in terms of their extent and effectiveness. Some argue that they are often weak, non-binding, or difficult to enforce, and may not have a practical impact on animal welfare standards⁸. This is because trade law prioritizes economic interests over animal welfare concerns, and policies aimed at improving animal welfare may be seen as undesirable trade barriers.

Trade law emphasizes that animals are commodities and goods⁹ and that any measure to promote animal welfare is an unwanted trade barrier. Therefore, while there have been efforts to mitigate the negative effects of trade on animal welfare, the practical implementation of these measures remains a challenge.

⁴ Ibid,

⁵ Fitzgerald I, P.L., 2011. “Morality” may not be enough to justify the eu seal products ban: animal welfare meets international trade law. *Journal of International Wildlife Law & Policy*, 14(2), pp.85-136.

⁶ Ibid.

⁷ Blandford, D., Bureau, J.C., Fulponi, L. and Henson, S., 2002. Potential implications of animal welfare concerns and public policies in industrialized countries for international trade. *Global food trade and consumer demand for quality*, pp.77-99.

⁸ Stevenson, P., 2002. The World Trade Organisation rules: a legal analysis of their adverse impact on animal welfare. *Animal L.*, 8, p.107.

⁹ Ibid.

III. GATT AND BRINGING ANIMAL WELFARE ON THE TRADE TABLE

The first trade dispute in this context was the GATT tuna-dolphin case (1991),¹⁰ which is possibly the most well-known of all GATT rulings. It is crucial to note that the GATT parties did not embrace the conclusions of the GATT panel, and much of its legal analysis is still debatable today.

Mexico said that the United States had adopted discriminatory measures and import restrictions in violation of GATT. The panel concurred with Mexico that U.S. law was incompatible with GATT. The argument was that U.S. fishing regulations governed the “*way tuna was caught, but not variances in the product themselves*”. This showed that regulating how something was produced was more difficult to justify under GATT and it left a long shadow over issues about trade and the environment, as well as debates regarding trade and animal welfare.

Efforts by the United States to protect dolphins and sea turtles have been found to clash with GATT regulations. Due to concerns about GATT restrictions, the EU has mostly abandoned its bans on furs from countries that use leghold traps and cosmetics tested on animals¹¹. This has created a significant barrier to adopting animal welfare-improving measures, as GATT regulations often prevent the establishment of higher welfare requirements.

For instance, if the EU is unable to prevent its farmers from being undercut by imports of cheap eggs from battery cages, it may choose not to proceed with its own cage ban. Under GATT rules, a country can ban a cruel rearing system on its own territory, but it cannot necessarily ban the import of meat or eggs from animals reared in that system in other countries. This creates a powerful disincentive for the country to proceed with a ban on that system on its own territory.

Thus, it is necessary to rewrite or reinterpret GATT rules to ensure that advancements in animal protection and other ethical issues are not impeded by trade liberalization laws. Moreover, current trade liberalization laws subordinate other important public policy concerns, such as the environment, basic labor standards, animal welfare, and the needs of developing nations. This is unreasonable and unacceptable. Therefore, the GATT must be amended to strike a suitable balance between free trade and other reasonable concerns, such as animal welfare.

IV. ARTICLE XX (A) AND ANIMAL WELFARE

Article XX of the GATT permits differentiation against comparable or like products, with

¹⁰ United States - Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (adopted 6 November 1998).

¹¹ Sykes, K., 2014. Sealing animal welfare into the GATT exceptions: The international dimension of animal welfare in WTO disputes. *World Trade Review*, 13(3), pp.471-498.

exceptions for the preservation of "public morality" (Article XX(a)) and "human, animal, or plant life or health" (Article XX(b)). In the EC-Seal case, the Appellate Body upheld the Panel's determination that a WTO Member could enforce "animal welfare-related trade restrictions" to safeguard public morality under Article XX(a)¹². However, in the Shrimp Turtle case¹³, the Appellate Body heightened the burden of proof for parties invoking Article XX(a) to demonstrate that the measure safeguards "morals" rather than solely "animals."

For example, a prohibition on the trade of seals hunted in another member's jurisdiction is invalid, but safeguarding the ethical concerns of the public to whom seal items have been imported is appropriate.

In the US Gambling Case¹⁴, the Panel opined that members should be allowed to establish their own definitions of "public morals" and "public order." Similarly, in the US-Gasoline case¹⁵, the Appellate Body concluded that the WTO Agreements should not be seen in isolation from public international law, and that the scope of Article XX(a) is a matter of international law.

V. THE BRIGHT SIDE OF ANIMAL WELFARE UNDER WTO

Although the World Trade Organization (WTO) lacks a specific mandate to regulate animal welfare, its agreements provide some guidance on the treatment of animals in international trade.

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the Technical Barriers to Trade (TBT) Agreement allow WTO members to implement measures to protect animal health and prevent the spread of animal diseases, but these measures must be based on scientific evidence and not used as disguised trade barriers. However, there have been challenges in reconciling animal welfare concerns with international trade law, with disputes arising over the interpretation of the SPS and TBT Agreements particularly when it comes to the use of non-science-based measures to protect animal welfare¹⁶.

