

INTERNATIONAL ANIMAL LAW

THE CASE OF FARM ANIMAL WELFARE

Aurélia Prasličková

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Dr. Ángel José Rodrigo Hernández

Departament de Dret



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ABSTRACT

Animal welfare has emerged as a pervasive concern in modern international law. Although the question of animal welfare is one of the greatest social justice issues of our times, there is a surprising lack of legal research in this area. Therefore, our aim is to create an interdisciplinary dissertation with two main purposes.

Firstly, to contribute to the advancement of an emerging general international regime- the regime of *international animal law*. In the process of its construction, we will identify whether animal welfare is a universal value and a common concern of humankind reflecting interests and concerns of international community in its entirety. We will also examine animal welfare as a matter of a public interest that could be protected by public interest norms.

Secondly, to delve into the specific question of farm animal welfare within the European Union. We will analyze international legal principles and norms protecting animals, within the broader framework of public international law and European Union law. In this way, the research seeks to formulate concrete reforms and proposals for a change on a global level. A change that would lead to international rules concerning animal welfare. Although this is a very ambitious objective, it is utterly necessary to center our capacities towards animal questions. Animal issues have far-reaching consequences, and it is about time to face them.

Key Words: animal law, international animal law, public international law, European Union law, global public interest, international regimes,

public interest norms, universal values, animal welfare, farm animal welfare, animals raised for food, industrial farming.

RESUMEN

El bienestar animal se ha convertido en una importante preocupación en el derecho internacional moderno. Aunque la cuestión del bienestar animal es uno de los mayores problemas de justicia social de nuestro tiempo, hay una sorprendente falta de investigación legal en esta área. Por lo tanto, nuestro objetivo es crear una disertación interdisciplinaria con dos propósitos principales.

En primer lugar, contribuir al avance de un régimen internacional general emergente: el régimen del *Derecho animal internacional*. En el proceso de su construcción, identificaremos si el bienestar animal es un valor universal y una preocupación común de la humanidad que refleja los intereses y preocupaciones de la comunidad internacional. También examinaremos el bienestar animal como un asunto de interés público que podría ser protegido por normas de interés público.

En segundo lugar, profundizar en la cuestión específica del bienestar de los animales de granja dentro de la Unión Europea. Analizaremos los principios y normas legales internacionales que protegen a los animales, en el marco más amplio del Derecho internacional público y el Derecho de la Unión Europea. De esta forma, la investigación busca formular reformas concretas a nivel global que darían lugar a normas internacionales en materia de bienestar animal. Aunque es un objetivo muy ambicioso, es absolutamente necesario centrar nuestras

capacidades en cuestiones animales. Los problemas con los animales tienen consecuencias de largo alcance, y ya es hora de enfrentarlos.

Palabras clave: derecho animal, derecho animal internacional, derecho internacional público, derecho de la Unión Europea, interés público global, regímenes internacionales, normas de interés público, valores universales, bienestar animal, bienestar de los animales de granja, animales criados para la alimentación, agricultura industrial.

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PART III

THE CASE OF EU FARM ANIMAL WELFARE

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ACRONYMS AND ABBREVIATIONS

AAT	Australian Antarctic Territory
AIDCP	Agreement on the International Dolphin Conservation Program
AW	Animal welfare
CAP	Common Agricultural Policy
CBD	Convention on Biological Diversity
CCH	Common concern of humankind
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
ECHR	European Court of Human Rights
ECI	European Citizens' Initiative
EESC	European Economic and Social Committee
EFSA	European Food Safety Authority
EGD	European Green Deal
ETP	Eastern Tropical Pacific Ocean
F2F	Farm to Fork Strategy

EU	European Union
FAO	Food and Agricultural Organization
FVE	Federation of Veterinarians of Europe
GATT	General Agreement of Trade and Tariffs
ICJ	International Court of Justice
ICRW	International Convention for the Regulation of Whaling
IPPC	Intergovernmental Panel on Climate Change
IWC	International Whaling Commission
JARPA	Japanese Whale Research Program under Special Permit in the Antarctic
MRM	Marine Management Exception
NEWREP-A	New Scientific Whale Research Program in the Antarctic Ocean
NEWREP-NP	New Scientific Whale Research Program in the North Pacific
OECD	Organization for Economic Co-operation and Development
OIE	Office International des Epizooties

