

MASTER THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

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Anna Korkman

ADVANCING LEGAL ANIMAL RIGHTS IN INTERNATIONAL LIVE  
TRANSPORT

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Supervisors: Elina Pirjatanniemi, Birgitta Wahlberg

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Author: Anna Korkman

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Supervisors: Elina Pirjatanniemi, Birgitta Wahlberg

**Abstract:**

International trade of farm animals constitutes an essential part of the food- and animal production industry today in the European Union (EU) and globally. The industry is characterised by transboundary value chains, involving the transport of millions of live farm animals to other countries annually to be bred, fattened, and slaughtered. International transport of live animals represents a major animal welfare concern as the farm animals are frequently exposed to conditions causing suffering, pain and sometimes death. The international law protecting traded farm animals' wellbeing is fragmented and unclear. Current animal protection laws are increasingly criticised for being unable to protect animals' wellbeing efficiently. Consequently, an active scholarly debate prevails in the legal field of animal law around the need for new legal approaches to enhance the protection of animals in legal systems.

Against this background, this present thesis aims to analyse the rules pertaining to international transport of live animals between the EU and third countries through a lens of animal law. In the legal field of animal law, a *zoocentric* perspective is applied as opposed to the traditional *anthropocentric* perspective on laws relating to animals to analyse how legal systems could protect animals most effectively from harmful treatment. The thesis intends to explore modern theories of legal animal rights and animal subjectivity as an alternative to current legal protection. Thus, by focusing on the concrete example of international live animal transport, two research questions are analysed from a zoocentric perspective; how is European farm animals' welfare currently protected in international live transport and how could legal animal rights protect internationally traded and transported farm animals from harmful human impact?

The thesis shows how EU- and international law justifies and maintains systems detrimental to farm animals' wellbeing. While the available legal provisions protect some aspects of individual animals' welfare, harmful treatment of farm animals remains permitted under current laws. In addition, the thesis shows that a main obstacle for improving farm animal protection in international transport is that farm animals, under the current legal paradigm, are considered as legal objects in law. A coherent legal recognition of animals as living, sentient beings with legal animal rights is missing. Thus, this thesis argues that a legal paradigm shift is needed to enable the most efficient protection of farm animals in international trade and transport. It would imply ascribing animals with legal rights, which is conceptually possible. The analysis further shows that if animals would hold fundamental rights, it would necessitate a systemic change in the trade and transport of live farm animals.

Key words: international trade law, animal welfare, animal rights, fundamental animal rights, animal subjectivity, animal law, international live animal transport

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# 1. Introduction

## 1.1 Background

Trade, transports, and consumption of animal products has increased dramatically over the recent decades and the trend does not show any signs of stopping.<sup>1</sup> The animal production industry that stands at the centre of the global food production system today is characterized by the centralization of animal production facilities, specialization and outsourcing of food production systems.<sup>2</sup> As a consequence of the global intensification of animal production, millions of live farm animals including chicken, pigs, cattle, sheep and goats<sup>3</sup> are continuously traded and transported between EU and non-EU states to the international market, to be slaughtered, bred and fattened. Available data indicates that 229,182,495 farm animals were transported alive from the EU to non-EU states in 2019.<sup>4</sup> For example, young and unweaned animals, such as calves and lambs are often first exported to be fattened in certain EU countries and subsequently transported to third countries to be slaughtered.<sup>5</sup> The EU represents one of the world's largest exporters, standing for up to 80 per cent of the global trade in live animals, according to estimations.<sup>6</sup> Moreover, the number of exported farm animals has increased over the past decades.<sup>7</sup>

Numerous investigations have shown that the animals' welfare<sup>8</sup> is often being harmed during live transports, especially when animals are transported on long journeys to third

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<sup>1</sup> Food and Agricultural organization of the United Nations (hereafter FAO) report 2022, pp.149.

<sup>2</sup> Bachelard 2022, pp. 16.

<sup>3</sup> The food production industry relies principally on the consumption of these five animal species. FAO 2022 pp. 267.

<sup>4</sup> The export of poultry constituted 98 percent of the total export. Among the main trading partners in live animals for the EU at that time, Ukraine, Belorussia, Ghana, Egypt, Morocco and Albania.

Eurogroup for Animals, "Live animal transport: time to change the rules. White paper on the revision of Council Regulation (EC) 1/2005" 2021, pp. 8.

<sup>5</sup> Four Paws, Position Paper "Solution concepts for dairy farms in order to end the transport of unweaned calves" 2022 pp. 3-5.

<sup>6</sup> Eurogroup for Animals 2021, pp. 8.

<sup>7</sup> *Ibid.* See also: In-depth analysis – 'Patterns of livestock transport in the EU and to third countries', European Parliament, Directorate-General for Internal Policies, Policy Department B – Structural and Cohesion Policies 2021, pp. 25.

<sup>8</sup> Animal welfare is a concept used to describe "the physical and mental state of an animal in relation to the conditions in which it lives and dies", according to the World Organisation for Animal Health (WOAH). A good state of animal welfare implies *inter alia* that an animal is in good health, comfort, nourished, experiences a sense of safety and can express innate behaviour in its living conditions, according to the present scientific understanding. See the WOAH's Terrestrial Animal Health Code, 2021, Accessed 20.1.2022 at: [https://www.oie.int/en/what-we-do/standards/codes-and-manuals/terrestrial-code-online-access/?id=169&L=1&htmlfile=chapitre\\_aw\\_introduction.htm](https://www.oie.int/en/what-we-do/standards/codes-and-manuals/terrestrial-code-online-access/?id=169&L=1&htmlfile=chapitre_aw_introduction.htm) article 7.1.1.

countries.<sup>9</sup> In transports headed for countries beyond European borders, animals are transported thousands of kilometers and for many hours in overcrowded vehicles that often lack sufficient space, bedding, ventilation systems as well as appropriate water- and food supply to meet the welfare needs of the animals.<sup>10</sup> During the loading and unloading to transport vehicles, the risk of animals being injured is especially high<sup>11</sup> and the risk for animal borne diseases on board transports is increased when animals are transported in cramped conditions during long journeys.<sup>12</sup> Several inspections have also revealed that animals frequently are exposed to high or low temperatures during transports, that cause the animals severe distress and physical and physiological suffering.<sup>13</sup> Furthermore, the longer a journey goes on, the more aggravated the animal welfare problems connected with the live transports become.<sup>14</sup> Every year, many farm animals die *en route* due to the poor transport conditions that fail to fulfil the welfare needs of the animals.<sup>15</sup>

The issues pertaining to the welfare protection of farm animals transported within the EU and to third countries represents a topic of considerable societal interest within the EU. Surveys have demonstrated that citizens of the EU view animal welfare protection as an important issue<sup>16</sup> and the European public has expressed concern regarding the practice of animal live transports explicitly.<sup>17</sup> Recently, the animal welfare problems pertaining to the international live transports of animals have also been raised and investigated by the European Parliament.<sup>18</sup>

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<sup>9</sup> Eurogroup for Animals 2021, pp. 16-17.

<sup>10</sup> *Ibid.*, pp. 14-17.

<sup>11</sup> *Ibid.*, pp. 16-17.

<sup>12</sup> *Ibid.*

<sup>13</sup> See article by Deutsche Welle "EU parliament restricts live animal transports" available at <https://www.dw.com/en/eu-parliament-restricts-live-animal-transports/a-60488383>, accessed 12.12.2022.

<sup>14</sup> The Scientific Committee on Animals Health and Animal Welfare 2002.

<sup>15</sup> Four Paws, "Position paper: Transport via Road or Ship" 2022 pp. 2.

<sup>16</sup> Special Eurobarometer 442 2016. According to a Eurobarometer survey conducted in 2016, 94% of Europeans view the protection of farmed animals as an important issue.

<sup>17</sup> See for example the EU campaign by the Eurogroup of animals "no Animal left behind", closed 4 October 2021 and collected 198,245 signatures: <https://www.eurogroupforanimals.org/campaigns/no-animal-left-behind>, accessed 31.1.2022.

<sup>18</sup> See an "investigation of alleged contraventions and maladministration in the application of Union law in relation to the protection of animals during transport within and outside the Union" January 2022. Available at: <https://www.europarl.europa.eu/news/en/press-room/20220114IPR21025/animals-must-be-better-protected-during-transport> and [https://www.europarl.europa.eu/doceo/document/B-9-2022-0057\\_EN.html](https://www.europarl.europa.eu/doceo/document/B-9-2022-0057_EN.html). Accessed: 31.1.2022.

Moreover, scholarship in animal law<sup>19</sup> increasingly suggests that current legal protection conferred to farm animals used for production purposes is incapable of protecting animals' wellbeing successfully. During recent decades, scholars of animal law, have therefore begun examining animal protection laws from a *zoocentric perspective* (animal centered)<sup>20</sup> instead of from the conventional *anthropocentric perspective* (human centered) to assess how laws could be enhanced in respect of protecting farm animals' wellbeing. Consequently, animal law scholars suggest that more transformative legal approaches in animal protection law are required to protect animals' welfare needs efficiently. Conceptual theories of legal animal rights and animal subjectivity have emerged during recent years and animal law scholars argue that laws could view and relate to farm animals as something else than property and goods that can be sold on the market.<sup>21</sup>

Therefore, given the numerous reported animal welfare issues pertaining to the industry it appears crucial to analyze how international law relates to farm animals during different stages of production and explore the scholarly debate in animal law. Besides the animal welfare issues connected with the animal industry, the current intensive animal production system is also today one of the main sources of greenhouse gases,<sup>22</sup> environmental degradation and global diseases.<sup>23</sup> Thus, to examine how farm animals are viewed and protected in law is also useful at a time when the world is searching for alternative sustainable alternatives to our present ways of living and for moving beyond "business as usual" in food systems currently driven by the intensive animal production.<sup>24</sup>

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<sup>19</sup> This thesis uses the following definition of animal law by Pamela Frasch "Animal Law is that field of study, scholarship, practice, and advocacy in which serving the best interests of nonhuman animal through the legal system is the primary goal." During the past 30 years, the academic field of animal studies and scholarship have steadily increased and "animal law" has developed into a field of law. Cao, White 2016, pp. 6, 14.

<sup>20</sup> More on the zoocentric perspective in Wahlberg 2020, pp. 19.

<sup>21</sup> Offor 2020, pp. 239-240.

<sup>22</sup> FAO 2022, pp. 110, 238.

<sup>23</sup> *Ibid.*, pp. 289-290.

<sup>24</sup> FAO 2022, pp. 2.

## 1.2 Research question and structure

In the light of the above, this thesis intends to study the fragmented legal framework purporting to international animal welfare protection by focusing on international live transport of animals, through a lens of animal law. Two central questions underpin the thesis, namely, how is European farm animals' welfare currently protected in international live transport and how could legal animal rights protect internationally traded and transported farm animals from harmful human impact? Due to a lack of recognition of animal welfare in international instruments, the interrelation between international trade and animal welfare remains a topic largely unexplored in international law.<sup>25</sup> Nonetheless, laws concerning animals have also traditionally been studied from an anthropocentric perspective, not from the zoocentric perspective applied in animal law.<sup>26</sup>

The analysis is accordingly divided in two parts. First, the relevant legal provisions pertaining to farm animal protection in international law and EU law will be systematized and examined. By examining the available legislation, the thesis seeks to analyse how farm animal interests are valued and positioned in relation to other interests in international law<sup>27</sup>, and conclude what the current legislation implies from the animal perspective. The second part of the thesis proceeds to examine the critique of the current legal paradigm of animal welfare protection, referred to in this thesis as the *animal welfare paradigm*, that is characterized by viewing animals as legal objects, property, and commodities in law.<sup>28</sup> By drawing on the modern theories on legal animal rights and animal subjectivity, this part explores the notion of an *animal rights paradigm*.<sup>29</sup>

The thesis is structured as follows; the second chapter, following this introductory chapter, explains how farm animals generally are recognized and protected in international law. It focuses on international trade law, which is the branch of international law primarily concerned with traded and transported farm animals. Throughout chapter two several trade disputes are described to showcase how the WTO

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<sup>25</sup> Offor 2020, pp. 239-240. Albeit the topic is receiving more attention recently in animal law studies.

<sup>26</sup> Wahlberg 2020, pp. 20.

<sup>27</sup> Ceo, White 2016, pp. 87.

<sup>28</sup> More about the welfare paradigm in Francione and Garner 2010.

<sup>29</sup> Wahlberg, 2020, pp. 22-23.

generally has viewed animal protection in relation to other trade interests. The third chapter moves on to explaining the legal protection and legal status endowed to farm animals in international live transport in the European Union. The chapter reviews the scope and nature of the Regulation Council Regulation (EC) No 1/2005<sup>30</sup>, principal requirements, territorial scope, and the meaning of a long journey. To illustrate how the EU generally have approached animal protection in international live transport, the chapter explains several examples of legal cases relating to the topic, adjudicated by the European Court of Justice (ECJ).

The fourth chapter examines and analyses the literature in animal law, that increasingly criticize the current animal welfare paradigm of farm animal protection. In addition, the controversial aspects of the current animal welfare paradigm in respect of the purpose of protecting animals in international trade and transport is explained. Lastly, modern, and established theories of legal animal rights and animal subjectivity is examined, with the purpose of determining what a transition towards an animal rights paradigm in animal protection law would imply for the farm animals in live transport and for international trade. Finally, the fifth and final chapter presents the conclusions of the thesis.

### 1.3 Material and method

As a thesis combining international law and animal law, a zoocentric perspective is applied throughout the thesis, namely an animal perspective that is typically used in animal law studies. By applying the perspective in research, the intention is to find out how a legal system, in this case the international legal system, can serve the best interests of the animals concerned.<sup>31</sup>

The method applied in this thesis can thus be described as a critical and non-conventional in international law studies. Accordingly, drawing on the research methods typically used in animal law studies, the purpose of the thesis is to examine how the relevant legal systems and existing legal instruments relate to farm animals *de lege lata* as well as de

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<sup>30</sup> Council Regulation (EC) No 1/2005 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97, 22 December 2004.

<sup>31</sup> Based on the definition of animal law coined by Frasch 2019.



*lege ferenda*.<sup>32</sup> In addition, an examination of legal systems through a lens of animal law, implies a multijurisdictional and multidisciplinary method, where different fields of research and law are combined and explored including natural science and philosophy.<sup>33</sup>

Furthermore, for answering the first research question, namely, how the European animal welfare is protected in international live transport, a legal dogmatic method is applied on the relevant law. Among the legal sources of public international law studied in this thesis, international trade agreements of the World Trade Organization constitute the main source.<sup>34</sup> The analysis is mostly limited to the General Agreement on Tariffs and Trade, because the agreement has demonstrably been of most relevance in respect of animal welfare concerns in international trade. In addition, the relevant EU law relating to the international transport of farm animals is reviewed and analysed, as the focus is limited to animals transported alive between EU and non-EU states.

To support the analysis, secondary legal sources are also studied comprehensively, including the relevant case law of the WTO. Cases concerning animal protection that have been adjudicated on by the WTO's dispute settlement bodies are indisputably few, and it can be noted that they therefore have been examined quite extensively in scholarship before. Yet, they have not been examined extensively in the context of the research questions posed in this thesis and they are important to examine to gain an understanding of the prevailing view of farm animal protection in international law. EU jurisprudence is also referred to for answering the research questions as well as the international guidelines and soft law norms on animal welfare established by the World Organisation of Animal Health (WOAH), the leading international organisation on for animal health and welfare.<sup>35</sup> Accordingly, the available legal avenues concerning international protection of

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<sup>32</sup> Wahlberg 2020, pp. 20. *de lege ferenda* is defined as "being on the basis of new law" in the Merriam-Webster dictionary.

<sup>33</sup> *Ibid.*

<sup>34</sup> See the Statute of the International Court of Justice Article 38(1) stating the primary and secondary sources of public international law.

<sup>35</sup> The organization encompasses 182 members, including all the member states of the EU. The European Commission is an observer in the organization.

The World Organisation for Animal was previously known as OIE. See "who are we" on the WOAH's webpage, available at: <https://www.oie.int/en/who-we-are/>, accessed 7.2.2022.

farm animals' wellbeing is examined as well as the shortcomings of the current animal protection laws, as analysed from a zoocentric perspective.

The second part of the thesis focuses on the latest understandings and theories in animal law concerning animal subjectivity and legal personhood for animals. Theories of animal legal rights and rights-holding are also examined to find out how the ascription of animal legal rights could enhance the protection of farm animals' welfare needs in international transport and trade. While noting that academic writing in public international law typically excludes *de lege ferenda* arguments, animal law scholarship is characterized by including such "how the law should be", arguments.<sup>36</sup> Thus, as this thesis combines research methods used in animal law and international law, the analysis devotes a part of the analysis to *de lege ferenda* argumentation and consequently, takes the analysis one step further than simply stating conclusions about the current legal protection endowed to farm animals.

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<sup>36</sup> Wahlberg 2020, pp. 20.

## 2. International law and farm animals

### 2.1 Animals as tradable goods

Farm animals are perceived *prima facie* as commodities that may be traded on the globalized market under international law. As such, farm animals are essentially subjected to the technical and complex system of international trade law contained in the World Trade Organisation's treaties.<sup>37</sup> Currently, 164 states are members of the WTO and committed to the provisions included in the numerous trade agreements regulating their rights and obligations under international trade law, some of them related to the regulation of farm animals.<sup>38</sup> Moreover, the international legal framework concerning farm animal protection remains patchy and is primarily regarded as a domestic matter across the globe.<sup>39</sup>

Three trade agreements are, however, demonstrably of relevance for farm animals: the Agreement on the Application of Sanitary and Phytosanitary Measures (hereafter SPS-agreement)<sup>40</sup>, the Agreement on Technical Barriers to Trade (hereafter TBT Agreement)<sup>41</sup> and the GATT – agreement. The two former mention animal health, while the issue of animal protection as an environmental concern and animal welfare concern has been brought under the GATT. Animals are referred to as “animals” or “animal products” under WTO jurisdiction and generally subjected to the property rights held by natural and legal persons, such as companies or human persons.<sup>42</sup> Because farm animals are subjected to the laws pertinent to trade of “goods”, “they” are first and foremost regulated by the principles underpinning international trade of goods and products.<sup>43</sup>

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<sup>37</sup> Blattner 2019 pp. 83.

<sup>38</sup> WTO website: understanding the WTO: available at: [https://www.wto.org/english/thewto\\_e/whatis\\_e/who\\_we\\_are\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm), accessed 17.2.2021. The WTO preceded the international trade organization GATT and its agreements from 1947, established after World War II. The purpose of the organization is established as to “facilitate the implementation, administration, and operation as well as to further the objectives of the WTO Agreements.” WTO Agreement, article 3 (1).

<sup>39</sup> Peters 2016, pp. 1. Blattner 2019, pp. 2.

<sup>40</sup> Agreement on the Application of Sanitary and Phytosanitary Measures (SPS agreement) 1994. Gstöhl 2010 pp. 278.

<sup>41</sup> Agreement on Technical Barriers to Trade (TBT Agreement) 1995.

<sup>42</sup> Blattner 2019, pp. 85.

<sup>43</sup> The General Agreement on Tariffs and Trade 1994, the preamble.