The Trans Pacific Partnership (TPP)¹⁷ is a new trade agreement that addresses a broader spectrum of *linked trading challenges* than previous treaties, but, the impact of its Environment

¹² Nachmani, T.S., 2013. To Each His Own: The Case for Unilateral Determination of Public Morality under Article XX (a) of the GATT. *U. Toronto Fac. L. Rev.*, 71, p.31.

¹³ United States – Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report, WTO Doc. WT/DS58/AB/R, 12 Oct. 1998 (US – Shrimp).

¹⁴ Ortino, F., 2006. Treaty interpretation and the WTO Appellate Body Report in US–Gambling: a critique. *Journal of International Economic Law*, 9(1), pp.117-148.

¹⁵ Ibid.

¹⁶ Blattner, C., 2015. An Assessment of Recent Trade Law Developments from an Animal Law Perspective: Trade Law as the Sheep in Wolf's Clothing. *Animal L.*, 22, p.277.

¹⁷ Ibid.

Chapter on animal protection and wildlife trafficking still unknown. However, environmental objectives in new trade treaties demonstrate the potential for trade-linked agreements to combine trade law enforcement with animal protection and welfare criteria. Julian Assange called Wikileaks' 2014 Environment Chapter draft a "toothless public relations exercise."¹⁸

The environmental community's efforts to raise awareness of trade and environmental protection led to environmental objectives in new trade treaties. The TPP Environment Chapter shows how those efforts began with strong criticism (as in Seattle (US) in 1999 and earlier anti-trade activity) and evolved to include conversation and partnership. This story suggests animal welfare¹⁹.

The TPP Environment Chapter may indirectly support animal welfare through CITES²⁰, which includes substantial animal welfare standards that could form the basis for a complaint through the dispute resolution system if a party fails to implement and enforce them.

A future trade agreement with a chapter on animal welfare could commit parties to minimum farmed animal welfare standards, potentially using criteria from organizations such as the OIE, FAO, or EU as a foundation. This could result in an increase in animal welfare. The WTO's settlement bodies could help establish global animal treaty law, even if it is not explicitly authorized to do so. Animal-related trade regulations have the potential to shift global animal treaty law from species preservation to sentient individual protection and from anthropocentrism to sentientism²¹.

VI. INDIA, TRADE AND ANIMAL WELFARE

India is a signatory to CITES²² which regulates the trade and possession of wildlife and wildlife products. India has faced several legal challenges related to its animal welfare and environmental regulations in the context of international trade. These challenges have come from other countries and organizations who argue that India's regulations unfairly restrict international trade.

India's ban on the import of foie gras, a controversial French delicacy made from the liver of force-fed ducks. In 2015, the European Union challenged this ban at the World Trade Organization (WTO), arguing that it violated international trade rules²³. The EU claimed that

¹⁸ Offor, I., 2020. Animals and the Impact of Trade Law and Policy: A Global Animal Law Question. *Transnational Environmental Law*, 9(2), pp.239-262.

¹⁹ Supra note 1.

²⁰ Ibid.

²¹ Ibid.

²² Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973)

²³ Retnam, L., Chatikavanij, P., Kunjara, P., Paramastri, Y.A., Goh, Y.M., Hussein, F.N., Mutalib, A.R. and

the ban was not based on scientific evidence and was therefore an unfair trade barrier. India defended its ban, arguing that it was justified on ethical and animal welfare grounds. In 2017, the WTO ruled in India's favor, stating that the ban was justified under international law. The ruling was seen as a victory for animal welfare advocates and for countries that want to regulate imports based on ethical and environmental concerns.

India also faced a challenge from the United States over its restrictions on imports of poultry meat due to concerns over avian influenza.²⁴ In 2012, the US filed a complaint with the WTO, arguing that India's restrictions were not based on scientific evidence and were therefore an unfair trade barrier. India defended its restrictions, arguing that they were important to protect public health and prevent the spread of avian influenza. In 2014, the WTO ruled in India's favor, stating that the restrictions were justified under international law. These legal challenges highlight the tension between trade liberalization and environmental and animal welfare concerns and countries like India must balance their obligations under international trade law with their commitment to environmental and animal welfare.

VII. CONCLUSION

In conclusion, the intersection of animal welfare and international trade law is a complex issue that requires careful consideration and balancing of competing interests. On the one hand, animal welfare advocates argue that trade agreements should include provisions that protect animal welfare and prevent the trade of products that have been produced in ways that are cruel or inhumane to animals. On the other hand, trade agreements seek to promote free trade and protect the interests of producers and exporters. To resolve this issue, it is important for policymakers and stakeholders to engage in open and transparent dialogue and consider the scientific evidence on the impact of trade on animal welfare. They should also consider the ethical and moral dimensions of animal welfare and ensure that any trade agreements or policies are consistent with these values. Ultimately, the goal should be to promote trade that is both economically and socially sustainable, while also ensuring that animal welfare is protected and respected. This requires a careful balance between economic interests and ethical considerations, and will require ongoing collaboration between policymakers, industry stakeholders, and animal welfare advocates.

Poosala, S., 2017. Laws, regulations, guidelines and standards for animal care and use for scientific purposes in the countries of Singapore, Thailand, Indonesia, Malaysia, and India. *ILAR journal*, 57(3), pp.312-323.

²⁴ Ibid.