TBT	Technical Barriers to Trade
TED	Turtle Excluder Device
TFEU	Treaty on the Functioning of the European Union
UDAW	Universal Declaration on Animal Welfare
UNCWFS	United Nations Committee on World Food Security
UNEP	The United Nations Environment Programme
WAP	World Animal Protection
WIPO	World Intellectual Property Organization
WSPA	World Society for the Protection of Animals

Introduction

“We patronize the animals for their incompleteness, for their tragic fate of having taken form so below ourselves. And therein we err, and greatly err. For the animal shall not be measured by man. In world older and more complete than ours, they are more finished and complete, gifted with extensions of the senses we have lost or never attained, living by voices we shall never hear. They are not brethren, they are not underlings; they are other Nations, caught with ourselves in the net of life and time, fellow prisoners of the splendour and travail of the earth.”¹

Henry Beston

Humans have been inflicting pain on animals for a long time. Billions of farm animals are living in horrid conditions of factory farms just so they can be killed prematurely and served as a meal. Millions of animals suffer agony in experiments we cannot even imagine. Marine wild animals are captured, separated from their families, imprisoned in ironically called entertainment aquatic parks. Land wild animals alike, are playing the role of amusers for tourists in exotic destinations, circuses or living in between four walls in zoos. Atrocities mounded upon atrocities.

The abhorrent continuous, immense animal exploitation reflects brutal apathy to animal interests and their value, rooted in the elevation of human benefit upon everything else. Massive animal suffering brought on by us is wrong not only for ethical reasons. It also has far-reaching, global adverse consequences for our environment, global health, food security and social justice. These reasons have led many voices to call

¹ BESTON, Henry, *The Outermost House: A Year of Life On The Great Beach of Cape Cod*, New York 1988, p. 25.

for animal mercy. And those voices are getting louder materializing into a paradigm shift in the international community. What started as a worry of few pressure groups², moral philosophers³ and relatively marginal number of individuals, has transformed into a public debate on state, regional and universal level. It is not anymore just activists, rooting for the change of our relations to animals. Animal welfare has emerged into a pervasive ethical, environmental, economic, and social concern in modern international law and society at large. And although the questions of animal welfare are one of the greatest social justice issues of our times⁴ and has a global, borderless dimension, there is a surprising lack of legal research in this area and large gaps in its international regulation.

A) Object of the dissertation

Anchored in the understanding that animal welfare issues have global nature and that there is a growing global interest for the improvement of animal lives, our normative argument is that international legal responses are necessary to tackle animal welfare issues. In that vein, our aim is to create an interdisciplinary dissertation with two main purposes. First, to contribute to the advancement of an emerging general international regime- the regime of international animal law. Second, to delve into the specific question of farm animal welfare. More

² PETA, Mercy for Animals, World Animal Protection, etc.

³ Peter Singer, Tom Regan, Will Kimlicka, Garry Francione, etc.

⁴ PETERS, Anne, *Animals in International Law*, Hague 2021.

specifically, we will present a case study of farm animal welfare within the European Union.

Consequently, our core hypothesis is following:

Animal welfare is a universal value and a common concern of humankind that reflects interests and concerns of a global community in its entirety. It is a matter of a public interest as its protection and enforcement has intergenerational dimension. It is protected by public interest norms. However, the current state of regulations relative to animals is not sufficiently advanced. Because of the on-growing concern for animal protection, it is, therefore, necessary to develop and complement the emerging general international regime of international animal law.