Moreover, the principle of non-discrimination constitutes the foundation of international trade law, composed of the so called “most favoured nation obligation” and the “national treatment obligation” provided for in the General Agreement on Tariffs and Trade (hereafter GATT).<sup>44</sup> The GATT aims to minimize trade barriers and provide for a smooth international trade of goods. According to the “most favoured nation obligation”, enshrined in article I of the GATT, every member state must ensure “treatment no less favourable than to another” in respect of the member states it conducts trade with.<sup>45</sup> Member states are thus obliged to treat all trading partners equally, also in terms of imposing trade restrictive measures against other states such as tariffs, quotas or bans of certain products. The “national treatment obligation” is contained in article III of the GATT and requires state-imposed restrictions on imports to be no less favourable than those applied on similar, so called “like” products of domestic origin.<sup>46</sup> By according foreign and domestic goods equal treatment, the purpose is to prevent protectionism and ensure fair and equal competition between domestic and imported products.<sup>47</sup> While committed to expanding the world trade in goods and service, parties to the WTO agreement have simultaneously agreed to use the world’s resources optimally. In the preamble, parties recognise the objective of sustainable development and the preservation and protection of the environment in international trade.<sup>48</sup>

## 2.2 Animal health and welfare

Members of the WTO are legally committed to protecting animal *health* through the SPS–agreement mentioned in the previous subchapter.<sup>49</sup> The SPS–agreement aims to prevent risks of outbreaks of diseases or pests by ensuring food safety in international trade.<sup>50</sup> The protection of animal health is seen as necessary for preventing animal disease and consequently, potential devastating impacts it could have on the international animal market. International standards on animal health were initially developed by the World Organisation for Animal Health (hereafter WOAH) as voluntary standards and later

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<sup>44</sup> General Agreement on Tariffs and Trade 1994 (hereafter GATT).

<sup>45</sup> GATT 1994, article 1.

<sup>46</sup> *Ibid.*, article 3.

<sup>47</sup> *Ibid.*, article 3.

<sup>48</sup> WTO agreement 1994, first paragraph of the preamble.

<sup>49</sup> SPS agreement 1994.

<sup>50</sup> *Ibid.*, article 2.

incorporated in the trade agreement with the purpose of harmonizing sanitary and phytosanitary measures on a global scale.<sup>51</sup> In addition, the aim is to ensure that any sanitary or phytosanitary measures are only applied would it be deemed necessary for the protection of human, animal or plant life or health, without discriminating against other member states.<sup>52</sup>

Besides the SPS Agreement, the TBT Agreement mentions animal health.<sup>53</sup> The TBT Agreement is concerned with domestic technical regulations, such as packaging and labelling requirements.<sup>54</sup> The protection of “animal life” is mentioned in the TBT agreement as a potential legitimate objective for restricting trade, and under labelling regimes it may be of relevance for animals in terms of raising consumer awareness on animal welfare.<sup>55</sup> Yet, the TBT Agreement spells out that “technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective”<sup>56</sup> and further recognizing such legitimate objectives as “*inter alia*: national security requirements, the prevention of deceptive practices, protection of human health and safety, animal or plant life or health, or the environment.”<sup>57</sup> To determine if a technical regulation is necessary to protect animal health, “available scientific and technical information, related processing technology or intended end-uses of products” are to be considered, according to the TBT Agreement.<sup>58</sup>

However, the concept of animal health does not include important aspects of an animal’s natural behaviour essential to its wellbeing such as those pertaining to the emotional wellbeing of the animal. To preserve an animals’ health implies to keep an animal free from disease and keep the animal alive,<sup>59</sup> while the concept of animal welfare, in turn, implies a deeper and broader understanding of an animals’ wellbeing encompassing also

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<sup>51</sup> A formal cooperation between the WOAHA and the WTO was established in July 1998 WT/L/272. See also the SPS Agreement 1994, introduction, article 12.3 and Annex A paragraph 3 (a).

<sup>52</sup> SPS Agreement 1994, article 2(1).

<sup>53</sup> TBT Agreement 1994. The GATT 1994.

<sup>54</sup> *Ibid.*, preamble.

<sup>55</sup> Cook, Bowels 2010, pp. 229.

<sup>56</sup> TBT Agreement., article 2.2.

<sup>57</sup> *Ibid.*, article 2.2.

<sup>58</sup> *Ibid.*

<sup>59</sup> Sowery 2018, pp. 61.

physiological abilities and needs.<sup>60</sup> Hence, the international protection of animal welfare constitutes the focus of this thesis instead of the protection of animal health.

However, no universal legally binding definition of “animal welfare” exists at present. “Animal welfare”, nonetheless, constitutes an internationally established concept used to describe the current protection of farm animals’ interests related to their physical and physiological wellbeing. The leading non-governmental organization on animal health and welfare, the World Organisation for Animal Health (hereafter WOA) provides the following definition of “animal welfare” adhered to throughout this thesis:

“... how an animal is coping with the conditions in which it lives. An animal is in a good state of welfare if (as indicated by scientific evidence) it is healthy, comfortable, well nourished, safe, able to express innate behavior, and if it is not suffering from unpleasant states such as pain, fear, and distress. Good animal welfare requires disease prevention and appropriate veterinary treatment, shelter, management and nutrition, humane handling and humane slaughter or killing. Animal welfare refers to the state of the animal; the treatment that an animal receives is covered by other terms such as animal care, animal husbandry, and humane treatment”<sup>61</sup>

Underpinning and guiding the WOA’s international animal welfare definition are the so-called five freedoms outlining what a state of good animal welfare of terrestrial animals implies (land living animals).<sup>62</sup> The five freedoms include; freedom from hunger and thirst; freedom from discomfort; freedom from pain, injury or disease; freedom to express normal behaviour and freedom from fear and distress.<sup>63</sup>

In 2004, the WOA recognized the crucial linkage between animal health and animal welfare and incorporated international guidelines on animal welfare in WOA’s international standards.<sup>64</sup> However, the international standards on animals’ welfare

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<sup>60</sup> WOA Terrestrial Animal Health Code 2021, chapter 7, article 7.1.2 (1). In 2004, the WOA confirmed the interconnectedness between animal welfare and animal health through its international, albeit non-binding, standards on animal welfare. Available at: [https://www.oie.int/en/what-we-do/standards/codes-and-manuals/terrestrial-code-online-access/?id=169&L=1&htmfile=chapitre\\_aw\\_introduction.htm](https://www.oie.int/en/what-we-do/standards/codes-and-manuals/terrestrial-code-online-access/?id=169&L=1&htmfile=chapitre_aw_introduction.htm) accessed 20.1.2022.

<sup>61</sup> *Ibid.*, article 7.1.1.

<sup>62</sup> The five freedoms were initially developed by Britain's Farm Animal Welfare Council in 1965 and constitutes the basis of WOA’s work. See: <https://www.oie.int/en/what-we-do/animal-health-and-welfare/animal-welfare/>. Accessed 21.1.2022.

<sup>63</sup> WOA’s Terrestrial Animal Health Code, article 7.1.2.

<sup>64</sup> Terrestrial Animal Health Code, on guiding principles, stating that “that there is a critical relationship between animal health and animal welfare”, article 7.1.2.

developed by the WOAHA are not legally binding for the 187 member states of the organisation, nor for WTO member states. A legal obligation for the protection of animal welfare is therefore not stipulated as a substantive provision in the international trade agreements.

Furthermore, if a member state of the WTO wishes to protect the wellbeing of traded farm animals, it may do so by adopting high standards of animal protection laws in its own state territory.<sup>65</sup> Most of the world's states have, indeed, adopted national animal welfare laws to protect farm animals from unnecessary harm and suffering during different stages of production and to promote humane animal treatment.<sup>66</sup> Yet, if a member of the WTO enacts animal welfare laws it must assert that the provisions are compliant with free trade obligations contained in the technical and complex legal system of international trade law.

### 2.3 Free trade obligations and animal protection

When states adopt measures to protect animals' welfare under their respective national jurisdictions, they might result in trade restrictions and regulations. In accordance with international trade rules, any such animal welfare measure imposed by member states of the WTO must be carried out in compliance with the substantive obligations of trade law and the basic principle of non-discrimination. According to WTO rules and the principle of non-discrimination established in the GATT, a member state cannot impose, for example, animal welfare standards, also described as "regulatory requirements", on imported animal products, as it would be considered discriminatory against trading partners.<sup>67</sup> Regulatory requirements can comprise trade restrictive measures such as, labels, taxes and tariffs imposed on products or even prohibitions of certain imported products based on animal welfare concerns.<sup>68</sup> While member states are allowed to impose taxes, duties and tariffs on imports and exports of products to a certain extent, they are

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<sup>65</sup> Blattner 2019, pp. 85.

<sup>66</sup> Sykes 2014, pp. 480. Peters 2016, pp. 12.

<sup>67</sup> Blattner 2019, pp. 85.

<sup>68</sup> *Ibid.*

prohibited to impose for example, quantitative restrictions on imports and exports of products, because Article XI of the GATT prohibits it.<sup>69</sup>

If a trade dispute rises between two or more member states because of presumed discriminatory behaviour, parties first meet to negotiate with the aim of resolving the issue, as established by WTO praxis.<sup>70</sup> If the negotiations fail to reach an agreement, the issue is brought to a WTO panel for a hearing, which usually results in the submission of a panel report. The report contains recommendations on how the parties can act to bring a discriminatory trade policy to conform with international trade law contained in the WTO treaties.<sup>71</sup> If the dispute fails to be solved by the panel, any state may appeal to the Appellate Body, a standing body of the WTO. The Appellate Body then issues its report on the matter, with possible amendments to the conclusions made by a panel.<sup>72</sup> Finally, the decision-making body, the Dispute Settlement Body (also called the General Council) decides to either accept or reject a panel or Appellate Body report.<sup>73</sup> Once a report is adopted, its recommendations and conclusions become binding to the parties involved in the dispute, requiring member states to promptly act in compliance with the recommendations.<sup>74</sup> Non-compliance with Dispute Settlement Body decisions may be met with retaliatory measures, such as trade sanctions.<sup>75</sup>

Because the removal of trade barriers constitutes the primarily and initial task of the WTO, creating restrictions to free trade is naturally discouraged in the organisation.<sup>76</sup> Furthermore, as noted by the Appellate Body in a report, import restrictions and prohibitions are considered “the heaviest ‘weapon’ in a member’s armoury of trade

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<sup>69</sup> GATT 1994, article XI.

<sup>70</sup> Schoenbaum, Mavroidis, Matsuhita 2006, pp. 9, Among the main tasks of the WTO, accepted by the member states, is the resolving of trade disputes via a dispute settlement system. In addition, the WTO provides a forum for negotiation for member states, administers the Trade Policy Review Mechanism and cooperated with the World Bank and International Monetary Fund. The main tasks are listed in article 3 of the Marrakesh Agreement.

<sup>71</sup> Marrakesh Agreement, Annex 2: Understanding on rules and procedures governing the settlement of disputes.

<sup>72</sup> *Ibid.*, article 17.

<sup>73</sup> *Ibid.*, article 21, article 22.

<sup>74</sup> *Ibid.*

<sup>75</sup> Understanding on rules and procedures governing the settlement of disputes, article 22.2.

<sup>76</sup> The GATT 1994 preamble states that member states of the WTO are committed to: “entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.”



measures”.<sup>77</sup> Accordingly, member states have historically been cautious in terms of promoting individual preferences such as animal protection, due to the potential “destructive” effects such measures may imply for the system of international trade.<sup>78</sup> A deeply rooted conception reflected in WTO jurisprudence is also, that any internal regulations concerning for example, products and their animal welfare requirements, could imply extra-jurisdictional legislation.<sup>79</sup>

A few WTO disputes concerning member states’ trade restrictive measures based on a WTO members’ interest of protecting animals’ wellbeing have, however, occurred in the past.<sup>80</sup> These cases will be further studied in the analysis as they are illustrative of the relevant and existing international law pertaining to animal protection in trade. Disputes and reports by the Appellate Body or a panel showcase how international trade law has related to the protection of some animals in international trade, and how willing the dispute settlement bodies have been in respect of allowing trade restrictions based on animal protection concerns. Moreover, due to the lack of substantive provisions concerning animal protection in international trade law instruments, viewing the jurisprudence of the WTO is important for informing the analysis.

## 2.4 Regulating processes and production methods and likeness of products

A substantive provision particularly significant from an animal protection perspective in trade is GATT article III (4)<sup>81</sup> which reads as follows;

“The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to *like* products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use”.<sup>82</sup>

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<sup>77</sup> *United States — Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 of the DSU of Malaysia* WT/DS58/23 2001, para. 171.

<sup>78</sup> McGuire 2015, pp. 5.

<sup>79</sup> Nollkaemper 1996, pp. 244.

<sup>80</sup> Howse, Langille, Sykes 2015, pp. 83.

<sup>81</sup> Kelch 2011, pp. 248.

<sup>82</sup> GATT 1994, article III (4).

The article prohibits discrimination between similar “like” domestic and imported products and requires all “like” products, to be equally treated. Trade restrictive measures, however, typically purport to some form of discrimination between similar or “like” products.<sup>83</sup> Furthermore, if a member state wishes to impose a non-discriminatory ban or import trade restriction on certain animal sourced products due to the poor animal welfare conditions the animals have been exposed to during the production process, it must provide convincing evidence that the banned product is not a “like” product in terms of article III (4).<sup>84</sup> However, the likeness of products has typically been interpreted in a manner excluding any considerations regarding the processes behind a particular product, unless the production method and process implicate the physical characteristics of the final product.<sup>85</sup> Since the 1970’s, the Appellate Body’s has generally understood the likeness of products under the GATT as something that:

“...should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a "similar" product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is "similar": the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality.”<sup>86</sup>

Accordingly, the case *European Communities — Measures Affecting Asbestos and Products Containing Asbestos (EC–Asbestos)*, illustrates the meaning of how the Appellate Body and panel usually have interpreted “likeness” of products.<sup>87</sup> In the mentioned case, a European ban on all products containing asbestos was justified because the product’s physical property distinguished the product, rather than the production process used to produce the product. Moreover, in *EC–Asbestos*, the cancerogenic chrysotile found in asbestos posed a threat to human health and was therefore determined

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<sup>83</sup> Blattner 2019, pp. 87.

<sup>84</sup> Howse, Regan 2000, pp. 249 and 251.

<sup>85</sup> Wilkins 1997, pp. 135-141. Howse, Regan 2000, pp. 249 and 251.

<sup>86</sup> This basic approach was first adopted in the *The Report of the Working Party on Border Tax Adjustments*, 1970. See Appellate Body Report, *Japan–Taxes on Alcoholic Beverages*, 1996 WT/DS8/AB/R WT/DS10/AB/R WT/DS11/AB/R, pp. 20.

<sup>87</sup> Panel Report, *European Communities - Measures Affecting Asbestos and Asbestos-containing Product* (hereafter *EC–Asbestos*), WT/DS135/R 2000, para. 8.188.

as a distinguishing element in the product on the market. Products containing asbestos were therefore not considered “like” other products resembling it.<sup>88</sup>

In the case of animal protection, the living or transport conditions farm animals endure and what sort of methods are applied during the process of production, naturally represent areas of concern. Yet, as noted above, the process of production has traditionally not been viewed as a significant factor when determining the likeness of animal sourced products. Furthermore, this phenomenon is illustrated in the famous case *United States—Restrictions on Imports of Tuna (Tuna–Dolphin I)*.<sup>89</sup> In the case, a WTO panel contemplated whether different fishing methods of tuna could impact the understanding of likeness in products. Moreover, the case *Tuna–Dolphin I* involved an import ban imposed by the United States on yellowfin tuna caught with purse seine nets in Mexico and other countries using the fishing technique. According to United States laws, the method of harvesting yellowfin tuna with purse seine nets was prohibited because of the detrimental effect it had on dolphin populations. Dolphins were often trapped and died in the nets. Consequently, the United States required trading partners to comply with its internal dolphin standards to ensure the conservation and protection of lives or health of the dolphins.<sup>90</sup> Yet, the panel found that article III only pertained to measures affecting “products as such” and thus, that processes of production, meaning the fishing methods, “could not be regarded as being applied to tuna products as such because they would not directly regulate the sale of tuna and could not possibly affect tuna as a product.”<sup>91</sup>

Thus, in its report, the panel found that tuna-fishing methods involving the deaths of dolphins did not affect the tuna in terms of its characteristics as a final product.<sup>92</sup> Hence, in *Tuna–Dolphin I*, the panel found that so-called “dolphin deadly tuna” and “dolphin friendly tuna” were similar products and should be treated according to the principle of no less favourable treatment and national treatment principle. Likewise, in a subsequent case, *United States—Restrictions on Imports of Tuna (Tuna–Dolphin II)*, the panel

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<sup>88</sup> Panel Report *EC–Asbestos*, para. 8.188.

<sup>89</sup> Panel Report *United States—Restrictions on Imports of Tuna*, DS21/R-39S/155. (*Tuna–Dolphin I*) 1991.

<sup>90</sup> *Ibid.*, para. 2.8.

<sup>91</sup> *Ibid.*, para. 5.14.

<sup>92</sup> *Ibid.*, I, para. 5.15.

concurred with its observations in *Tuna–Dolphin I* and abstained from stating that the processes used to produce a product would implicate the likeness of a product.<sup>93</sup> Furthermore, it stated that: “article III calls for a comparison between the treatment accorded to domestic and imported like products, not for a comparison of the policies or practices of the country of origin with those of the country of importation.”<sup>94</sup> *Tuna–Dolphin I* occurred more than 30 years ago, and the panel report was, in fact, never adopted and rendered legally binding. Yet, the case still raises interest today due to its impact on trade disputes involving environmental protection (it was raised as an environmental concern, and not as a measure for to protect animals even if it concerned animals).<sup>95</sup>

Although the US did not impose a trade ban successfully on tuna connected to the deaths of dolphins because the measure was deemed discriminatory, the US has subsequently imposed labelling schemes with the purpose of indicating which tuna products that are “dolphin friendly”. In 2008, Mexico again claimed that the US acted in incompliance with trade obligations due to the US imposed labelling scheme on dolphin friendly tuna. Mexico requested consultations at the WTO because it saw that the US labelling standards on tuna were discriminatory against Mexican tuna products.<sup>96</sup> The Appellate Body of the WTO shared Mexico’s view as it ruled that some of the aspects of the US labelling on tuna products were indeed discriminatory. Thus, the Appellate Body demanded the US to modify its labelling of tuna products to comply with trade obligations.<sup>97</sup> After years of disagreement between the US and Mexico the case was only concluded in 2019 when the dispute settlement bodies of the WTO finally held that the US’ labels indicating dolphin friendly tuna was modified in a manner that it conformed with WTO trade rules.<sup>98</sup>

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<sup>93</sup> Panel Report *United States—Restrictions on Imports of Tuna* DS29/R (*Tuna–Dolphin II*) 1994, paras. 5.8, 5.9.

<sup>94</sup> *Ibid.*, paras. 5.8, 5.9.

<sup>95</sup> WTO webpage, available at: [https://www.wto.org/english/tratop\\_e/envir\\_e/edis04\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/edis04_e.htm), accessed 23.9.2022.

<sup>96</sup> United States–Measures concerning the importation, marketing and sale of tuna and tuna products, Request for consultations by Mexico, WT/DS381/1 G/L/858 G/TBT/D/32 2008.

<sup>97</sup> See the first Appellate Body Report in the discussed case: *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (II), WT/DS381 2012 ( *US–Tuna II*). The final ruling was adopted in 2019.