In this way, the research seeks to formulate concrete reforms and proposals for a change on an international level. A change that would lead to international rules protecting animal welfare. But first, what is animal welfare? We can understand it as the way in which individual animal copes with the conditions inflicted on it. It includes “scientific, ethical, cultural, social, religious and political dimensions.”⁵ The legal reform focused on animal welfare still allows the use of animals but tries to ameliorate the conditions in which they live. Welfarist approach tries to create realistic reforms that change the system one step at a time. Opposed to that, animal rights theory urges to move animals from the category of things to the category of persons leading to the total abolition of animal use. Industrial livestock breeding would have to stop, as well as animal trade, animal testing, etc. The aim is, therefore,

⁵ OIE, “Animal Welfare”, <https://www.oie.int/en/what-we-do/animal-health-and-welfare/animal-welfare/>.

an institutionalized eradication of animal exploitation. We can see that there is a stark contrast between those two approaches. We believe that for the most ideal outcome to happen, first we need to pragmatically deal with the cruelest practices that must be ended right now. Therefore, we will focus on international animal welfare solutions. As we can see, the research is delimited by the welfarist approach, and it will not develop the theory of animal rights. Issues of animal welfare will be studied from domestic, regional, and international perspective, with a major focus on the latter two.

B) The relevance of the dissertation

Second question is why do we even need to focus on animal welfare? Is there really a necessity for international legal solutions? As we have outlined before, animal suffering has a global dimension. The increase in international trade and economic activity has been remodeling national animal issues into international ones. Animal agriculture forms an important part in the global marketplace and as such it has acquired global nature, it addresses global problems, and it needs a global international approach. The “global” aspect of animal welfare issues can be observed in many aspects of our interconnected world⁶- for instance the long distance transportations (including transport by sea or air to another continent),⁷ intensive modern factory farming model and its adverse ethical, environmental, health and food security implications; relocation of laboratories to countries with low animal welfare rules to

⁶ PETERS, Anne, “Global Animal Law: What It Is and Why We Need It”, *Transnational Environmental Law*, Vol. 5, No. 1, (2016), p. 16.

⁷ One of the longest journeys is the one of sheep- from Australia to the Middle East.

perform animal experimentation; wildlife trafficking or truly globalized clothing industry that in the name of fashion kills millions of animals;⁸ as well as pressure from multinational dairy and meat corporations on governmental institutions to promote carnivore diet.⁹ We can see that the globalization is intertwined with animal conditions in farming, wildlife, experimentation, and entertainment industries.

These are some of the reasons why we need to adopt a global approach towards animal welfare problems. “[T]he use of animals throughout the world (is) on an unprecedented scale. Along with this unprecedented use has come unparalleled profit and unparalleled globalized trade in animals.”¹⁰ Therefore, “[p]arochialism and one state strategies will not ultimately be effective in ending animal abuse. Without an integrated global strategy, increases in animal trade and outsourcing will undoubtedly continue apace.”¹¹ Indeed, in the dissertation we will learn about the circumvention of national and regional animal welfare norms by large corporations via relocation and outsourcing. Powerful market forces can easily hamper animal welfare efforts adopted on parochial level. Consequently, global approach is necessary to solve a global problem.

Now, more than ever, we need to take a closer look to animal issues and to change our traditional view that all animals exist solely for human

⁸ PETA, “Animals used for clothing” <https://www.peta.org/issues/animals-used-for-clothing/>.

⁹ What the Health, “What the Health - Documentary”, <https://www.youtube.com/watch?v=LL2cLhOqPsE>, (accessed 9 November 2018).

¹⁰ KELCH, Thomas, G., *Globalization and Animal Law: Comparative Law, International Law and International Trade*, Alphen aan den Rijn 2017, p. 83.

¹¹ *Ibid.*

use. There is no doubt that animals are vital for human welfare, but as our society went global, animal exploitation increased drastically. The consequences are alarming, and law should react to them. Current norms concerning animal welfare are circumstantial both on national and international level and most lawyers are unfamiliar with them. Therefore, it is crucial to dedicate the legal debate to these issues, contribute with suggestions, reforms, and ideas about how to fill the gap in the emerging regime of international animal law. We need to approach this from an international perspective as it is a topic that overlaps individual nations. As we argue, it is a general interest of international community that reflects actual concerns of humanity.

C) A personal quest

There are many more examples reflecting the global nature of animal welfare issues, which will be detailly examined in the dissertation. All these interconnections reflect on one hand growing international impacts of poor animal welfare as well as growing interest in their roots and solutions. We ourselves have been impacted by the increasing international concern and media coverage on animal welfare. In fact, the very idea to make this dissertation was sparked by our lifestyle change which resulted from broadening our knowledge to animal welfare and environmental issues. Accidently, one day, we have seen a documentary named “Cowspiracy”¹² which opened our eyes to the interrelationships between animal agriculture and ecological imbalances. This, however, was just the beginning of the rabbit hole. Driven by the

¹² COWSPIRACY, “The Film That Environmental Organizations Don’t Want You to See”, <https://www.cowspiracy.com>.

strong interest in the matter we studied scientific papers establishing multilayered adverse consequences of industrial-scale meat production; documentaries of whistleblowers showing unforeseen horrors of factory farms and slaughterhouses; studies on animal sentience and their ability to feel pain; articles demonstrating the redundancy of cruel animal experimentation; or analyses on wildlife destruction and loss of biodiversity. This, coupled with studying the effects of the globalization and influenced by one particular book, “The world is flat”, by Thomas Friedman,¹³ we made the connection: animal welfare issues became global. Knowing that there is very little written about animal welfare in the spheres of public international law, we saw it as a unique opportunity to furnish our ideas when the discussion on the topic is still in its infancy. And just like that, the idea to write a dissertation on the international protection of animal welfare emerged.

D) Structure of the dissertation

The dissertation proceeds in three parts, each of them consisting of three chapters. Because this topic is so complex and multilayered it was necessary to conduct, throughout the three parts, an interdisciplinary research delving into historical, philosophical, ethical, and legal questions. Together they create a kaleidoscopic view on the causes, problems, and international solutions of animal welfare problems. Each part then represents one essential step towards the construction of international animal law.

¹³ FRIEDMAN, Thomas, *The World is Flat*, New York 2005.

The first part titled “Humans, Animals and Law: From Past to Present”, introduces us to the historico-philosophical roots of animal plight, to the readiness of international law to encompass animal welfare issues and to the progressive inclusion of animal welfare interests in international jurisprudence. First part, therefore, builds the basic pillars on which we can later develop our arguments. Because the construction of international animal law is a novel legal challenge, we reckon that it is essential to provide background to current problems. In the chapter no. I, we will take you to the times of hunters and gatherers and to the inception of our interactions with animals. As we will go through the time, and pause at different historical eras, we will observe the evolution of our personal link with animals. From times, when we were looking at animals eye to eye, to a gradual disconnection in which we know animals mostly through our plates. Causes and effects of this evolution will be demonstrated. Different philosophical attitudes to animals and their impact on current animal exploitation will be discussed. We will also illustrate that animals have sentience, *e.g.*, that they can feel pain and suffer and lastly, we will offer an overview of legal statuses given to animals in different countries. Chapter no. II will present important shifts in the international legal order leading to the proliferation of subjects, actors, interests, sources of law and changes in the traditional understanding of jurisdiction. We will see that international law is flexible and reacts to new societal needs and concerns. This chapter will, therefore, establish that international law is prepared to include new interests and values into its scope. Chapter no. III will continue in the analysis of these developments, with special emphasis on international jurisprudence. We will analyze five cases dealing with animal questions,

taking place in different points of the history. The *Case of Exploitation or Preservation of Pacific Fur Seals*,¹⁴ *Us- Tuna II (Mexico) case*,¹⁵ *Shrimp/ turtle case*,¹⁶ *Whaling in Antarctic case*¹⁷ and *EC- Seal Product case*¹⁸ will show us the shift in the attitudes of international courts towards animal issues reflecting the transformation described in previous chapter. As a result, we will see that the international law, given its ability to react to changes and challenges in the society, is ready to include the topic of animal welfare under its auspices.