<sup>98</sup> See for example: Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by the United States*, WT/DS381/RW/USA and Add.1 / United States – Measures Concerning the Importation,

Demonstrably, because of the fear of acting in incompliance with obligations of international trade law, member states' attempts to regulate or prohibit methods used in animal production have historically been postponed or watered down in member states.<sup>99</sup> It was also demonstrated in the prolonged process of adopting an EU Council Regulation 3254/91 banning the use of leghold traps in the EU as well as the import of pelts produced in countries catching animals with leghold traps in 1991.<sup>100</sup> By enacting the so called Leghold Trap Regulation, the EU's intention was to protect the wild animals from pain and suffering caused by the use of leghold traps.<sup>101</sup>

After failed attempts of banning the use of leghold traps in third countries, the EU enacted a ban that came in force in 1995. The import ban on furs and pelts from wild animals caught with leghold traps, would have affected countries such as the United States and Canada, where the method was used and the pelts exported to the EU. Consequently, the United States and Canada argued that the ban would violate their trade rights under international law, and that they would raise a trade dispute before the WTO.<sup>102</sup> Thus, due to the risk of causing potential trade disputes as a result of restricting the import and impacting extraterritorial production methods, the EU ultimately decided to conclude bilateral agreements with the biggest exporting countries of animal pelts, Canada and Russia as well as the United States on requirements for accepted humane trapping standards, instead of imposing a complete import ban on the pelts from those countries.<sup>103</sup>

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Marketing and Sale of Tuna and Tuna Products – Second Recourse to Article 21.5 of the DSU by Mexico, WT/DS381/AB/RW/USA, WT/DS381/AB/RW2 2019.

<sup>99</sup> Blattner 2019, pp. 84.

<sup>100</sup> Council Regulation 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 1991.

<sup>101</sup> *Ibid.*

<sup>102</sup> Nollkamper 1996, pp. 241-242.

<sup>103</sup> Council Decision 98/142/EC concerning the conclusion of an Agreement on international humane trapping standards between the European Community, Canada and the Russian Federation and of an Agreed Minute between Canada and the European Community 1998. Council Decision 98/487/EC concerning the conclusion of an International Agreement in the form of an Agreed Minute between the European Community and the United States of America on humane trapping standards 1998. Nollkaemper 1996, pp. 252.

Furthermore, it has become a form of “conventional wisdom” that import restrictions based on only production methods are considered violating international trade law.<sup>104</sup> The conventional interpretation of “like products” as disregarding the often-extraterritorial production methods, by solely focusing on the physical characteristics of a final product, naturally raises concerns from a farm animal’s welfare perspective. The treatment and potential suffering experienced by animals, before they are transformed into the final “products” tend to be obscured and not visible in the final product.<sup>105</sup> Nonetheless, the understanding of similar products under the scope of GATT article III is not entirely clear-cut or a settled issue. No legal provision explicitly prohibits regulations and restrictions based on extraterritorial production methods.<sup>106</sup> Indeed, what constitutes a “like product” is not defined anywhere in the WTO treaties, but the concept has developed out of jurisprudence.<sup>107</sup>

## 2.5 General exceptions

### 2.5.1 A principle of necessity

Trade restrictive measures can be justified in exceptional and necessary circumstances under the GATT. Article XX in the GATT lists some general exceptions to the substantive free trade provisions, allowing for trade restrictive measures that would otherwise be viewed as incompliant with GATT obligations and the principle of non-discrimination.<sup>108</sup>

Contained in article XX are so-called “non-trade values” comprising ethical, social, political and environmental norms that may necessitate trade barriers and trade restrictions to enable protection.<sup>109</sup> Thus, when the provision is evoked, the panel and Appellate Body must decide how to balance the rules of liberalized trade against other values. Animal protection and animal welfare concerns have demonstrably constituted such non-trade values.<sup>110</sup> In respect of restricting trade for the purpose of protecting

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<sup>104</sup> Favre 2012 pp. 250. Howse, Regan 2000, pp. 249, 251.

<sup>105</sup> Harrop, Bowels 1998, pp.73.

<sup>106</sup> Howse, Regan 2000, pp. 249, 251.

<sup>107</sup> See Appellate Body stating this in its report, *Japan–Taxes on Alcoholic Beverages*, 1996, pp. 21.

<sup>108</sup> GATT 1994, article XX.

<sup>109</sup> Sykes, 2014 pp 490.

<sup>110</sup> *Ibid.*

animals, the chapeau and the following three subparagraphs of GATT article XX are especially relevant;

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:<sup>111</sup>

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health; [. . .]

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption [. . .].<sup>112</sup>

Two of the subparagraphs have been evoked in connection with animal protection, namely, articles XX (g) and XX (a). Article XX (b), which permits trade restrictive measures that are considered “necessary to protect human, animal or plant life or health” has been invoked, but not in trade disputes concerning the protection of animal health.<sup>113</sup>

For any trade restrictive measure’s legality to be examined by a WTO panel under article XX, a presumable violation of the substantive trade obligations and the non-discriminatory principle in the GATT is required.<sup>114</sup> The trade restrictive measure in question can only be justified if it meets the requirements of any of the listed exceptions in GATT article XX as well as satisfies the chapeau.<sup>115</sup> Thus, the role of the chapeau is to ensure that a measure does not constitute arbitrary or unjustifiable discrimination and hinders the general exceptions of article XX from being abused or misused.<sup>116</sup> In other words, the purpose of the chapeau is to prevent member states from implementing protectionist measures and acting against the non-discrimination obligations of free trade.

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<sup>111</sup> GATT 1994, the chapeau of article XX.

<sup>112</sup> GATT 1994, article XX.

<sup>113</sup> See for example the Panel Report: *United States – Standards for Reformulated and Conventional Gasoline* WT/DS2/R 1996.

<sup>114</sup> Ahn 1999, pp 827.

<sup>115</sup> This approach was used by the Appellate Body in e.g., the case *Brazil-Measures affecting imports of retreaded tyres*, WT/DS332/AB/R, para. 213, 2007.

<sup>116</sup> This was confirmed in for example, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, WT/DS58/AB/R, (hereinafter “*US – Shrimp*”) 1998 para 151. This case will be further explained in the thesis as it also relates to animal protection.

The Appellate Body has expressed that the role of the chapeau of article XX is to uphold a balance between member states' right to evoke an exception under the article and the substantive rights of other states enshrined in the GATT. Accordingly, the application of the chapeau marks "a line of equilibrium".<sup>117</sup>

The legality of the trade restrictive measures under article XX has generally been determined by WTO panels and the Appellate Body through the applied praxis of balancing various interests against each other. Moreover, when the bodies of the WTO decide whether a measure can be justified under article XX, the measure's contribution to an objective of safeguarding a particular value is weighed against its restrictiveness and impacts it may have on trade.<sup>118</sup>

Furthermore, the relation between the so called "non-trade values" expressed in, for example, other international treaties and the "free trade values" incorporated in the WTO treaties remains an unsettled issue in the WTO.<sup>119</sup> The WTO jurisprudence has, however, shown that if an international non-trade value is encompassed in an international treaty, it renders it more likely to be viewed as a justifiable reason for states to adopt trade restrictive measures.<sup>120</sup> For example, environmental values provided for in international environmental law, can impact the outcomes of trade disputes, according to WTO jurisprudence.<sup>121</sup> Although the multilateral trade agreements are the primary legal instruments pursuant to interpretations of the Appellate Body and the panels, the WTO legal framework is constantly in touch with the larger system of public international law, as the International Law Commission stated in its report on Fragmentation of International Law.<sup>122</sup> Article 3 (2) of the Dispute Settlement Understanding also underlines that the dispute settlement system attempts to interpret the provisions of the WTO agreement "in accordance with customary rules of interpretation of public international law".<sup>123</sup> Furthermore, the Appellate Body also noted in its first ruling, the

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<sup>117</sup> *Ibid.*, paras. 156-160.

<sup>118</sup> The Appellate Body has noted this is in for example, *EC – Asbestos*, Appellate Body Report, para. 172.

<sup>119</sup> McGuire, 2015, pp. 11.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

<sup>122</sup> International Law Commission, *Fragmentation of International Law* 2006, pp. 29, para. 45.

<sup>123</sup> Marrakesh Agreement, Annex 2: article 3(2) in the Understanding on rules and procedures governing the settlement of disputes 1994.



*US – Standards for Reformulated and Conventional Gasoline*, that WTO treaties must not be read “in clinical isolation from public international law”.<sup>124</sup>

A well-known trade dispute that sheds light on the articles’s relevance for animal and environmental protection is the *United States - Import Prohibition of Certain Shrimp and Shrimp Products (US–Shrimp)*.<sup>125</sup> A panel was established to examine the case after the United States imposed an import ban on shrimp that was harvested with a specific type of equipment and fishing methods. The import ban concerned the use of shrimp trawl nets that were prohibited according to US domestic law, because endangered sea turtles often were caught in the nets during the harvest of shrimp. Subsequently, countries that exported shrimp to the United States, namely, India, Malaysia, Pakistan and Thailand submitted a complaint to the WTO, arguing that the trade restrictive measure discriminated against them and thus violated international trade law obligations.<sup>126</sup>

When the trade dispute was brought to the Appellate Body for adjudication, it deemed that the US import ban on shrimp was justifiable under article XX (g) of the GATT, as a necessary measure “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”.<sup>127</sup> Moreover, the measure was considered necessary as it aimed to protect a species of turtles recognized as endangered in the Convention on International Trade in Endangered Species of Wild Fauna and Flora<sup>128</sup>, as well as in other international agreements.<sup>129</sup> According to the Appellate Body, the measure could be viewed as crucial for the conservation of exhaustible natural resources, in this case; the endangered sea turtles. Nevertheless, the trade restrictive measure was ultimately not justified under the chapeau.<sup>130</sup>

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<sup>124</sup>Appellate Body Report *US – Standards for Reformulated and Conventional Gasoline* WT/DS4/AB/R 1996, 17, article 31.1 on the general rule of interpretation.

<sup>125</sup> *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, WT/DS58/AB/R, (hereinafter *US – Shrimp*), 1998.

<sup>126</sup> Appellate Body Report *US–Shrimp* 1998.

<sup>127</sup> *Ibid.*, para.187.

<sup>128</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973.

<sup>129</sup> *Ibid.*, paras. 132, 186 and 187.

<sup>130</sup> *Ibid.*, findings and conclusions, para. 187.

Moreover, unlike animals recognised as natural resources or endangered species in other international treaties, farm animals and their interests are not protected or addressed by a separate international treaty. Neither have the bodies of the WTO so far viewed animal welfare law as necessary for protecting animal health under article XX (b).<sup>131</sup> It can also be noted that in the case *US–Shrimp*, animal protection attempts concerned the endangered sea turtles as a species. By contrast, the fishing methods’ impact on the “harvested” shrimps’ welfare was not of regulatory interest within or outside the territory of the United States.<sup>132</sup>

### 2.5.2 Public morals and seal welfare

A trade restrictive measure based on animal welfare concerns specifically has been provisionally justified once under international trade law. In 2014, the Appellate Body recognized the protection of seals’ welfare as a public moral held among Europeans, and a trade restrictive measure was provisionally justified under article XX (a) as “necessary to protect public morals” in the case *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products* (hereafter *EC–Seal Products*).<sup>133</sup> It also marked the first recognition of animal welfare concerns as a justifiable restriction to trade rules.<sup>134</sup> *EC – Seals Products* has given reason for some scholars to believe that the WTO is beginning to view animals as potential beneficiaries of legal protection.<sup>135</sup> In animal law, the Appellate Body’s decision in *EC – Seals Products* has been described as significant. The provision has become important for scholars to examine in terms of advancing animal welfare protection under international trade law.<sup>136</sup> Although this case has received comprehensive scholarly attention due to its uniqueness in WTO jurisprudence, it represents an important case to examine to acquire an understanding of the WTO’s legal approach to animal welfare protection in international trade.

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<sup>131</sup> Blattner. 2019, pp. 114.

<sup>132</sup> Howse, Langille, Sykes 2015, pp.124-125.

<sup>133</sup> Appellate Body Reports *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R and WT/DS401/AB/R (*EC–Seal Products*) 2014.

<sup>134</sup> Blattner 2019, pp. 114.

<sup>135</sup> Sykes 2014, pp. 471- 498.

<sup>136</sup> Sykes 2014, pp. 471-498.

Furthermore, *EC – Seal products* concerned the EU’s legal regulations on the trade of seal products, referred to also as the EU seals regime, adopted in 2009.<sup>137</sup> The EU’s seal regime implied a comprehensive ban on seal products such as, products made of seal skin or products containing seal oil. The ban on the marketing, import and selling of seal products in the EU followed many decades of public outrage regarding the methods applied during the seal hunts amongst citizens in EU–countries. After the killing methods used were exposed in the 1960’s via a video that showed how seals were hunted, the moral opposition among the European public steadily grew over the years. According to the understanding of seal welfare and inhumane treatment of seals in the EU, the methods used to hunt seals for commercial purposes were deemed a severe threat to the welfare of seals.<sup>138</sup> The seal hunts involved clubbing, shooting and chasing seals in the wild and painful stunning methods of the seals were also used.<sup>139</sup> When the ban on seal products then finally was adopted in 2009, some seal products remained exempted from its scope. These included seal products originating from indigenous communities obtained in accordance with traditional hunting practices and products derived from seals killed for the purpose of marine resources management under the authorization of the national governments as well as seal products that travellers brought to the EU for personal use.<sup>140</sup>

Seal-producing countries Canada and Norway consequently submitted complaints respectively to the WTO, by principally referring to the exceptions from the ban as discriminatory.<sup>141</sup> They argued that the EU Seals Regime discriminated against them, particularly because seal products originating from indigenous communities and marine resource management were exempted from the ban. According to Canada and Norway, the EU’s seal Regime therefore showed incompliance with WTO substantive obligations as it subjected them (Norway and Canada) to less favourable treatment than that given to “like” seal products of domestic origin and foreign origin, such as seal products from

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<sup>137</sup> Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products 2009.

<sup>138</sup> Appellate Body Report *EC–Seal products* para. 5.153. on the Panel’s findings.

<sup>139</sup> Cao, White 2016, pp. 57 According to EU understanding of humane seal-killing, the stunning of an animal at the time of killing would be conducted without inflicting “unnecessary” pain, fear or distress on the animal such as through repeated stunning.

<sup>140</sup> Appellate Body Report *EC–Seal products*, para.1 (4).

<sup>141</sup> *Ibid.*, para. 1.5.

Greenland that were exempted from the ban because they originated from indigenous communities.<sup>142</sup>

### 2.5.3 The public morals exception and animal welfare

The "public morals exception" provided for in article XX (a) that was evoked in *EC – Seal Products* had only been tested two times under international trade law before the case in question.<sup>143</sup> To assess the justifiability of a trade restrictive measure based on public morals, the panel and the Appellate Body have developed a three-tier analysis of the paragraph to determine whether a trade restrictive measure qualifies as necessary under the scope of article XX (a). The test was initially expressed in the *United States – Measures affecting the Cross-Border Supply of Gambling and Betting Services* (hereafter *US–Gambling*), under the General Agreement on Trade in Services (GATS)<sup>144</sup> Accordingly, a justified trade restrictive measure under article XX (a) presupposes the measure to be "designed to protect public morals", "necessary to protect public morals" and it needs to "satisfy the chapeau".<sup>145</sup>

The Appellate Body and WTO panels have generally adopted a view allowing states to determine a public moral rather broadly within its own territory. For example, in the case *US – Gambling*, the panel stated that WTO member states "should be given some scope to define and apply for themselves the concept of "public morals" in their respective territories, according to their own systems and scales of values.<sup>146</sup> In the case of *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* it was noted that "the protection of public morals ranks among the most important values or interests pursued by Members as a matter of public policy."<sup>147</sup> Furthermore, the Appellate Body has described public moral

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<sup>142</sup> *Ibid.*, para. 1.5.

<sup>143</sup> *United States – Measures affecting the Cross-Border Supply of Gambling and Betting Services* WT/DS285, Appellate Body Report. The General Agreement on Trade in Services (GATS) 1995. *China – Measures affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* WT/DS363/R, ("China–Publications and Audiovisual Products").

<sup>144</sup> The General Agreement on Trade in Services (GATS) 1994. Article XIV (a) provides for a general exception to trade obligations if it is necessary to protect public morals or maintain public order. The article was invoked and analysed in *US–Gambling* para. 292.

<sup>145</sup> Appellate Body report *US–Gambling* para. 294.

<sup>146</sup> Panel report *US–Gambling*, para. 6.461.

<sup>147</sup> Appellate Body report *China–Publications and Audiovisual Products*, para. 243.

and public order as something that may vary among member states because of “time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values.”<sup>148</sup>

In *EC – Seal Products*, the panel saw that the legal evidence sufficed to prove that the objective of the ban was to address the public moral and ethical concerns regarding seal welfare within the EU. In other words, that the ban on seal products was designed to protect a public moral held among Europeans.<sup>149</sup> The panel referred to the long legislative history of animal welfare generally in the EU, and seal welfare legislation as well as the general opposition to “inhumane killing” of seals, expressed in conventions, domestic legislation and international instruments applicable in the EU.<sup>150</sup> The WTO panel in *EC– Seal Products*, recognized that a “moral concern regarding the protection of animals” is considered an important moral value in the EU and further, that the protection of public moral values generally is important.<sup>151</sup> In addition, the panel referred to animal welfare even as a “globally recognized issue”.<sup>152</sup>

Canada and Norway rejected the panels’ findings regarding that the seal regime was designed to protect public morals. According to the complainants, not enough evidence existed to prove a linkage between the objective of protecting the public moral and the EU seal regime. Canada argued, moreover, that the hunting methods used during the seal hunts did not show incompliance with acceptable forms of seal hunts, in terms of safeguarding the welfare of seals. According to Canada, EU policies and practices of animal welfare protection indeed encompassed acceptance of a certain level of animal suffering, both in terms of slaughter and hunts of wildlife. In addition, Canada contended that welfare risks coupled with commercial seal hunts are “commonplace” in situations involving the killing of animals, especially as part of wildlife hunts.<sup>153</sup> In addition, Canada claimed that the panel failed to consider evidence regarding poor animal welfare

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<sup>148</sup> Panel report *US – Gambling*, para 6.461.

<sup>149</sup> Appellate Body Report *EC– Seal products*, para. 5.138. Panel Report *EC– Seal products*, para. 7.410.

<sup>150</sup> *Ibid.*

<sup>151</sup> Panel report *EC–Seal Products*, paras. 7.631 and 7.632.

<sup>152</sup> *Ibid.*, para. 7.420.

<sup>153</sup> Appellate Body Report *EC–Seal products*, para. 2.30.

outcomes in other terrestrial hunts in the EU, such as animal welfare concerns connected with deer hunts.<sup>154</sup>

The case was subsequently brought to the Appellate Body, that historically justified the ban as necessary to protect the public moral regarding seal animal welfare in the EU.<sup>155</sup> Accordingly, the trade ban on seal products was viewed as a necessary measure to restrict trade as it contributed to some extent to its objectives of protecting the European public moral of protecting seal welfare.<sup>156</sup> Less trade restrictive measures than a total ban were assessed by the Appellate Body, such as labelling and certification systems, yet, they were not viewed as reasonably available to protect the public moral.<sup>157</sup> A trade ban was thus seen as contributing to its objective of protecting the seal welfare as it reduced the total number of seals killed “inhumanely” and subsequently, consumed by the European public, according to the panel and Appellate Body.<sup>158</sup>

However, the original ban was ultimately not justified under GATT XX (a).<sup>159</sup> According to the Appellate Body, the trade ban on seal products failed to satisfy the chapeau of the article because it saw the exemption of seal products hunted by Greenland Indigenous Communities as an unjustifiable or arbitrary form of discrimination between trading partners.<sup>160</sup> In particular, discriminating between seal products derived “commercially” and from hunts by indigenous communities, as the EU was unable to demonstrate the connection between this exemption and the objective of the measure (to protect seal welfare).<sup>161</sup> Also, it was noted that the criteria of the indigenous community exception were vague and ambiguous.

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<sup>154</sup> *Ibid.*, para. 2.33.

<sup>155</sup> *Ibid.*, findings and conclusions regarding the Canada Panel Report (WT/DS400/R), para. 6.1 (d), Norway Panel Report (WT/DS401/R), para. 6.1 (d).

<sup>156</sup> Appellate Body Report *EC– Seal products* para. 5.279 and para 5.289.

<sup>157</sup> Appellate Body Report *EC– Seal products* para. 5.279 and para 5.289.

<sup>158</sup> *Ibid.*, para. 5.279 and para 5.289.

<sup>159</sup> *Ibid.*, findings and conclusions regarding the Canada Panel Report (WT/DS400/R), para. 6.1 (d), Norway Panel Report (WT/DS401/R), para. 6.1 (d).

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid.*

The original trade ban in seal products on the European market was subsequently therefore amended to comply with the rulings of the WTO.<sup>162</sup> The current seal regime based on the regulation in force in the EU still provides for exceptions, but in a lesser extent than before. Seal products derived from hunts in indigenous communities as well as import of seal products for personal use of travellers in some instances, are permitted on the EU market.<sup>163</sup>

Furthermore, *EC–Seal Products* represented the first case where the Appellate Body recognized the protection of animal welfare as a legitimate value to protect under the exceptions listed in article XX. In addition, it can be understood as constituting an expression of the WTO’s stance on animal welfare protection generally. In its report, the panel refers to international doctrines that identify animal welfare as a matter of ethical responsibility for “human beings in general” by stating the following;

“...Although not all evidence presented to us makes an explicit link between seal or animal welfare and the morals of the EU public, we are nevertheless persuaded that the evidence sufficiently demonstrates that animal welfare is an issue of ethical or moral nature in the European Union. International doctrines and measures of a similar nature in other WTO Members, while not necessarily relevant to identifying the European Union's chosen objective, illustrate that animal welfare is a matter of ethical responsibility for human beings in general.”<sup>164</sup>

From a zoocentric perspective, the *EC–Seal products* case can be depicted as significant to some extent, as it showed that the public morals exception enshrined in GATT article XX(a) can be invoked to protect the welfare of animals. Nonetheless, the public moral of protecting the welfare interests and needs of *farm* animals that are kept as livestock has not been addressed under article XX to this date. Notably, *EC–Seal products* concerned wild seals hunted for commercial purposes. Yet, scholars of animal law argue that article XX (a) may constitute a provision of importance in animal law generally, and in terms of potential future claims concerning farm animal protection and international trade.<sup>165</sup>

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<sup>162</sup> The original Regulation banning seal products in the EU was amended by EU Regulation 2015/1775 as a response to the conclusion of WTO rulings in *EC–Seal Products*.

<sup>163</sup> EU Regulation 2015/1775, article 3(1) and article 3(2).

<sup>164</sup> Panel report *EC– Seal Products*, para.7.409.

<sup>165</sup> Blattner 2019, pp. 114.

#### 2.5.4 Limitations to animal welfare protection through public moral

It remains an unanswered legal question to what degree member states are permitted to regulate extraterritorial methods in the animal industry under international trade law, as was discussed in chapter 2.4.<sup>166</sup> Accordingly, the vagueness of the jurisdictional limits to article XX was also demonstrated in the case *US–Shrimp*, that was explained earlier in this present chapter. In *US– Shrimp*, the Appellate Body made a remark on the extraterritorial aspect of the trade restrictive measure that was provisionally justified under XX (g) as necessary for the conservation of endangered sea turtles. It noted that sea turtles as highly migratory animals move through waters under several states’ domestic jurisdictions as well as the high seas. Yet, it stated in *US– Shrimp*, that it would not “pass upon the question of whether there is an implied jurisdictional limitation in article XX (g), and if so, the nature or extent of that limitation”.<sup>167</sup>

The same uncertainty prevails with respect of the public morals article XX (a).<sup>168</sup> Nonetheless, in *EC–Seal products*, the WTO acknowledged the extraterritorial aspect of the linkage between process of production (the hunt of seals in e.g., Canada) and public morality in the EU prevailed.<sup>169</sup> The EU regulations implemented to prohibit the selling of seal products derived by inhumane hunting activities according to EU standards of animal welfare, naturally impacted the seal industry in other states, because the import of seal products from Norway and Canada was prohibited. The Appellate Body also referred to the provision in the preamble of the EU Basic Regulation on trade in seal products. It stated that the EU seal regime concern “seals hunted within and outside the community”.<sup>170</sup> However, the Appellate Body decided to not elaborate further on the jurisdictional limitation in article XX (a), because the issue was not addressed in the submissions by the claimants.<sup>171</sup> Thus, a prominent legal uncertainty regarding article XX (a) and its application therefore concerns its jurisdictional scope and limitations.<sup>172</sup>

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<sup>166</sup> Howse, Langille Sykes 2015, pp. 123.

<sup>167</sup> Appellate Body Report *US – Shrimp*, para. 133.

<sup>168</sup> Howse, Langille, Sykes 2015, pp. 123.

<sup>169</sup> McGuire 2015 pp. 12.

<sup>170</sup> Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products.

<sup>171</sup> Appellate Body Report *EC– Seal Products*, para. 5.173.

<sup>172</sup> Sykes 2014, pp. 471.



The unclear definition of the concept of “public moral” in international trade law also presumably complicates the WTO’s ability to decide on the meaning of the concept. As noted, animal welfare protection is not listed as a common moral value in any international or WTO treaty. In addition, member states’ views on what constitutes the morally acceptable treatment of animals and understandings of suffering and inhumane treatment may vary due to the diversity of cultural, religious, economic and other preferences among member states.<sup>173</sup> Some fundamental issues and questions concerning international law and trade are reflected in *EC–Seal products* concerning the balancing between states’ right to regulate internally on the one hand, and legal obligations in international trade law, on the other hand.<sup>174</sup> Indeed, the *EC–Seal products* have been described as representing a trade dispute where local moral and ethical preferences concerning animal welfare and international commitment to international trade principles collide, in a sense.<sup>175</sup>

Yet, the *EC–Seal products* was important for animal protection, as the ruling recognised that the moral value of animal welfare can prevail over international trade obligations. Noteworthy is again, that the WTO essentially exists to regulate and facilitate trade between states, as opposed to impacting states’ internal policies or making moral claims affecting its member states.<sup>176</sup> International trade law differs from other branches of international law that first and foremost aim to promote certain normative ideals through legal norms established in treaties, such as human rights law.<sup>177</sup> Thus, it has been argued that the WTO might in fact, not constitute a suitable forum for making moral judgements, besides in cases when a trade dispute concerns the preservation of norms connected to non-discrimination, which occurs at times.<sup>178</sup>

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<sup>173</sup> Peters 2020, pp. 111. Chaudri 2014, pp. 293.

<sup>174</sup> Fitzgerald 2011, pp. 86-87.

<sup>175</sup> Sykes 2014, pp. 471.

<sup>176</sup> Howse, Langille, Sykes 2015, pp. 86.

<sup>177</sup> *Ibid.*, pp. 89.

<sup>178</sup> *Ibid.*, pp. 86.

## 2.6 International animal welfare standards and trade

This present chapter has demonstrated that trade obligations do not protect animal welfare of farm animals in trade, at least not through a legally binding obligation in the trade treaties. Neither is such an international obligation contained in another binding international agreement. As was briefly mentioned in chapter 2.2, the WOA<sup>179</sup> has developed international animal welfare standards aimed to serve as guidance for actors involved in international trade and also in transport of live farm animals.<sup>180</sup>

WOAH standards on animal welfare are, however, not legally binding to member states by contrast to WOA<sup>181</sup>'s international standards on animal health, that are codified as international trade law in one of the trade agreements.<sup>181</sup> Since 1998, the WTO and WOA<sup>182</sup> are formally cooperating on matters concerning animal health and the SPS agreement stipulates that "to harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations."<sup>182</sup>

Yet, although WOA<sup>183</sup>'s standards on animal welfare remain outside the legal scope of international trade law,<sup>183</sup> the organisation enjoys membership so wide, that the animal welfare standards may be perceived as a credible source of animal regulation.<sup>184</sup> Thus, given the role of WOA<sup>185</sup> as a global standard setter in terms of animal welfare, it seems relevant to briefly explain the non-binding standards on animal welfare protection developed by the WOA<sup>185</sup>.

Furthermore, included in the WOA<sup>185</sup>'s Terrestrial Animal Health Code are explicit standards designed as recommendations or guidelines regarding the protection of animals' welfare during transport operations conducted by sea, land and by air.<sup>185</sup> Three

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<sup>179</sup> Recalling the acronym for World Organisation for Animal Health.

<sup>180</sup> Terrestrial Animal Health Code 2022, foreword.

<sup>181</sup> SPS agreement 1995, article 12.3 and Annex A paragraph 3 (a). This was also explained in chapter 2.2.

<sup>182</sup> SPS agreement 1994, article 3 (1).

<sup>183</sup> The WOA<sup>185</sup> has 182 members.

<sup>184</sup> Lilienthal, Ahmad and Mustafa 2019 pp. 351-352.

<sup>185</sup> WOA<sup>185</sup>'s Terrestrial Animal Health Code 2022, chapters 7.2, 7.3, 7.4.4.1 and 7.4. Eleven sets of international standards regarding animal welfare have been adopted by the WOA<sup>185</sup>, of which eight are contained in the Terrestrial Animal Health Code.

chapters in the WOAAH's current Terrestrial Animal Health Code provide for the responsibilities of the handlers of the animals as well as competent authorities in the export countries.<sup>186</sup> According to the WOAAH, the recommendations are applicable on all live domesticated animals.<sup>187</sup> Outlined in the chapters are requirements regarding appropriate means of transport to safeguard the protection of animals' welfare interests. According to the WOAAH's recommendations, safeguarding an animal's welfare is the main objective in transport operations. Strongly emphasized in all three chapters is that the time animals spend on journeys should be reduced to the extent possible and kept to a minimum.<sup>188</sup> The importance of planning a journey by considering the behaviour of the animals is also underlined. Unloading and loading facilities should, accordingly, "aim to minimize the potential for distractions that may cause approaching animals to stop, baulk or turn back" such as e.g., reflections on shiny metal floors, uneven floors and dark entrances.<sup>189</sup>

To ensure the care for the transported animals, the exporters, shipping companies and those responsible for the different means of transport bear a responsibility of planning the journey with the aim of minimizing stress of the animals, and ensuring that animals are provided with appropriate food, water, ventilation, protection from weather and that the animals are regularly inspected during the journey.<sup>190</sup> However, the language and terms used in the guiding principles on animal welfare in transport have been criticised for being unclearly expressed, leaving much room for interpretation by the persons handling the animals.<sup>191</sup> For example, any duties concerning protecting animals' needs at the destination of the transport are not included. Thus, it provides for the risk that the animals are exposed to harmful treatment as soon as the animals are unloaded from vehicles in destination countries.<sup>192</sup> Favre views the international standards developed by the WOAAH regarding animal welfare as a merely a checklist of vague guidelines.<sup>193</sup>

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<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*, articles 7.1.1, 7.2.1, 7.2.3.

<sup>189</sup> *Ibid.*, article 7.2.2.

<sup>190</sup> *Ibid.*, article 7.2.3.

<sup>191</sup> Lilienthal, Ahmad and Mustafa 2019 pp. 351-352.

<sup>192</sup> *Ibid.*

<sup>193</sup> Favre 2012 pp. 251– 252.

Nonetheless, the United Nations Food and Agriculture Organization (FAO) sees WOH recommendations as strong evidence indicating a growing common understanding of the importance of animal welfare standards internationally.<sup>194</sup> Given the formal cooperation between the two international organisations since 1998, it appears that the WOH historically has influenced the legal developments in the WTO to some extent. Thus, considering the WOH's recognition of the interlinkage between animal health and animal welfare, it seems possible that also the issue of animal welfare could enter international trade law via the formal cooperation with the WOH.

Conclusively, this second chapter has demonstrated that farm animals are primarily regarded as tradable goods that can be sold, imported, exported, and transported on the international market. As such, the farm animals only receive dispersed protection under international trade law. Animal protection efforts under international trade law are based on trade restrictions, which in many aspects therefore stand in contrast to WTO's central objective of promoting free trade between member states. Furthermore, in respect of WTO member states' ability to impose justified trade restrictions based on animal welfare concerns, several legal uncertainties prevail, such as to what extent member states are allowed to regulate production processes beyond its borders. Member states have therefore historically been discouraged to adopt trade restrictions based on animal protection concerns due to the fear of violating the trade principle of non-discrimination.

Demonstrably, animal welfare concerns may, however, be addressed and even be considered a justifiable reason for restricting trade, as expressed in the case *EC–Seal products*. Thus, the global social, political and economic context can play an essential role in determining the legitimacy of trade rules and exceptions to the rules. Laws and public opinions as well as international standards may indeed alter the normative underpinnings of legal provisions in international trade law,<sup>195</sup> which could benefit animal welfare protection claims. The case *EC–Seal products* opened a potential legal avenue for protecting animal welfare in international trade through the public morals exception contained in XX (a). Yet, rulings legitimizing restrictions based on animal

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<sup>194</sup> FAO legislative study, "Legislative and Regulatory Options for Animal Welfare, for the Development Law Service FAO Legal Office: FAO Legislative Study 104" by Vapnek and Chapman, 2010, pp. 83.

<sup>195</sup> Offer 2020, pp. 245.

welfare concerns are not unilateral in nature. While seal products are banned on the European market based on the moral concern of seal welfare, such hunting practices might still be lawfully used in other parts of the world and causing seals pain and suffering. Considering that states are not legally bound to an international legally binding obligation to protect farm animals' welfare in trade operations, animal protection remains in a disadvantageous position in relation to the economic interests pursued in trade.

### 3. EU and farm animal protection

#### 3.1 The legal framework

The European Union is often considered a global forerunner in animal protection legislation.<sup>196</sup> As demonstrated in the previous chapter, the EU is the only member of the WTO that has defended a trade restrictive measure based on the public moral concern of animal welfare in the case *EC–Seal products*. EU’s commitment to animal welfare protection is expressed in the union’s primary sources of law, such as the Treaty on the Functioning of the European Union (hereafter TFEU). Since the treaty was adopted in 2009, farm animals have been recognised as “sentient beings” in EU primary law as opposed to previously referred to as solely commodities.<sup>197</sup>

Article 13 of the TFEU reads as follows;

“In formulating and implementing the Union’s agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.”<sup>198</sup>

Thus, according to article 13 of the TFEU, member states must “pay full regard to the welfare requirements of animals” since “they” are “sentient beings” in relation to the specific policy areas of agriculture, fisheries, transport, internal market, research and technological development and space policies. In comparison with international trade law, animals are therefore not solely regarded as tradable products. As sentient beings, animals are regarded as living, individual beings with intrinsic value, capable of feeling positive and negative emotions.<sup>199</sup> Yet, while the provision calls for member states to pay full regard to the welfare requirements of animals, it also stipulates that at the same time, “legislative or administrative provisions and customs of the Member States relating in

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<sup>196</sup> Mahoney 2017, pp. 371.

<sup>197</sup> Consolidated version of the Treaty on the Functioning of the European Union, OJ C 202, 2016 (hereafter TFEU), article 13.

<sup>198</sup> *Ibid.*

<sup>199</sup> Wahlberg 2021, pp. 27.

particular to religious rites, cultural traditions and regional heritage” must be respected. Thus, different moral preferences between states anchored in respective member states’ religious- and cultural traditions and other domestic legislative provisions are allowed to influence the protection of animals to some extent within the EU.<sup>200</sup> Furthermore, while animals are viewed as sentient beings in need of protection under EU primary law, farm animals are also considered legal objects, property and things.<sup>201</sup> Accordingly, article 38 of the TFEU defines animals as “agricultural products”.<sup>202</sup> The use of animals for agricultural purposes and for other human purposes is thus legally acceptable, given that “unnecessary” suffering is minimized and prevented, and humane treatment of animals promoted, according to the provisions contained in animal welfare laws.<sup>203</sup>

The Council of Europe<sup>204</sup> has adopted a total of five treaties on the protection of animal welfare, of which three concern farm animals. The EU is signatory to the European Convention for the Protection of Animals Kept for Farming Purposes<sup>205</sup> and in 2004, the EU signed the European Convention for the Protection of Animals During International Transport.<sup>206</sup> The Council of Europe’s Animal Welfare Conventions are open for ratification to its 46 member states (of which 27 belong to the EU) as well as to non-European Council States.<sup>207</sup> The European Convention for the Protection of Animals for Slaughter in 1988 is another treaty that the EU has signed, and is thus legally binding to the member states of the EU.<sup>208</sup> Animal welfare standards contained in the treaties are

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<sup>200</sup> Sowery 2018 pp. 87.

<sup>201</sup> Wahlberg 2020 pp. 14.

<sup>202</sup> TFEU, article 38

<sup>203</sup> Wahlberg 2020, pp. 14.

<sup>204</sup> Council of Europe, established in 1949, is an international organisation and not to be confused as an EU-organisation. The Council of Europe focuses on preserving and promoting human rights, democracy and rule of law in Europe. Since March 2022, the Council has 46 members.

<sup>205</sup> European Convention for the Protection of animals kept for farming purposes 1978. Council Decision 78/923/EEC of 19 June 1978 concerning the conclusion of the European Convention for the protection of animals kept for farming purposes.

<sup>206</sup> The European Convention for the Protection of Animals During International Transport 2003 (revised) Council Decision 2004/544/EC of 21 June 2004 on the signing of the European Convention for the protection of animals during international transport.

<sup>207</sup> The Council of Europe website, available at: <https://www.coe.int/en/web/portal/46-members-states>, accessed 24.4.2022.

<sup>208</sup> Council Decision 88/306/EEC on the conclusion of the European Convention for the Protection of Animals for Slaughter 1988.

further elaborated on in several directives and regulations adopted by the Council of the EU or the European Parliament.<sup>209</sup>

As legal instruments in the EU, directives are binding to member states as with respect to their objectives and national authorities can choose the means of implementation. Regulations are in turn, incorporated instantly once adopted in national laws as binding law in their entirety.<sup>210</sup> In five directives, rules are spelled out regarding animal welfare standards that are applicable within the union. Council Directive 98/58/EC establishes rules concerning the treatment of all farm animals kept and bred for the purposes of meat- and dairy production, skin, fur and wool as well as other animal sourced products,<sup>211</sup> whereas four other directives specify minimum standards concerning the protection of laying hens<sup>212</sup>, chickens used for meat production<sup>213</sup>, pigs<sup>214</sup> and calves.<sup>215</sup> Some farmed species, such as cattle and sheep thus remain outside the realm of the legislative protection of EU Council Directives. Under European Union law, rules concerning the protection of animals' welfare interests during transport operations<sup>216</sup> and at the time of slaughter<sup>217</sup> are contained in regulations.<sup>218</sup>

As a consequence of the stricter animal welfare legislation during recent decades in the EU, some of the practices understood as the most inhumane in the industrial animal production, such as the use of sow stalls and tethering of sows<sup>219</sup>, veal crates<sup>220</sup> and

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<sup>209</sup> European Council, Council of the European Union website, available at: <https://www.consilium.europa.eu/en/council-eu/decision-making/ordinary-legislative-procedure/>, accessed 24.4.2022.

<sup>210</sup> European Union, "Types of legislation", available at: [https://european-union.europa.eu/institutions-law-budget/law/types-legislation\\_en](https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en), accessed 13.12.2022.

<sup>211</sup> Council Directive 1998/58/EC of concerning the protection of animals kept for farming purposes 1998.

<sup>212</sup> Council Directive 1999/74/EC laying down minimum standards for the protection of laying hens 1999.

<sup>213</sup> Council Directive 2007/43/EC laying down minimum rules for the protection of chickens kept for meat production 2007.

<sup>214</sup> Council Directive 2008/120/EC laying down minimum standards for the protection of pigs 2008.

<sup>215</sup> Council Directive 2008/119/EC laying down minimum standards for the protection of calves 2008.

<sup>216</sup> Council Regulation (EC) No 1/2005 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97 2004.

<sup>217</sup> Council Regulation (EC) No 1099/2009 on the protection of animals at the time of killing 2009

<sup>218</sup> Vomáčka 2020, pp. 697, 692.

<sup>219</sup> Council Directive 2008/120/EC laying down minimum standards for the protection of pigs 2008, articles 3 and 4.

<sup>220</sup> Council Directive 2008/119/EEC of 18 December 2008 laying down minimum standards for the protection of calves, article 3.



battery cages are nowadays prohibited by their respective directive.<sup>221</sup> For example, the use of battery cages was deemed illegal in 1999, through the adoption of a directive laying down minimum standards for the protection of laying hens.<sup>222</sup> Scientific evidence show that hens are unable to behave naturally and fulfil their ethological and physiological needs in battery cages, and the cages were therefore viewed as incompliant with the animal welfare objectives of EU law.<sup>223</sup> Directives as a legal instrument, however, often allow for transition periods in respect of implementing the provisions in member states. Thus, for example in the case of prohibiting the use of battery cages, the directive demanded a complete prohibition only after a transition period of 12 years.<sup>224</sup> Consequently, member states had the chance to choose whether to postpone or act rapidly in terms of prohibiting the use of battery cages before the complete ban came into effect in 2012.

While some methods and processes of animal production are prohibited in the EU, they might still be used in other non- EU countries. According to international trade rules, EU may not be able to restrict import and export because it would conflict with the non-discrimination principle explained in chapter 2. Thus, when the ban of battery cages was comprehensively enacted in 2012, the EU imported more than 15 000 tonnes of egg products<sup>225</sup> and available data on the EU's import and exports suggest that most of the imported eggs originated from countries where the use of battery cages was permitted in the respective laws at the time, and in extensive use.<sup>226</sup> In addition, EU member states have also been allowed to continue selling the battery cages to non-European states, where the use of them remains legal.<sup>227</sup>

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<sup>221</sup> Council Directive 1999/74/EC laying down minimum standards for the protection of laying hens, article 5.

<sup>222</sup> *Ibid.*

<sup>223</sup> European Parliament resolution on the EU laying hens industry: the ban on the use of battery cages 2012, B7-0706/2010.

<sup>224</sup> *Ibid.*

<sup>225</sup> Offor 2020, pp. 250. In 2012, roughly half of its eggs from the United States, where most hens were kept in battery cages at the time.

<sup>226</sup> *Ibid.*

<sup>227</sup> *Ibid.* See also the article by World Animal Protection, "European companies promoting prohibited farming systems abroad" available at: <https://www.worldanimalprotection.org/news/european-companies-promoting-prohibited-farming-systems-abroad-battery-cages-hens>, accessed 21.1.2022.

Furthermore, to provide for common and harmonized legal standards across the internal market regarding the protection of animal welfare interests while allowing for a smooth and free trade, constitutes the overreaching purpose of EU animal welfare legislation.<sup>228</sup> Individual member states of the EU are allowed to implement stricter and more detailed national animal welfare protection laws than what is provided in the treaties, regulations and directives. Yet, according to EU standards, national animal welfare laws must only be as strict as necessary to ensure the protection of animals' welfare.<sup>229</sup> Thus, prohibitions or restrictions on products, including farm animals, may not be applied if it implies any "arbitrary discrimination" of products sold on the internal market or constitute a disguised restriction on trade between member states.<sup>230</sup> Any internal legislation concerning the protection of animals' welfare may not for example, involve domestic rules that result in quantitative prohibitions or restrictions on the tradable goods (such as *inter alia* live animals) between member states.<sup>231</sup>

If EU member states choose to apply stricter animal welfare obligations within respective states' internal jurisdiction it may therefore, cause problems in relation to the harmonized common standards. This was exemplified in the case *R v. Compassion in World Farming*,<sup>232</sup> where the European Court of Justice (hereafter ECJ) considered the legality of an imposed ban on export of veal calves to other states within the EU that used "veal crate systems", a type of box that was prohibited in the United Kingdom. The ban was enforced by the United Kingdom based on the Council Directive 91/629/EEC (now repealed) that allowed EU member states to impose stricter provisions (derogate from the common minimum standards on animal welfare) within their respective territories.<sup>233</sup>

However, according to the judgment of the ECJ, the derogation in terms of a total ban on live export of calves would infringe the harmonization created by the EU provisions.<sup>234</sup> According to the ECJ the ban would have affected the market structure so extensively

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<sup>228</sup> Vomáčka 2020, pp. 701.

<sup>229</sup> *Ibid.*

<sup>230</sup> TFEU, article 36.

<sup>231</sup> *Ibid.*, articles 34 and 35.

<sup>232</sup> *R v. Compassion in World Farming*, Case C-1/96, EU:C:1998:113.

<sup>233</sup> *Ibid.*

<sup>234</sup> *Ibid.*, para. 44.

that the market would be unable to function properly, thus rendering the trade ban on live calves unjustified.<sup>235</sup> Moreover, all legal instruments concerning farm animal protection within the EU are characterised by a form of dual aim of protecting animals' welfare interests on the one hand and ensuring a free trade of goods on the other.

## 3.2 Live export of farm animals

### 3.2.1 Scope and nature of animal transport legislation

In 2019, the EU exported around 4,5 million living sheep, cattle and pigs and almost 225 million poultry to non-EU states to be either fattened, bred or slaughtered.<sup>236</sup> Exact numbers of live animals traded between the EU and third countries is not available due to the lack of consistent data. It implies that the perception of EU's international trade in live animals is not completely informed.<sup>237</sup> Intra-EU trade of farm animals constitutes most transports, while 15 per cent are transported to non-EU states, which is predominantly export based.<sup>238</sup> Among the farmed animal species in the EU, poultry<sup>239</sup> is the most traded and exported followed by the sheep, cattle and pigs.<sup>240</sup> Substantial export in live fish and aquatic invertebrates as well as horses, asses, mules, live companion animals and animals used for laboratory purposes is also conducted by the EU.<sup>241</sup> With respect of trade in mammals, EU's principal trade partners in 2019 were Libya, followed by Jordan, Israel, Saudi Arabia, Lebanon and Turkey.<sup>242</sup>

As briefly touched upon earlier, the EC Regulation 1/2005 on the protection of animals during transport regulates the protection of commercially utilized farm animals during

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<sup>235</sup> *Ibid.*

<sup>236</sup> Eurogroup for Animals, pp. 8. Approximately 1,6 billion farm animals were transported within the EU and to non-EU countries in 2019, according to the estimations compiled by the non-governmental organization Eurogroup for Animals. Poultry was mainly exported to Ukraine, Belarus, Ghana, Egypt, Morocco and Albania. The number of animals (sheep, cattle and pigs) traded between EU countries was 44 657 715.

<sup>237</sup> In-depth analysis – 'Patterns of livestock transport in the EU and to third countries', European Parliament, Directorate-General for Internal Policies, Policy Department B – Structural and Cohesion Policies 2021, pp. 25.

<sup>238</sup> *Ibid.*, pp.6, 25.

<sup>239</sup> *Ibid.*, Poultry represents 98% of intra-EU trade and 97% of EU trade to non-EU states. The transports of live animals to non-EU countries represents a small part of EU's total transports of live animals.

<sup>240</sup> Eurogroup for Animals, pp. 9.

<sup>241</sup> *Ibid.*, pp. 9 -13.

<sup>242</sup> *Ibid.*

transport operations in the EU.<sup>243</sup> The first directive concerning the regulation of live animal transport was adopted in 1991<sup>244</sup>, followed by stricter regulation provided for in Directive 95/29/EC<sup>245</sup> and two Council Regulations.<sup>246</sup> The previous regulations and directives were finally amended by the present, Regulation 1/2005 on the protection of animals during transport and related operations.<sup>247</sup>

Regulation 1/2005 refers to the “animals” that it regulates as live vertebrate animals used for commercial purposes.<sup>248</sup> Its provisions are therefore applicable on transport operations involving animals such as poultry, cattle, sheep, goats, deer and horses and fish as well as other aquatic vertebrates.<sup>249</sup> However, some farmed species, such as fish, are not mentioned in the Regulation.<sup>250</sup> Animals used for non-commercial purposes or invertebrate animals remain excluded from its regulatory scope, as well as animals being transported to or from a veterinary clinic prescribed by a veterinary.<sup>251</sup>

The EU’s harmonized rules regarding the live animal transport contained in the Regulation 1/2005 are based on article 13 of the TEUF, demanding member states to pay full regard to the welfare requirements of animals when formulating and implementing the Union’s transport policies.<sup>252</sup> Accordingly, the central aim of the Regulation 1/2005 is to prevent injury and unnecessary suffering to transported animals.<sup>253</sup> It also allows member states to adopt their own national measures to improve the welfare of animals during transport operations conducted in the territory of a member state or during

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<sup>243</sup> Council Regulation (EC) No 1/2005.

<sup>244</sup> Council Directive of 19 November 1991 on the protection of animals during transport and amending Directives 90/425/EEC and 91/496/EEC.

<sup>245</sup> Council Directive 95/29/EC of 29 June 1995 amending Directive 91/628/EEC concerning the protection of animals during transport.

<sup>246</sup> Council Regulation 411/98 of 16 February 1998 on additional animal protection standards applicable to road vehicles used for the carriage of livestock on journeys exceeding eight hours and Council Regulation No 1255/99 on the common organization of the market in milk and milk products 1999.

<sup>247</sup> Council Regulation 1/2005/EC on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97, 22 December 2004.

<sup>248</sup> *Ibid.*, article 2 (a).

<sup>249</sup> “Animals” are defined as “live vertebrate animals” in article 2(a) of the Council Regulation (EC) No 1/2005.

<sup>250</sup> Eurogroup for Animals, pp. 4.

<sup>251</sup> Council Regulation (EC) No 1/2005, articles 1(5) and 2(a).

<sup>252</sup> TFEU, article 13.

<sup>253</sup> Council Regulation (EC) No 1/2005 preamble (11) states that “ in order to ensure a consistent and effective application of this Regulation across the Community in the light of its basic principle according to which animals must not be transported in a way likely to cause injury or undue suffering...”

transports at sea that departed from a member state's territory.<sup>254</sup> At the same time, the Regulation aims to eliminate technical barriers to trade. The preamble of the Regulation 1/2005 reads as follows;

“Under Council Directive 91/628/EEC of 19 November 1991 on the protection of animals during transport, the Council has adopted rules in the field of the transport of animals in order to eliminate technical barriers to trade in live animals and to allow market organizations to operate smoothly, while ensuring a satisfactory level of protection for the animals concerned. “<sup>255</sup>

Hence, in a preliminary ruling of *Danske Svineproducenter v. Justiteministeriet* (C-316/10), the ECJ confirmed, that the objective of the Regulation 1/2005 is twofold in its aims, earlier directives on animal welfare protection in transport alike.<sup>256</sup> Furthermore, in *Danske Svineproducenter v. Justiteministeriet* (C-316/10), the ECJ answered questions inquired by a national court in Denmark regarding the interpretation of the Regulation 1/2005 with respect of national jurisdiction on animal transport.<sup>257</sup> By contrast to the transport provisions outlined in the Regulation 1/2005, Denmark had specified numerical standards concerning minimum height of compartments that pigs were kept in as well as specified minimum inspection height and maximum loading densities.<sup>258</sup> Accordingly, the ECJ examined the compatibility of such national rules and measures with EU law, as per request by the national court.<sup>259</sup> Furthermore, the EJC asserted that member states have a certain margin of discretion in terms of implementing the provisions of the Regulation as they see fit. Yet, national measures on animal welfare are required to comply with the main objective of the Regulation that is to protect animal welfare of the transported animals. Yet, such measures must not undermine the other objectives of the Regulation that constitutes eliminating technical barriers to trade in live animals and allowing market organisations to operate smoothly.<sup>260</sup>

The ECJ further emphasised in its preliminary ruling, that member states may not enact rules that provide for stricter protection of pigs than what considered necessary during

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<sup>254</sup>*Ibid.*, article 1(3).

<sup>255</sup> *Ibid.*, recital 2 of the preamble.

<sup>256</sup> *Danske Svineproducenter v. Justiteministeriet* (C-316/10) 2011 para. 44.

<sup>257</sup> *Ibid.*, para. 37, concluding remarks.

<sup>258</sup> *Ibid.*, para. 37, concluding remarks.

<sup>259</sup> *Ibid.*, para. 37, concluding remarks.

<sup>260</sup> *Ibid.*, para. 41, 42, 52, 55.

transport according to the Regulation, to prevent trade restrictions of goods (live animals).<sup>261</sup> Furthermore, the Regulation's provision regarding pigs in transport, establishes that pigs must be able to stand up in their natural position and that the space inside the compartments must be sufficient as well adequate ventilation provided.<sup>262</sup>

### 3.2.2 Principal requirements

Contained in the Regulation 1/2005 are obligations and duties of all actors involved in the process of transporting live animals such as the central authority of a member state, the keeper responsible for handling the animals during the transport, the official veterinarian as well as the authorised transporter.<sup>263</sup> Furthermore, the personnel concerned with the handling of the animals must be appropriately trained and considered competent to execute the transport without treating the animals in a manner that would cause unnecessary fear, suffering or injury to the transported animals.<sup>264</sup>

As stated in article 1 the Regulation applies to "the transport of live vertebrate animals carried out within the Community, including the specific checks to be carried out by officials on consignments entering or leaving the customs territory of the Community"<sup>265</sup> The animal welfare duties are reflected as required minimum standards concerning adequate transport conditions of "animals". Furthermore, general conditions pertaining to the transport of animals are listed under article 3, based on the provided principle that "No person shall transport animals or cause animals to be transported in a way likely to cause injury or undue suffering to them."<sup>266</sup>

Accordingly, provisions concern watering and feeding intervals, duration of journey, resting periods.<sup>267</sup> According to the Regulation, animals destined for transport must for example, be fit before commencing a journey, and the people responsible for handling the animals are required to plan the journey with the aim of minimizing the length of the journey. Before the animals are loaded onto the transport vessels or vehicles , they must

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<sup>261</sup> *Ibid.*, 55.

<sup>262</sup> *Ibid.*, para. 57.

<sup>263</sup> Council Regulation (EC) No 1/2005, article 2 defines the different persons involved in the transport.

<sup>264</sup> *Ibid.*, article 3 e.

<sup>265</sup> *Ibid.*, article 1.

<sup>266</sup> *Ibid.*, article 3.

<sup>267</sup> *Ibid.*, article 3.

undergo health checks with the purpose of assessing whether the animals are fit for transport by road, rail, ship or airplane. In addition, the means of transport as well as unloading and loading facilities are required to be designed and maintained so that the safety of animals is secured, and suffering is avoided.<sup>268</sup>

Animals are not considered fit for transport if they are for example, unable to move pain-free or without help or have open wounds, according to the Regulation. Neither are pregnant females that have passed 90 per cent of their expected gestation period fit for transport nor females that have given birth within the previous week. Very young animals, such as piglets under the age of three weeks or lambs less than one week old, less than ten-day-old calves (unless they are to be transported together with the mother) are also exempted from transport.<sup>269</sup> However, injured or sick animals may be considered fit for transport in some instances, given for example, they are only “slightly injured or ill and transport would not cause additional suffering”.<sup>270</sup> The transport company and drivers are in that case, responsible for deciding if the animal can be considered fit for the planned transport operation. Moreover, the transport of pregnant animals with more than 90 per cent of the gestation time already elapsed as well as the transport of animals with some psychological weaknesses or injuries, represent some of the frequently occurring and documented violations of the Regulation’s provisions.<sup>271</sup>

To maintain the animals’ welfare during the journey, the transporter is obliged to reach the transport destination without any delay. In addition, the personnel responsible for handling the animals during the journey must possess the competence to offer appropriate care for the animals and abstain from any use of violence or other forms of methods that could cause unnecessary injury, fear or suffering.<sup>272</sup> Regarding the means of transport, the regulation states that animals must be transported without being injured and protected from extreme temperatures and harmful variations in climatic conditions. Moreover, the containers that animals are transported in need to be clean and designed to hinder animals

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<sup>268</sup> *Ibid.*, article 3 (b,c,d,f), article 2 (n), article 15(2).

<sup>269</sup> *Ibid.* chapter I article 2.

<sup>270</sup> *Ibid.*, chapter I, article 3.

<sup>271</sup> European report on the investigation of alleged contraventions and maladministration in the application of Union law in relation to the protection of animals during transport within and outside the Union (2020/2269(INI)) para. 36.

<sup>272</sup> *Ibid.*, article 3, (b,c,d,f)

from experiencing stressful movement. Sufficient ventilation and space must also be provided for and a possibility to move naturally, with sufficient space in relation to the animals' size and the length of journey.<sup>273</sup> Any delays in the transport should be averted and the welfare of the animals controlled regularly during the journey. In addition, the animals should be provided with sufficient food and water of good quality and have a possibility to rest at appropriate intervals.<sup>274</sup>

Moreover, before embarking on a long journey with a final destination in a third country, a competent authority of the place of departure is obliged to assess that the transporters possess valid transport authorisations and are certified to carry out a long journey. In addition, the organiser of the transport must submit a journey log presenting a realistic plan over the trip ahead, to ensure its compliance with the Regulation. The journey log is supposed to only be approved if the "checks provided for in point (a) is satisfactory".<sup>275</sup> On border of the EU, at the so called "exit points" or "inspection posts" the wellbeing of the animals must be assessed one last time by official veterinarians, to ensure that the transport operation will be executed in compliance with the Regulation. If the animals are seen as unfit for international transport outside EU borders, they are to be unloaded and provided with water, food and rest to ensure that the welfare needs are met.<sup>276</sup> Furthermore, any transport operations that are evaluated as harming the welfare of the farm animals, should be terminated. In the EU, the border where most animals are transported out of the EU, is situated between Bulgaria and Turkey. Numerous animals are also transported by sea, to for example countries in Africa.<sup>277</sup>

### 3.2.3 Duration of journey

A characterizing trait of international transport of live animals concern the fact that they tend to be "long journeys", implying a journey exceeding 8 hours, according to the

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<sup>273</sup> *Ibid.*, chapter II "Means of Transport".

<sup>274</sup> *Ibid.*, article 3 f, h.

<sup>275</sup> Council Regulation (EC) No 1/2005, article 14.

<sup>276</sup> *Ibid.*, article 21.

<sup>277</sup> In-depth analysis – 'Patterns of livestock transport in the EU and to third countries', European Parliament, Directorate-General for Internal Policies, Policy Department B – Structural and Cohesion Policies 2021, pp. 27.



Regulation 1/2005.<sup>278</sup> Long journeys are discouraged in the Regulation because such journeys are more likely to affect the animals' welfare negatively than short journeys.<sup>279</sup> Yet, long journeys exceeding eight hours remain lawful under the Regulation if certain requirements are fulfilled.<sup>280</sup> Accordingly, horses and mules may lawfully be transported for a time period of 24 hours, while cattle, sheep, goats and pigs may be transported for 14 hours, followed by at least one hour break and then transported again for another 14 hours.<sup>281</sup> Thus, total journey times of up to 29 hours are permitted according to the Regulation 1/2005. Total journey times of 31 hours have also been allowed, motivated by it being beneficial for the wellbeing of the animals.<sup>282</sup> Whether long journeys should be permitted under the EU legal framework, given the detrimental effects especially long, international journeys might have on the animal's welfare is increasingly discussed within the EU.<sup>283</sup> Questions regarding the acceptable total duration of transport have also been brought to the ECJ for clarification.<sup>284</sup>

Accordingly, the case *Masterrind GmbH V Hauptzollamt Hamburg - Jonas* (C-469/14) involved a German company that planned to transport six live cows from Hamburg in Germany to Morocco. According to the journey plan, the duration of the journey was estimated at 30 hours and thirty minutes within the EU. The Regulation 1/2005, however, establishes that cattle may be transported for 29 hours maximum including a 1-hour break. In this case the total journey time amounted to 30 hours because of resting periods during the transport operation were planned to last for more than one hour. In addition, more than only one stop was planned to take place during the journey.<sup>285</sup> At the EU border exit point in France, the responsible veterinaria found that the total journey time thus exceeded the time allowed, indicating non-compliance with Regulation 1/2005.<sup>286</sup>

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<sup>278</sup> Council Regulation (EC) No 1/2005, article 2 (m).

<sup>279</sup> *Ibid.*, recital 18.

<sup>280</sup> *Ibid.*, annex I, Chapter V.

<sup>281</sup> *Ibid.*, chapter V, article 1.4.

<sup>282</sup> *Ibid.*, Article 3 (a). Vomáčka, 2020, pp. 700.

<sup>283</sup> See the Proposal for a European Parliament recommendation to the Council and the Commission following the investigation of alleged contraventions and maladministration in the application of Union law in relation to the protection of animals during transport within and outside the Union (2021/2736(RSP)).

<sup>284</sup> *Masterrind GmbH V Hauptzollamt Hamburg-Jonas* (C-469/14), EU:C:2016:609, ECJ preliminary ruling.

<sup>285</sup> Council Regulation (EC) No 1/2005, chapter V, article 1.4.

<sup>286</sup> *Masterrind GmbH V Hauptzollamt Hamburg-Jonas* para. 18.

Thus, following a request for a preliminary ruling from a national court in Germany, the ECJ then expressed its opinion about the interpretation of 29-hour rule of maximum time when transporting cows in accordance with the Regulation 1/2005. The first question submitted by to the ECJ was;

”Is the rule set out in point 1.4. of Chapter V of Annex I to Regulation No 1/2005 according to which, after 14 hours of travel, animals are to be given a rest period of at least 1 hour sufficient for them in particular to be given liquid and if necessary fed, after which they may be transported for a further 14 hours, to be interpreted as meaning that the periods of transport may be interrupted by a rest period of more than 1 hour or by several rest periods, at least one of which lasts for 1 hour?”<sup>287</sup>

Because the Regulation states that the rest period should be “at least one hour”, the ECJ responded that the rest period may indeed exceed one hour. Yet, the ECJ emphasized that any such prolongment of rest period and timespan of journey must not cause the transported animals undue suffering or injury. The ECJ further stated that while a combined journey and resting times should not exceed 29 hours, it may be permissible to lengthen the journey and derogate from the rule with two hours if it serves the animals’ interests.<sup>288</sup> Thus, what ECJ conveyed also through its interpretation of the case *Masterrind GmbH V Hauptzollamt Hamburg-Jonas*, as it did in *Danske Svineproducenter v. Justiteministeriet*, that the primary objective is to safeguard the welfare of animals transported.<sup>289</sup> Long journeys of up to 31 hours might thus be justified if they serve the welfare interests of the animals transported. Yet, at the same time, the Regulation 2005/1 indeed discourages member states from conducting long journey transports of live animals altogether, due to the detrimental impact long journeys have on their animal welfare.<sup>290</sup> A comprehensive report conducted by the European Parliament has also found evidence indicating ”that many competent authorities often approve and stamp journey

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<sup>287</sup> *Ibid.*, para. 32 (1).

<sup>288</sup> *Ibid.*, para. 43.

<sup>289</sup> *Ibid.*, para. 43.

<sup>290</sup> Council Regulation (EC) No 1/2005, recital 18.

logs with unrealistically short estimated journey times, as well as with other missing information, in clear contravention of the provisions of Regulation (EC) No 1/2005".<sup>291</sup>

Furthermore, as Sowery notes, the case *Masterrind GmbH V Hauptzollamt Hamburg-Jonas*, exemplifies how current animal welfare obligations leave room for different interpretations among member states and are impacted by other interests. Thus, resulting in varying interpretation and enforcements of the provisions regulating journey times, rest and watering periods.<sup>292</sup> Scientific evidence shows that the length of journey increases the risk for animals to experience stress and suffering as a result of extreme temperatures, insufficient access to food, water. The duration of journey is not in itself the issue, but the detrimental effect the conditions during long journeys have on animal welfare.<sup>293</sup>

Yet, as Sowery notes, the transport of live farm animals over long journeys, exceeding the eight-hour rule remain lawful because EU member states, essentially, were unable to reach an agreement on maximum journey times due to the different preferences expressed in the law-making process.<sup>294</sup> Neither were stricter regulatory requirements concerning the journey times seen as reasonable when weighed against the financial interests tied to the system of live transport.<sup>295</sup> Consequently, the vagueness and unclarity characterising the language of the Regulation, has resulted in member states interpreting the provisions in a manner that has resulted in frequent violations and varying application of the rules, resulting in heightened risks concerning the animals' wellbeing.<sup>296</sup>

### 3.2.4 The territorial scope

In respect of the international protection of animals transported beyond EU territory, the territorial scope is of crucial importance to examine. According to article 1 (1) of the

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<sup>291</sup> European parliament, Report on the investigation of alleged contraventions and maladministration in the application of Union law in relation to the protection of animals during transport within and outside the Union 2021, para 80.

<sup>292</sup> Sowery 2018, pp. 87-88.

<sup>293</sup> Nielsen, Herskin 2011, pp. 415.

<sup>294</sup> Sowery 2018, pp. 87-88.

<sup>295</sup> *Ibid.*

<sup>296</sup> European parliament, Report on the investigation of alleged contraventions and maladministration in the application of Union law in relation to the protection of animals during transport within and outside the Union 2021, para 76.

Regulation, the provisions aimed to safeguard the transported animals' welfare apply "on the transport of live vertebrate animals carried out within the Community, including the specific checks to be carried out by officials on consignments entering or leaving the customs territory of the Community".<sup>297</sup>

Yet, when the question of the territorial scope of the Regulation 1/2005 was raised in the case *Zuchtvieh-Export GMBH v. Stadt Kempten*, the ECJ found that the European animal welfare obligations in live transport indeed possess an extraterritorial dimension. Moreover, in its ruling, the ECJ stated for the first time, that the provisions contained in the Regulation 1/2005 remain applicable during the *entire* (in this case by road) transport of animals from the EU to non-European countries, given the departure is within the EU.<sup>298</sup> Thus, the ECJ found that the Regulation is applicable on transports conducted also *outside* the Community, even if article 1(1) refers to transports conducted *within* the community.

Furthermore, the case *Zuchtvieh-Export GMBH v. Stadt Kempten* involved the export company Zuchtvieh – Export that planned to transport 62 live cows for a distance of 7000 kilometres. The transport operation was planned to commence on 23 April 2012 in Kempten, Germany and end Andijan in Uzbekistan on 2 May 2012 with stops in Poland, Belarus, Russia and Kazakhstan.<sup>299</sup> According to the journey log submitted by the export company at the point of departure, the export company planned to pause twice outside the borders of the EU to let the cattle rest, eat and be watered; first in Brest in Belarus and Karaganda, Kazakhstan for a respective 24 hours. However, according to the journey plan, the cattle would remain loaded on the trucks during these resting periods. In addition, the final stretch of the journey was estimated to take 29 hours.<sup>300</sup>

Moreover, Stadt Kempten (municipality of Kempten) refused to grant customs clearance for the shipment to Andijan because in the competent authority's view, the specifications on resting, transfer and exit points during the journey outside the EU were insufficient. Stadt Kempten therefore commanded the export company to amend the planning log

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<sup>297</sup> Council Regulation (EC) No 1/2005, article 1(1).

<sup>298</sup> *Zuchtvieh-Export GMBH v. Stadt Kempten* (Case C-424/13), para. 56.

<sup>299</sup> *Ibid.*

<sup>300</sup> *Ibid.*, paras. 16-17

covering the entire journey to comply with Regulation 1/2005. The transport company Zuchtvieh – Export subsequently appealed to local courts due to the Kempten’s refusal of customs clearance, claiming that the Regulation did not apply in third countries.<sup>301</sup>

According to the export company Zuchtvieh – Export, the journey log submitted before conducting a long journey only concerned stages of the journey explicitly within the Union.<sup>302</sup> The export company also held that it was unrealistic and “counterproductive” to apply the provisions beyond borders, especially those concerning resting, watering and feeding due to lack of adequate resting points and transport infrastructure.<sup>303</sup> In addition, they referred to the principle of territoriality as limiting the application of the Regulation and underlined the potential regulatory conflicts that might arise between domestic regulation in third countries and the Regulation 1/2005.<sup>304</sup> Nevertheless, Stadt Kempten opposed the export company’s claims by stating that the transporters were bound by the obligations of the Regulation 1/2005, regardless of available resting points in third countries. Stadt Kempten and the Public Prosecutors Office for the Land Bavaria, Germany pointed at the preamble of the Regulation asserting that long journeys should be limited to the best availability by stating that journeys impossible to adhere to the Regulation’s provisions, should not be executed at all.<sup>305</sup>

In its preliminary ruling, the ECJ ultimately held that the Regulation 1/2005 was applicable during the entire journey, including the stages of a journey conducted outside the EU if the journey commenced within the EU.<sup>306</sup> Thus, the judgment established that animal welfare protection ascribed to transported animals within the EU would continue to apply beyond EU borders.<sup>307</sup> According to how the ECJ interpreted EU law in *Zuchtvieh-Export GmbH v. Stadt Kempten*, the competent authority is required to abstain from authorizing a journey log submitted by the transport organizer if the planned arrangements of the journey “indicate” incompliance with the Regulation 1/2005 outside European borders. Given the requirement of ensuring compliance of the Regulation

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<sup>301</sup> *Ibid.*, paras. 18-19.

<sup>302</sup> *Ibid.*, para. 26. Council Regulation (EC) No 1/2005, article 14.

<sup>303</sup> *Ibid.*, para 27.

<sup>304</sup> *Ibid.*, para 30 and 31.

<sup>305</sup> *Ibid.*, para 32.

<sup>306</sup> *Ibid.*, para 56.

<sup>307</sup> Mahoney 2017, pp. 371.

1/2005 all the way to the destination, the prevailing view is that the provisional protection of transported European animals extends to third countries.<sup>308</sup>

Furthermore, the ECJ noted that many uncertainties are involved in the execution of a “long journey”, which renders full compliance with the Regulation 1/2005 a hard task to complete. At the point of departure, the competent authority therefore is entitled to a certain margin of discretion when determining if a journey log appears “realistic” and “indicate” compliance with the Regulation.<sup>309</sup> Competent authorities must therefore merely indicate in the journey plan submitted before departure, that the requirements connected to watering and feeding intervals as well as journey times and resting periods will be considered.<sup>310</sup>

In an advisory opinion to *Zuchtvieh-Export GmbH v. Stadt Kempten*, Advocate General Bot, highlights the blurry lines concerning the territorial scope of the Regulation. Accordingly, advocate General Bot argues that the Regulation encompasses no legal effect beyond EU borders by referring to its article 1(1), establishing that the provisions in the Regulation pertain to transport operations conducted within the Community.<sup>311</sup>

Nonetheless, reports have highlighted the disregard of the ECJ ruling with respect of enforcing the Regulation extraterritorially and violations of the Regulation.<sup>312</sup> Violations include non-realistic journey logs, lack of personnel suitable to handle the animals and of contingency plans.<sup>313</sup> In addition, control posts outside EU borders are often not available nor formal surveillance for asserting that journey logs are in compliance with the Regulation beyond EU borders.<sup>314</sup> Extensive reporting shows that the Regulation is frequently not complied with during international transport operations. Thus, the animal

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<sup>308</sup> *Zuchtvieh-Export GMBH v. Stadt Kempten* paras. 56 och 52.

<sup>309</sup> *Ibid.*, para. 52.

<sup>310</sup> *Ibid.*, para. 55.

<sup>311</sup> Opinion of Advocate General Bot: *Zuchtvieh-Export GmbH v Stadt Kempten*, Case C-424/13, European Union: Court of Justice of the European Union, 11 September 2014.

<sup>312</sup> European parliament, Report on the investigation of alleged contraventions and maladministration in the application of Union law in relation to the protection of animals during transport within and outside the Union 2021, para. 27.

<sup>313</sup> *Ibid.*, para.27.

<sup>314</sup> *Ibid.* 120.

welfare concerns in live transport are severe, in particular during transports conducted to third countries, due to the lack of effective enforcement of the Regulation.<sup>315</sup>

When animals are transported to states outside the EU, they are likely subjected to weaker animal protection laws than inside the union. Although the ECJ has found that the animal welfare obligations contained in the Regulation applies during the entirety of the journey, that legislative protection ceases when they are unloaded from the transport vehicles. While the ECJ has stated that animals transported to non-European countries are protected by the provisions in the Regulation 1/2005 *during* the entire journey, including outside the EU, if the journey commenced in the EU, the EU has no legislative power to enforce the provisions extraterritorially. In addition, the ECJ has noted that member states have a wide margin of discretion in terms of complying with the obligations contained in the Regulation 1/2005.<sup>316</sup>

Accordingly, the current animal regulation can result in a "race to the bottom" in respect of animal welfare standards during transport, as noted by a recent find fact mission.<sup>317</sup> The phenomenon of a race to the bottom is, generally, a risk in that obligations of animal protection are invalidated by economic interests.<sup>318</sup> The same phenomenon is often discussed in connection with international environmental protection and human rights protection in different industries.<sup>319</sup>

To conclude this chapter, it can be noted that the *intention* of current animal welfare legislation applicable on international live animal transports is good from a zoocentric perspective in the sense that it aims to protect the welfare interests as a main objective. Yet, based on the analysis presented in this chapter, it appears undisputable that current legislation fails to fulfil its principal purpose. Furthermore, the other, secondary objective of promoting a trade free of barriers appears to be the aim in terms of implementation, at

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<sup>315</sup> European parliament, Report on the investigation of alleged contraventions and maladministration in the application of Union law in relation to the protection of animals during transport within and outside the Union 202, para. 23.

<sup>316</sup> *Zuchtvieh-Export GMBH v. Stadt Kempten* paras. 52, 55.

<sup>317</sup> European parliament, Report on the investigation of alleged contraventions and maladministration in the application of Union law in relation to the protection of animals during transport within and outside the Union 2021, para. 14.

<sup>318</sup> Blattner 2019, pp. 3.

<sup>319</sup> *Ibid.*

the expense of protecting animal welfare. Accordingly, the EU's animal welfare legislation aimed to protect animals during international transport is conflicted in its aims because it promotes on the one hand, the harmful practice of international live animal transport and on the other hand, animal welfare protection.



## 4. Advancing international animal protection: shifting the paradigm

### 4.1 Why current animal protection law fails

In academic literature, two distinct legal approaches for safeguarding animals' protection from harmful human induced treatment have traditionally been advocated for; the current legal animal welfare paradigm,<sup>320</sup> and an animal rights paradigm. The animal welfare paradigm characterises current animal welfare laws, based on the assumption that by imposing legal obligations on the persons handling the animals concerning for example, adequate living conditions, animals' wellbeing will be sufficiently protected. Scholars advocating for a legal animal rights paradigm, in turn, argue that for animals' physical and physiological wellbeing to be adequately protected, animals should hold some legal rights.<sup>321</sup> During recent years, scholarship concerning legal animal rights has increased considerably, expressing critique of the current animal welfare paradigm.

Furthermore, as has been demonstrated in this thesis, under the current legal paradigm, animal protection laws are characterised by a strong division between legal subjects and objects. Among living beings, humans are principally viewed as subjects under international law (as well as domestic laws) and all nonhuman animals are essentially considered legal objects.<sup>322</sup> The current animal welfare paradigm as a basis for animal protection, is grounded in the view that humans have a responsibility to treat animals without causing animals "unnecessary suffering" and harm while justifying human use of animals to the extent that it does not breach welfare obligations and thus, inflict "inhumane" treatment and "unnecessary" pain or suffering to animals. The previous chapter demonstrated that the legal framework employed in the European Union is based on an animal welfare paradigm allowing for a regulation of animals as human "property" but also requiring that the "welfare needs" of animals as "sentient beings" are realized to best availability.<sup>323</sup> Consequently, provisions in international and regional instruments typically emanate from minimum standards with respect of fulfilling the animal welfare

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<sup>320</sup> Francione and Garner 2010. The animal welfare paradigm characterizes current animal welfare laws.

<sup>321</sup> Wahlberg 2020, pp. 22.

<sup>322</sup> Trigg 2021, pp. 77.

<sup>323</sup> Sowery, 2018, pp. 60 and TFEU, article 13.

provisions<sup>324</sup> and certain degrees of suffering and pain are permitted as well as the killing of animals for human purposes.<sup>325</sup> The objective of animal welfare law is thus not to eradicate animal suffering, but to avoid causing animal unnecessary and additional suffering when they are instrumentalized and commodified .<sup>326</sup>

Thus, despite farm animals being recognized as sentient beings under EU law, they are in practice treated as legal objects and property, without any form of legal personhood.<sup>327</sup> It can therefore be argued that the recognition of farm animals as sentient beings in article 13 of the TFEU, remains mostly a symbolic act with limited legal effect in terms of reaching the objective.<sup>328</sup> Accordingly, as Sowery notes regarding the dual status of farm animals as sentient beings and legal objects since 2009; “article 13 TFEU purports to reshape the existing understanding of animal welfare in EU law. But, in practice, this shift creates clear tensions with the previous status of, and protections for, animals as “products” under Union Law”.<sup>329</sup>

Thus, current animal welfare legislation is in many aspects, inherently oxymoronic with respect to the objective; provisions that are aimed to protect animal welfare interests and prevent animal suffering simultaneously permit institutional exploitation of animals.<sup>330</sup> Favre describes the placement of animals in the legal category of “objects” as an example of a legal fiction, because animals are not “things”, yet they can be treated as things according to legal provisions.<sup>331</sup> Waldau implies that, “one can see how psychologically anchored the dualism is by the fact that scientists today still use it even though scientists pride themselves on the commitment to scientific descriptions of the world”.<sup>332</sup>

Moreover, any form of legal protection endowed to animals is currently weighed against a human interest in animal protection laws.<sup>333</sup> For example, in the Regulation 1/2005 that

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<sup>324</sup> Council Directive 98/58/EC concerning the protection of animals kept for farming purposes 1998.

<sup>325</sup> Wahlberg 2020, pp.14.

<sup>326</sup> Peters, 2020, pp. 96.

<sup>327</sup> Sowery 2018, pp. 85. Favre 2020, pp. 306-307. While the TFEU recognises animals as “sentient beings” it also views animals as “agricultural products” in article 38 of the TEUF.

<sup>328</sup> Sowery 2018, pp. 85.

<sup>329</sup> *Ibid.*, pp. 55.

<sup>330</sup> Peters 2020, pp. 9.

<sup>331</sup> Favre 2020, pp. 306-307

<sup>332</sup> Waldau 2017, pp.178.

<sup>333</sup> Wahlberg 2020, pp. 14.

was explained in the previous chapter, the preamble establishes that an objective of the Regulation 1/2005 is “ensuring a satisfactory level of protection for the animals concerned”<sup>334</sup> and further that “for reasons of animal welfare the transport of animals over long journeys, including animals for slaughter, should be limited as far as possible.”<sup>335</sup> Meanwhile, the Regulation 1/2005 also aims to “eliminate technical barriers to trade live animals and to allow market organizations to operate smoothly.”<sup>336</sup>

Animal law scholars tend to underline that the increased number of legal regulations concerning animal welfare protection globally has not resulted in any substantial changes in the animal industry.<sup>337</sup> Demonstrably, the industrial production of animals continue to flourish and practices such as international live transport of farm animals is permitted despite scientific research showing its detrimental effects on the animals’ welfare.<sup>338</sup> In fact, the number of farm animals transported and exported internationally has been historically high during recent years.<sup>339</sup>

To enable effective protection of animals that are traded, transported, and slaughtered for commercial reasons, animal law scholars thus increasingly advocate for moving beyond the legal animal welfare paradigm.<sup>340</sup> Among the alternative approaches proposed in literature regarding what that would entail legally speaking, the animal rights paradigm has gained the strongest foothold in legal studies. After the philosophical discussion about animal rights was ignited in the 1970’s several moral theories on animal rights have been presented, followed by theories on legal animal rights.<sup>341</sup> Furthermore, proponents of an

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<sup>334</sup> Council Regulation (EC) No 1/2005, recital 2.

<sup>335</sup> *Ibid.*, recital 5.

<sup>336</sup> *Ibid.*, recital 2.

<sup>337</sup> Favre 2020, pp. 298.

<sup>338</sup> Federation of veterinarians of Europe position on the issue, available at:

<https://fve.org/publications/fve-calls-to-ensure-better-animal-welfare-during-animal-transport/>, accessed 2.11.2021

<sup>339</sup> FAO report 2022, pp. 149.

<sup>340</sup> Sparks, Kurki, Stucki 2020, pp. 149-150.

<sup>341</sup> Wills 2020, pp. 199. See for example Peter Singer’s work “The Case for Animal Rights”, University of California Press in 1983 is usually referred to as the book that started the conversation on animal rights. See also Gary Francione with his work “Animals, Property, and Law” Temple University Press 1995, as it represents one of the first and most important works pertaining to legal animal rights.

animal rights paradigm argue that the legal status of animals as legal objects constitutes an important obstacle for enhancing animal protection legislation.<sup>342</sup>

However, demonstrably, animals have never been ascribed legal rights under international law and no legal system recognises animals as legal subjects with fundamental legal animal rights at present.<sup>343</sup> A few individual cases indeed exist where animals have been recognized as rights holders in national courts. One of the most notable cases where lawyers representing animals have succeeded in transforming moral rights to legal rights, concern a court that recognized the writ of *habeas corpus*, a right to personal freedom, to a chimpanzee.<sup>344</sup> While this case will not be further examined in this thesis, it can be noted that the claimants in present animal rights legal cases base their argumentation on the aspect that these animals in question, possess cognitive capabilities comparable with for example young infants or humans with severe cognitive impediments.<sup>345</sup>

Furthermore, considering the history and developments of public international law, the notion of transforming legal objects into subjects with rights is, in fact, not a new occurrence. For example, humans, were once considered legal objects under international law but are now legal subjects with human rights.<sup>346</sup>

## 4.2 Legal subjects under international law

Legal subjects under international law are the “persons” regulated and recognised in international treaties.<sup>347</sup> Given the scope of this thesis, the basic and widely established and acknowledged conception of international legal subjecthood is useful to briefly present in the context of the research questions.

Historically, states have been considered the principal legal subjects under international law as states are the primary actors capable of exercising rights and obligations stipulated

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<sup>342</sup> Palmer 2016, pp. 19.

<sup>343</sup> Peters 2020, pp. 1.

<sup>344</sup> The chimpanzee Cecilia was recognized as a subject of law with rights. Extpre Nro. P-72.254/15 2016.

<sup>345</sup> Wills 2020, pp. 200.

<sup>346</sup> Peters 2020, pp. 114.

<sup>347</sup> Fleur 2017 (article by Tiunov 1993), pp. 65-66.

in international treaties as well as holding procedural capacity.<sup>348</sup> Generally, international legal personality is viewed a threshold for enabling any action in international legal situations and as a prerequisite for legal proceedings under international law typically against a state.<sup>349</sup> States are the main actors, conductors of international affairs and parties to the international agreements regulating international legal relationships and constituting the sources of international law.<sup>350</sup> According to the Vienna Convention on the Law of Treaties of 1969, states are exclusively entitled to adopt and create treaties.<sup>351</sup> As affirmed by the Permanent Court of International Justice in *France v. Turkey* (the *Lotus* case) in 1927, “international law governs relations between independent states.”<sup>352</sup>

Some scholars therefore argue that solely states are legal subjects under international law, based on a notion that only if a legal entity can create international legal norms itself, may it be viewed a legal subject.<sup>353</sup> International law is intergovernmental and thus, essentially created *by* states for the purpose of regulating the behaviour *of* states.<sup>354</sup> In addition, article 34 of the Statute of the International Court of Justice stipulates that “only states may be parties in cases before the Court.”<sup>355</sup> Hence, as only states have been viewed as legally capable of bringing international claims before an international court, it has generally been the state that has been able to act in the capacity of an international legal subject in cases where individuals or companies national to it are subjected to any injury because of another state’s actions.<sup>356</sup>

Although States are considered the principal legal subjects under international law, some non-state entities have also been viewed as justified legal subjects under international law. The ICJ provided clarification around the content of the concept of international legal person in its famous 1949 Advisory opinion on *Reparation for Injuries Suffered in*

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<sup>348</sup> Grant 2010, pp. 35.

<sup>349</sup> Fleur 2017 (article by Klabbbers 2005), pp.5.

<sup>350</sup> *Ibid.*

<sup>351</sup> Vienna Convention on the Law of Treaties of 1969, articles 1 and 2.

<sup>352</sup> Permanent Court of International Justice (PCIJ), judgment number 9, *France v. Turkey* 1927, para. 44. The PCIJ preceded the International Court of Justice.

<sup>353</sup> Fleur 2017, article by Vukas 1991 pp. 80-81.

<sup>354</sup> *Ibid.*, article by Tiunov 1993, pp. 65-66.

<sup>355</sup> Statute of the International Court of Justice , article 34.

<sup>356</sup> Grant 2010, pp. 36.

*the Service of the United Nations* (1949).<sup>357</sup> The case concerned the death of a UN personnel, the Swedish diplomat Count Folke Bernadotte in 1948 in Palestine. Bernadotte was murdered by Jewish groups advocating for a state of Israel during his time in service of the UN. After his murder, the UN General Assembly posed an inquiry to ICJ concerning UN's capacity to file an international claim against the government of Israel, as responsible for the death. In *Reparations*, the ICJ found for the first time, that the international organisation of the United Nations constituted an international legal subject; an actor with rights and obligations under international law. In the case, it asserted that a subject of international law can possess international rights and duties, and that the rights can be preserved due to the ability of presenting international claims.<sup>358</sup> The ICJ based its findings also on the fact that, the UN had treaty-making power as accorded in the Charter and was international in character.<sup>359</sup>

After the *Reparations* case, other international bodies have also been admitted international legal personhood separate from that possessed by the state.<sup>360</sup> The concept of international legal subjectivity has demonstrably been tested and expanded. According to the present conceptual and doctrinal understanding of international law, also other international "non-state actors" appearing on the international arena, including non-governmental organisations, individuals, multinational corporations, national liberation movements may be perceived as legal subjects, depending on the situation.<sup>361</sup> Furthermore, based on agreements among states, these bodies may act within the frames of what has been established in their respective legal instruments that constitutes the basis of that organization. Thus, in comparison with states, international organisations for example, remain what one can refer to as "lesser" legal subjects than states, as their rights and duties are regulated and limited by agreements.<sup>362</sup> Indeed, the *Reparations* case underlined that the legal capacity of various international persons may vary.<sup>363</sup>

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<sup>357</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949: *i.c.j. Reports* 1949.

<sup>358</sup> *Ibid.*, pp.178-179 as well as the conclusions.

<sup>359</sup> *Ibid.*, pp. 181.

<sup>360</sup> Distefano, 2019 pp. 65.

<sup>361</sup> Grant 2010, pp. 35.

<sup>362</sup> Distefano 2019. pp. 70-71.

<sup>363</sup> Advisory Opinion, ICJ Reports, *Reparation for Injuries Suffered in the Service of the United Nations* 1949, pp. 178.

Moreover, human individuals were ascribed legal personhood under international law through jurisprudence, after the second World War.<sup>364</sup> Before that, an individual could not make a claim to any international entity.<sup>365</sup> It was during the special Military Tribunals of Nuremberg and Tokyo that were established by the UN Security Council in 1946 that individuals for the first time, were recognised as legal persons under international law.<sup>366</sup> Accordingly, the tribunals examined the atrocities committed by individual war criminals under World War II and found for the first time, that individuals can be held criminally liable for crimes against humanity and war crimes.<sup>367</sup>

A justice of the International Military Tribunal in Nuremberg stated at the time famously concerning individual accountability under international law that: “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced.”<sup>368</sup> Subsequently, partly based on the jurisprudence formed in the special tribunals, was the Rome Statute developed that then established the International Criminal Court where individuals can be prosecuted for international crimes.<sup>369</sup> Yet, only after the adoption of the UN Charter and UN conventions on the protection of human rights, such as the International Covenant on Civil and Political Rights adopted in 1966,<sup>370</sup> did human individuals become legally entitled as persons with human rights with the ability to appeal to human rights courts, make complaints against states according to what is provided in those instruments.<sup>371</sup>

### 4.3 The pragmatic concept of the legal subject under international law

In international law, rights are thus principally ascribed to states, but also to individuals as well as other internationally recognised subjects.<sup>372</sup> A legal subject under international

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<sup>364</sup> Grant 2010, pp 38 -39.

<sup>365</sup> *Ibid.*, pp 38 -39.

<sup>366</sup> Adjei 2020, pp. 69.

<sup>367</sup> Grant, 2010, pp. 38 -39.

<sup>368</sup> Judgement of the International Military Tribunal, trial of major war criminals before the IMT in Nuremberg 1945-1946.

<sup>369</sup> Adjei 2020, pp. 69.

<sup>370</sup> International Covenant on Civil and Political Rights 1966.

<sup>371</sup> Sainati & Attanasio 2017, pp. 749.

<sup>372</sup> Fleur 2017, article by Ohlin, pp. 213, 228.

law encompasses several meanings and lacks any clear definition.<sup>373</sup> While states are perceived as the principal legal subjects under international law, it remains unresolved exactly to what extent other entities such as individuals, international- and non-governmental organisations and corporations may be considered legal subjects.<sup>374</sup> Importantly, the concept of legal personhood under international law is in many aspects unresolved. The concept can be understood as covering different actors, depending on the definition's extension adhered to.<sup>375</sup> Whether for example, international corporations and other international "entities" could be considered legal persons under international law, remains subject to scholarship and jurisprudence. Legal praxis and scholarship indicate, at least, a need and a will for reconceptualization of legal personality under international law to better recognise, reflect and regulate influential international relationships of today's world. In 1949, the ICJ stated with respect to subjects under international law that;

“The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.”<sup>376</sup>

Furthermore, modern scholarship concerning international legal subjecthood both aim to address the temporal dimension and bring the perception of legal subjecthood more in alignment with the current modern world by adopting new legal doctrines of personality suitable for this.<sup>377</sup> Yet, Fleur also underlines the importance of ensuring that international legal doctrines of personality are long-lasting and stable also in the future, concerning the transformative change such alterations in law imply for societies.<sup>378</sup>

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<sup>373</sup> *Ibid.*

<sup>374</sup> Portmann 2010, pp. 1-4.

<sup>375</sup> Distefano 2019, pp. 53 –55.

<sup>376</sup> Advisory Opinion *Reparation for Injuries Suffered in the Service of the United Nations*, 1949, pp. 7.

<sup>377</sup> Fleur 2017, pp. 24.

<sup>378</sup> *Ibid.*



The meaning of legal subject and legal person can be both very inclusive as well as the opposite, depending on definitions adhered to. According to some scholars, almost anything can qualify as a legal subject or person, given it is stipulated and defined by law. Other argue in turn that, to qualify as a legal person, the entity in question must be capable of holding legal rights and duties.<sup>379</sup> Animal law scholars often adhere to the view that legal personhood does not imply a set criterion of prerequisites, but rather is a concept formed depending on the legal context in question.<sup>380</sup> Considering the fact that corporations are legal persons in national laws, and humans have been ascribed personhood after being legal objects under international law, a conceptual possibility to confer legal personhood to animals arguably prevails.<sup>381</sup>

#### 4.4 Rethinking the paradigm: animals as legal subjects and legal rights holders

Whether legal animal rights would serve as a preferable or available means for protecting animals' inherent interests and wellbeing, is a contested question in legal studies. Much of the legal debate around legal animal rights is rooted in different conceptions of the nature and concept of legal rights and legal personhood.<sup>382</sup> Nonetheless, an increased amount of animal law scholars advocate for the abandonment of the traditional legal perspective adhered to in current animal welfare laws, that views animals as legal objects.<sup>383</sup> Modern and new conceptualisations of legal animal rights and animals subjectivity are based on a broader understanding of legal rights and -subjectivity. Furthermore, literature indicates that animals could be ascribed legal animal rights and constitute legal subjects, if the concepts are reimagined and implemented in a manner suitable for animals.<sup>384</sup>

Those opposing the notion that animals could hold legal rights often argue that for someone to hold a legal right, that "person" must also have duties and be recognised as a legal person. Accordingly, the understanding derives from the notion that if animals do

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<sup>379</sup> Naffine 2003, pp. 351 and 357.

<sup>380</sup> Kurki, Pietrzykowski 2017, 69–89.

<sup>381</sup> Peters 2020, pp. 114.

<sup>382</sup> Palmer 2016, pp.

<sup>383</sup> Sparks, Kurki, Stucki 2020, pp. 150.

<sup>384</sup> *Ibid.*

not hold legal duties that they can fulfil, they are unable to qualify as rights holders and stand accountable for their actions.<sup>385</sup>

Yet, modern theories of animal law show that animals, indeed, can hold legal rights without a legal system's explicit recognition of animals' rights holding capacity.<sup>386</sup> In addition, scholars imply that animals can hold legal rights as subjects of law without becoming legal persons.<sup>387</sup> Accordingly, it has been proposed that animals could be categorised as belonging to a new category of legal subjects, as for example, "non-personal subjects" or "subjects of animal protection law".<sup>388</sup> Animal law scholar Kurki, has also suggested that animals could be recognised as "passive legal persons", meaning that an animal could hold some legal rights that protect important interests of the animals, without the necessity of the animal being recognized as a "legal person" in a legally conventional sense.<sup>389</sup> A formal recognition of an animal as some sort of legal subject, such as for example, "nonhuman subjects" in law is presumed to essentially compel states to consider the animals' best interests to a larger extent and strengthen the animal's legal status in relation to humans.<sup>390</sup>

With respect of holding legal rights, scholars thus argue that animals can hold rights without the necessity to claim that right themselves.<sup>391</sup> According to established legal rights theories, animals can hold legal rights without those rights being explicitly spelled out.<sup>392</sup> This, arguably, broad understanding of what a legal right implies derives from the understanding that any person can hold a right under a legal system, provided that the system recognizes the interests of the entity in question.<sup>393</sup>

To illustrate the meaning of this, Favre describes a legal animal right as; "any attempt to recognize individual animals as the direct beneficiaries of some legal prerogatives afforded by a given juridical system."<sup>394</sup> According to this definition of a legal animal

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<sup>385</sup> Wills 2020, pp. 212-213.

<sup>386</sup> Kurki, Pietrzykowski, 2017. pp. 79

<sup>387</sup> Kurki 2021, pp. 58.

<sup>388</sup> See Kurki's and Pietrzykowski's theories in *Animals, Artificial Intelligence and the Unborn* 2017.

<sup>389</sup> See Kurki, on a *A Legal Theory of Legal Personality*, 2019.

<sup>390</sup> Wahlberg, 2020, pp. 23-24.

<sup>391</sup> Kramer explains the difference between interest- and will theories of rights: Kramer 2001, pp. 29, 43.

<sup>392</sup> Kurki, Pietrzykowski, 2017. pp. 79

<sup>393</sup> Kramer 2001, pp. 29, 43.

<sup>394</sup> This definition by Favre is used in this thesis. Favre 2020, pp. 298.

right, the farm animals covered by the animal welfare provisions studied in this thesis can be considered as the direct beneficiaries of the EU's juridical system on animal welfare. Moreover, the animals could thus, even be understood as rights holders under present animal welfare laws. Accordingly, animals protected by animal welfare duties in for example, the Regulation 1/2005 can be viewed as holders of some legal rights correlative of those duties.<sup>395</sup> Animal law scholar Saskia Stucki has further defined these current rights derivable from animal welfare duties as *simple rights*.<sup>396</sup> By explaining Stucki's theory of legal animal rights, the nature of current simple animal rights can be conceptualised and understood.<sup>397</sup>

Furthermore, the simple rights that can be extracted from current animal welfare provisions can be divided into two categories in Stucki's view; firstly, a right correlative to the duty of protecting a non-fundamental interest of the animals, such as, "prohibiting the slaughter of an animal without stunning", as it only protects a secondary interest of the animals, namely, "a right to not be slaughtered without stunning". Hence, such a right is normatively weak from a zoocentric perspective as it still permits slaughter of the animal, which is supposedly, not in the animals' own interest.<sup>398</sup> The other type of right that is derivable from current animal welfare duties is, however, more fundamental in substance, and therefore possess the potential for developing into what a legal right normally is perceived as, that is, normatively and legally strong in respect of protecting a legal entity's interests. Hence, when duties such as, for example, the duty "to treat animals humanely" is conceptualised as a simple right, it implies that animals "have a right to be treated humanely". Thus, such a right could be conceptualised as possessing a fundamental substance, Stucki argues. Yet, regardless of its fundamental substance, a simple right remains a weak right in practice, because of the high risk that it will be violated under current regulation.<sup>399</sup>

Some simple rights can thus be extracted from the animal welfare duties contained in Regulation 1/2005 regulating the live transport of farm animals. For example, the animal

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<sup>395</sup> Kramer explains the difference between interest- and will theories of rights: Kramer 2001, pp. 29, 43.

<sup>396</sup> Stucki 2020, pp. 1.

<sup>397</sup> *Ibid.*

<sup>398</sup> *Ibid.*, pp. 20.

<sup>399</sup> *Ibid.*

welfare provision in Regulation 1/2005 stating that “... animals must not be transported in a way likely to cause injury and undue suffering to them”<sup>400</sup> could be re-conceptualized as the simple right: “a right to be transported without being subjected to undue suffering”.<sup>401</sup>

However, while farm animals transported alive could be viewed as holding some weak, simple rights within the territory of the EU, the simple rights become even weaker when the animals are transported to third countries. Accordingly, while the ECJ’s established in its ruling *Zuchtvieh-Export GMBH v. Stadt Kempten*, that the application of the Regulation extends to third countries and during the entirety of the journey, the Regulations’ provisions are frequently violated extraterritorially.<sup>402</sup> Under international trade law, the absence of any substantive animal welfare obligation recognising individual animal interests renders it hard to argue that animals subjected to the international market would even have such simple rights.

Furthermore, it can naturally be questioned if current conceptual simple animal rights are to be considered legal rights at all, because they are so weak in their legislative force and so easily violated, as Stucki also notes.<sup>403</sup> In comparison with what a legal right normally entails, an animal right extracted from a welfare duty is also very vague in its wording.<sup>404</sup> However, the conceptualisation of animal welfare duties as simple animal rights is useful as it can serve as a preliminary stage for stronger legal animal rights, that Stucki defines as *fundamental animal rights*. Fundamental animal rights as a potential animal protection *de lege ferenda* would protect more basic and primary interests of animals.<sup>405</sup>

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<sup>400</sup> Council Regulation (EC) No 1/2005, recital 11.

<sup>401</sup> Based on the theory of simple rights and examples of rights provided by her by Stucki.

<sup>402</sup> Proposal for a European Parliament recommendation to the Council and the Commission following the investigation of alleged contraventions and maladministration in the application of Union law in relation to the protection of animals during transport within and outside the Union(2021/2736(RSP)), para. 131.

<sup>403</sup> Stucki 2020, pp.16, 20.

<sup>404</sup> *Ibid.*, pp.16.

<sup>405</sup> Wahlberg 2020, pp. 23-24.

#### 4.5 *De lege ferenda*: if animals in trade and international live transport were ascribed fundamental rights

A current legal proposal of amendment to the Constitution in Finland on fundamental animal rights outlined by legal scholars and lawyers in Finland,<sup>406</sup> interestingly depicts the content of potential fundamental animal rights in the future. According to the generally, more “radical” proponents of legal animal rights, the use of animals for instrumental purposes should cease altogether to ensure sufficient protection of the animals’ wellbeing.<sup>407</sup> However, the legal proposal of amendment to the Constitution in Finland on fundamental animal rights suggests that the human use of animals would remain permitted to a certain extent, but the legal framework of animal protection would be based on other premises.

According to the proposal presented by the Finnish Animal Rights Lawyers Society, animals dependent on human care, such as farm animals, would have a “right to life and the right to express natural behaviours and have the animal’s basic needs fulfilled” as well as “a right to experience and express positive emotions, and the right to be protected against and free from fear, pain, distress and suffering caused by humans”. In addition, animals would have a right to food and drink in a manner that maintains welfare and health, a right to adequate living conditions, and a right to be euthanised in certain circumstances.<sup>408</sup> Animals would also be ascribed a right to be heard before authorities or in courts. Accordingly, the legal standing of animals would be realised by having a legal representative speaking on behalf of the animals in legal proceeding pertaining to the animals’ interests and rights for example. The representative would also be authorised to file complaints on behalf of the animal. Given the respective interests do not stand in conflict, the animals’ owner can for example serve as the representative of the animal in a court.<sup>409</sup>

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<sup>406</sup> The legal proposal of amendment to the Finnish Constitution by the Finnish Animal Rights Lawyers Society, available at: <https://www.elaintenvuoro.fi/english/>, accessed 20.12.2022.

<sup>407</sup> Kurki 2021, pp. 49.

<sup>408</sup> The legal proposal of amendment to the Finnish Constitution by the Animal Rights Lawyers society, section 4.

<sup>409</sup> *Ibid.*, section 1.

The proposal on fundamental rights of animals is intended to be included in the Finnish Constitution and does therefore not address the international legal system. However, the proposal suggests that legal frameworks providing for fundamental rights to animals should be underpinned by three key principles, namely, the *Principle of Precaution*, the *Principle of Necessity*, and the *Principle of Proportionality*.<sup>410</sup> These principles are not legally binding but represent non-binding and guiding principles outlining the legal framework of fundamental animal rights.<sup>411</sup> Considering the general nature of these principles, it seems useful to examine them also in the context of this thesis focused on the international legal system. By viewing the principles, it can be assessed how legal animal rights could protect animals' interests and wellbeing in relation to international trade and live transport.

Firstly, the principle of precaution provides that every animal should initially be viewed as a sentient being in law, if not proved otherwise. Given the evolving nature of animal research in respect of establishing sentience and cognitive capacities across different species, legal provisions would have to assume that the science-based understanding of animal sentience is constantly changing and developing.<sup>412</sup> Secondly, the principle of necessity entails that any violation of animals' fundamental rights would be accepted only if it was determined as necessary for ensuring fundamental human or animal rights.<sup>413</sup> In accordance with a principle of necessity, the killing of a an animal would solely be justified if it was inevitable and in situations where no other available options existed for the protection of humans, animals, species or the environment.<sup>414</sup> Acute emergency conditions in a society could justifiably restrict animals' fundamental rights.<sup>415</sup>

Finally, the principle of proportionality prescribes that fundamental animal rights should be derogated from as little as possible in terms of reaching a particular objective. Thus, if a fundamental animal right must be restricted in some way, the attempt should be to minimize the restriction and potential harmful consequences it may imply for the animal.

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<sup>410</sup> Wahlberg 2020, pp.25.

<sup>411</sup> *Ibid.*, pp.19.

<sup>412</sup> The legal proposal of amendment to the Finnish Constitution by the Animal Rights Lawyers society, pp.2.

<sup>413</sup> *Ibid.*, section 2, pp.4.

<sup>414</sup> *Ibid.*, section 2, pp.6.

<sup>415</sup> *Ibid.*

In the light of the principles, companies would be compelled to consider animal rights in all their activities. Hence, it would imply a need of comprehensive assessments from an animal rights perspective before conducting any activities involving those animals.<sup>416</sup>

In practice, a higher level of monitoring and interventions from the company's side would be required to ensure the wellbeing of an animal. In addition, it would render public authorities obliged to respect and protect animals from violations of fundamental rights caused by companies.<sup>417</sup> A state would consequently have an obligation to ensure that the animals' fundamental rights are respected beyond borders, such as when animals are transported abroad and imported.<sup>418</sup>

If laws pertaining to farm animals, would incorporate these principles, it would result in a legal paradigm shift from current animal protection – to a legal paradigm that applies a zoocentric view instead of the current anthropocentric view on legal provisions. Thus, as holders of fundamental rights, the animals' own interest to for example, live, would weigh stronger in a balancing assessment between different interests as humans would have stronger obligations in relation to animals.<sup>419</sup>

Moreover, this thesis has highlighted the severe animal welfare concerns connected with international live transport and underlined that these aspects are further aggravated by the length of transport and transports to third countries.<sup>420</sup> Thus, if the responsible authorities in states, and companies, would have an obligation to respect fundamental rights of animals and base the operations on the principles, any practices involving animals would require comprehensive scientific assessment before completion. Given the amount of information indicating the harmful impacts live transport has on farm animals, international live animal transport would hardly be deemed an acceptable practice. Thus, it renders it likely that it would result in systemic changes in animal industry.

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<sup>416</sup> *Ibid.*

<sup>417</sup> *Ibid.*

<sup>418</sup> *Ibid.*

<sup>419</sup> Peters 2020, pp. 111. Stucki 2020, pp. 22.

<sup>420</sup> See for example the Euractiv article 26.3.2020, "MEPs join call for ban on live animal transport amid Covid-19 border delays": available at: <https://www.euractiv.com/section/agriculture-food/news/meps-join-call-for-ban-on-live-animal-transport-amid-covid-19-border-delays/>, accessed 1.10.2022. Sowery 2018, pp. 87.

By incorporating the principles of necessity, precaution and proportionality, requirements around animals' species-specific interests and needs would need to be established in law, by contrast to present legislation. In the EU and internationally, provisions do not outline different needs inherent to different animals based on species, age and other characteristics, in the respect of for example, duration of a journey.<sup>421</sup> Every practice and use of animals would have to be assessed from a zoocentric perspective, to ensure that animals' rights are only violated if it is necessary.

While current animal welfare laws can be explained as imposing duties *regarding* animals, an animal rights paradigm applied in EU and international law would create human duties *to* animals.<sup>422</sup> Hence, scholars suggest that such a shift in legal approach would raise the threshold for what would be considered justified violations against animals' fundamental interests<sup>423</sup>, and it would thus benefit the wellbeing of the animals. Furthermore, scholars argue that legal animal rights are indeed on the horizon, given the increasing amount of research and support the notion receives in literature.<sup>424</sup>

The majority of attempts aiming to change the legal status of animals so far, has relied on the presumption that evidence of animals' subjective interests can give rise to legal rights.<sup>425</sup> Yet, some also criticise such a paradigm shift that would ascribe legal rights to animals as insufficient with respect of protecting animals in the most effective manner. Indeed, some scholars argue that an even more "radical" paradigm shift is needed, one that would transform the dichotomy of legal subjects and objects characterising of modern legal systems.<sup>426</sup> Accordingly, an argument brought afront is that by granting animals fundamental rights and recognising them as some version of legal subject, the model in essence constitutes a reflection of "our moral anthropocentrism", as legal provision will be based on the notion of legal objects and subjects.<sup>427</sup> Favre argues that the view of rendering animals subjects of law and holders of rights reflects the legal ontology where "only legal persons are worthy of attention", thus still an excluding legal

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<sup>421</sup> Eurogroup for Animals, pp.16-17.

<sup>422</sup> Feinberg 1974, pp. 45.

<sup>423</sup> Peters 2020, pp. 111. Stucki 2020, pp. 22.

<sup>424</sup> Sparks, Kurki, Stucki 2020, pp. 150.

<sup>425</sup> Favre 2020, pp. 305. He refers to Kurki and Stucki among others.

<sup>426</sup> *Ibid.*, pp. 299, 318-319, Deckah, 2021 pp. 4-10.

<sup>427</sup> *Ibid.*, pp. 299.



paradigm; only if humans see an animal as morally significant may it be granted some form of legal personhood, while it risks that other animals will continue to be excluded from the paradigm.<sup>428</sup> Thus, in the context of the ongoing ecological crisis, Favre calls for legal thinking beyond legal subjectivism as the dichotomy might be unsuitable for addressing the diversity of relationships between different living beings. In his view legal provisions should acknowledge the plurality of relationships between humans and living beings.<sup>429</sup>

In sum, this chapter has intended to illuminate the shortcomings of the current animal welfare paradigm and to examine the modern theories connected with an alternative animal rights paradigm as legal protection of animals' wellbeing. Furthermore, a transition from the present, dualistic animal welfare paradigm to the proposed animal rights paradigm has evolved into a viable option based on theories of legal animal rights and animal subjectivity.<sup>430</sup> The analysis showed that according to modern theories on legal animal rights and- subjectivity and aligned with the current legal proposal of amendment to the Constitution in Finland, farm animals can hold legal animal rights.

In fact, animals protected by animal welfare laws can already be conceptualised as holding some weak, simple animals rights extractable from the provisions. It can, however, be questioned whether these weak rights are meaningful from a zoocentric perspective at present, as they remain unrecognised by any legal system. Yet, the analysis conducted in the final parts of this chapter demonstrated that some of these current, simple rights, indeed, contain elements that could develop into stronger, fundamental animal rights *de lege ferenda*. The final analysis also concluded that if farm animals were ascribed some legal rights in international trade and transport, the protection of farm animals' welfare would be considerably enhanced as it would impose a stronger obligation on states to protect animals' welfare within and outside state borders. Thus, considering the severe and extensiveness of animal welfare issues pertaining to international live animal transport today, it would no longer be possible to conduct international live transport of farm animals.

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<sup>428</sup> *Ibid.*, pp. 307.

<sup>429</sup> *Ibid.*, pp. 318-319.

<sup>430</sup> Kurki 2021, pp. 49.

## 5. Conclusion

International trade and transport of live animals constitutes a severe animal welfare concern in the EU at present. The intention of this thesis has therefore been to critically analyze the available and relevant legislative instruments pertaining to the protection of the animals traded and transported internationally, from a zoocentric perspective. The purpose has also been to explore and assess the scholarly critique directed towards the current legal paradigm of animal protection, and to analyze alternative legal approaches to the present regulation.

The analysis conducted in this thesis shows that no comprehensive international legal treaty-based system nor international obligation protects the welfare interests of individual farm animals traded and transported on the international market. In accordance with previous legal analyses conducted in animal law scholarship, it can be concluded that international law and animal protection law in many aspects, constitute conflicted legal fields. Under international trade law, the protection of farm animals' wellbeing constitutes a deprioritized concern since the WTO treaties do not include a legal provision requiring member states to protect farm animals' welfare in trade.

WTO jurisprudence has, however, demonstrated that animal welfare protection measures may be an issue addressed under one of the principal trade agreements, the GATT, as a non-trade value. As this analysis has demonstrated, any animal welfare protection measure that regulates or restricts methods of animal production must be balanced against substantive trade obligations and objectives, the principle of non-discrimination, and a measure must not pose a risk of intruding on a state's territorial sovereignty.

According to WTO jurisprudence, trade restrictive animal protection measures imposed by member states of the WTO can, however, be justified in exceptional situations. In the landmark case *EC–Seal Products* it was demonstrated that a trade restrictive measure, such as a trade ban based on specifically animal welfare concerns among the public in the EU, could constitute a necessary reason for member states to restrict trade under the so-called general exceptions article XX (a) GATT. Thus, while the primary purpose of the WTO is to prevent member states from imposing trade restrictive measures that could

affect the world market in a disadvantageous way, animal welfare concerns may legitimize a trade restrictive measure, such as a trade ban.

Moreover, in the WTO's only case so far concerning explicitly animal welfare protection in trade, *EC– Seal Products*, the WTO-panel recognised animal welfare as an international concern and as a moral concern held by the European public. Nonetheless, whether a trade restrictive measure aimed to protect the welfare of internationally transported farm animals could be viewed as a justified restriction under international trade law remain untested. Yet, *EC– Seal Products* have been described by animal law scholars as an important case in terms of advancing animal welfare protection under international trade law. The legal effect of that assumption remains to be seen.

Moreover, how successful an attempt to justify a trade restrictive measure motivated by a moral concern to protect farm animals' welfare would presumably depend on the economic impact that measure, such as a trade ban, would have on the international market. Notably, *EC– Seal products* concerned the trade in products derived from *seals*, a species that constitute a rather marginal part of the global animal production industry. It would surely be more difficult to justify a trade restrictive measure protecting animals such as live poultry, pigs, cattle, sheep in international transport, due to the economic interests involved in the trade of these animals.

In the few international trade disputes that have concerned animal protection, the importance of presenting evidence regarding the need to protect a specific animal species as an international value has been underlined. For example, in the case *US–Shrimp*, an animal protection measure to safeguard the conservation of endangered sea turtles was provisionally justified, largely, because states are committed to protecting endangered species through international conventions. Hence, without any international legal instrument concerning the protection of farm animal welfare, imposing a successful trade restrictive measures for purposes of protecting animal welfare seems problematic. Jurisprudence shows that the WTO prioritizes economic interests over regulating processes of production in the animal production industry to ensure the protection of animals' wellbeing.

Furthermore, the analysis has shown that, although an increased recognition of animal welfare exists at an international level, animal welfare protection is predominantly left to member states to decide on for themselves in respective national jurisdictions. Conclusively, with the meager jurisprudence at hand concerning animal welfare protection in international trade law, the WTO's reluctant approach to animal protection has also had a deterring effect on member states' international animal welfare measures in trade. As was demonstrated in the analysis, member states' attempts to ban certain practices have ultimately not been accepted under the WTO, but often resulted in watered down measures. Yet, considering that the WTO has incorporated WOA's international standards on animal health in its legislative framework, similar developments appear possible in terms of WOA established non-binding standards on animal welfare. If the WOA's animal welfare standards were to be included in an international trade treaty, member states would subsequently be conferred with an international legal responsibility to protect animal welfare also in international transport of live animals.

The legal protection endowed to farm animals destined for international live animal transport was examined in chapter three, with a focus on the principal legislative instrument EC Regulation 1/2005. Due to the lack of any uniform international regulation, provisions in EU legislation constitute the only form of international legal protection of animal welfare when animals are transported out to the international market. The ECJ has assured that the animal welfare obligations in the Regulation remain in force during the entire transport operation, also when the journey continues in non-EU states. Yet, based on analysis in chapter three it can be contended that the provisions in the EC Regulation 1/2005 contain several shortcomings for safeguarding sufficient protection of animals transported. Importantly, the Regulation in question is based on dual aims; to protect animal welfare during the entire transport journey, while simultaneously, promoting a trade in animals, free of any trade barriers.

Consequently, the implementation of the Regulation has shown that the dual aims are in many aspects controversial and have resulted in a weak form of protection of animals' welfare. For example, it permits long journey transports to maintain trade interests, while

simultaneously recognising that such transport operations should be avoided because they are harmful for the animals' wellbeing. According to available data, the export of farm animals to third countries seems to only have increased after the Regulation was adopted in 2005, with the purpose of improving animal welfare during transport operations. Indeed, the ECJ has noted that the implementation of the Regulation faces several challenges outside EU-borders. Noteworthy is also, that the legal protection covering the animals addressed by the Regulation ceases once the animals are unloaded from transport vehicles and vessels in non-EU states.

Thus, based on the examination international trade law and EU law from a zoocentric perspective the conclusion can be drawn, that under the current legal regulation, defined as the animal welfare paradigm, animals' welfare cannot be effectively protected. Furthermore, the reason for this is partly, that legal instruments are unclear in respect of their objective as the intention is to protect animal welfare while promoting trade, and partly because of animals' legal status as objects and products. While EU law recognizes animals as sentient beings, it has had little practical effect because legal provisions predominantly view farm animals as legal objects. Under international trade law, farm animals are, in turn, regarded as goods or resources and as noted, no recognition of animal sentience exists. Nonetheless, when animals are transported out of the EU, they are subjected to other states' jurisdiction where no recognition of animal sentience necessarily prevails.

A problem highlighted throughout this thesis is that the current legal systems concerning animals are inherently human centered, and the interests of humans are always prioritized over the animals' interests and needs. This is also reflected in the WTO jurisprudence concerning animal treatment in trade. The trade disputes involving animals have focused on anthropocentric aims, such as the protection of a public moral of a member state. Both international trade law and EU law base the legal regulation on the notion that animals are to be viewed as products in law. Viewing animals as objects although they are sentient beings, naturally, creates several risks from a zoocentric perspective regarding their health and wellbeing.

Thus, by drawing on literature and theories of legal animal rights and animal subjectivity, the second part of the thesis has explored an alternative legal paradigm to the current animal welfare paradigm. Although legal animal rights may come across as an impossible option under current circumstances, legal scholars of animal law argue that a transformation from the current animal welfare paradigm to an animal rights paradigm is conceptually within reach. While animals are not recognised as legal rights holders in manner that enables “them” to for example, make claims under legal systems, farm animals can, in fact, already be seen as holders of some legal rights extractable from animal welfare obligations, if legal provisions recognise that animals have interests that need protection.

The analysis showed that internationally transported animals can hold some weak legal rights, even under current animal welfare laws, and that these “simple” rights could be transformed into fundamental animal rights. According to modern conceptual theories of animal subjectivity, the legal elements also exist for changing the legal status of farm animals as objects into a new type of legal animal subject. Under international law, the concept of legal subjecthood has been interpreted and modified historically. For example, humans were once viewed as legal objects under international law but then transformed into legal subjects. It gives reason to believe that the concept of legal subjects is extensive and does at least, not rule out the possibility that also farm animals could be viewed as legal subjects of some sorts. Lastly, it was examined how fundamental animal rights could protect farm animals in international trade and transport, by drawing on a conceptual legal framework of fundamental animal rights, compiled by the Finnish Lawyers Society.

Thus, the final analysis of the thesis showcased that if animals were ascribed with legal rights, all use of farm animals would have to be assessed against the principles of precaution, proportionality, and necessity. It would result in a fairer structural balance between human- and animals’ inherent interests in international trade. Given the scientific evidence on the deterring effects live transports have on farm animals’ wellbeing, it can be concluded that animals’ fundamental rights cannot be fulfilled in international live transport, as transport operations are carried out under present laws. The transports of live farm animals would have to be halted and changed on a systemic level to respect the fundamental rights of farm animals.

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