Second part of the dissertation titled “The Construction of International Animal Law” builds upon the insight that animal welfare can form part of international law. Therefore, next step will be the construction of theoretical pillars of international animal law. First, in the chapter no. IV, we will go through existing international regulation on animal welfare and determine what has been adopted so far, what

¹⁴ Behring Sea Arbitration: Award of the Tribunal of Arbitration constituted under Art. 1 of the treaty concluded at Washington on the 29th February 1892 between Her Britannic Majesty and the United States of America/ presented to both Houses of Parliament by command of Her Majesty, August 1893.

¹⁵ United States- Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Panel Report, WT/DS381/R, 15 Sep. 2011 (US Tuna II (Mexico)). United States- Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Appellate Body Report, and following cases.

¹⁶ United States- Import Prohibition of Certain Shrimp and Shrimp Products, Panel Report, WT/DS58/R, 15 May 1998 (US-Shrimp). United States- Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report, WT/DS58/AB/R, 12 Oct. 1998 (US-Shrimp AB).

¹⁷ Whaling in Antarctic (Australia v. Japan: New Zealand intervening), Judgement, I.C.J. Reports, (adopted March 21, 2014).

¹⁸ Panel Report, European Communities- Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/R, WT/DS401/R (adopted Nov. 25, 2013), Appellate Body Report, European Communities- Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R, (adopted Jun. 16.2014).

are the gaps and limitations of current international animal welfare protection. Because only when we know the *status quo* we can move forward. In the chapters no. V, and VI, we will delve into the theory of general international regimes. The main question of the second part is how we can construct an effective international legal protection of animals, *i.e.*, how could be animal welfare protected internationally. Our proposal is the construction of general international regime of international animal law. This is because general international regimes protect global public interests such as loss of biodiversity, protection of human rights, climate change, and are suitable, as we will try to demonstrate, for the protection of animal welfare. In the chapter no. V, we will analyze animal welfare via the analytic tools of such regimes. More specifically, animal welfare as a universal value, global public interest and common concern of humankind will be evaluated. This analysis will highlight the emergency, the need, and the interest of international community towards regulation of animal welfare issues as well as their global dimension and their massive repercussions for entire humanity. With this knowledge we can continue developing, in the chapter no. VI, the theory of general international regimes. Here we will also look at public interest norms protecting animal welfare and possible future scope of international animal law. With chapters no. V, and VI we aim at building the backbone of international animal welfare protection. Because only with a well-justified arguments rooted in the theory of public international law, we can advocate for the international regulation of animal welfare.

Third part of the dissertation titled “The Case of EU Farm Animal Welfare”, will take everything we have learnt so far and apply it to the

specific case of farm animal welfare within the European Union. We chose farm animal welfare for several reasons. First, poor farm animal welfare has serious ethical, ecological, social, and global health consequences. Second, there are strong concerns of EU civil society in relation to intensive animal agribusiness which in turn translates in to concrete legal reforms adopted on the EU level. EU is a pioneer in animal welfare standards, and it has created the most advanced framework on animal welfare protection on international level. Chapter no. VII will map existing EU regulation on animal welfare. Through the study of reasons leading to the adoption of animal welfare legislation and their objectives we will establish whether farm animal welfare can be considered as universal value, global public interest, and common concern of humankind. We will also offer an overview of EU's animal welfare Directives, Regulations, policies, and trade agreements. We will inquire whether public interest norms with a regional character emerged in the EU animal welfare legislation. In the following chapter we will critically analyze the limitations of current EU animal welfare framework and propose reforms leading to better protection of land farm animals. More specifically, we will stress out the dichotomy between animals as sentient beings and as tradable goods will be discussed, as well as the vague language in Directives and Regulations and their poor compliance and enforcement. We will also explore the live animal transport and unnecessary and cruel mutilations of farm animals. Animal welfare labelling and meat tax will be examined as tools possibly leading to better animal welfare, environment, and food security. Last chapter will be dedicated to the future of international animal law and the ways in which it can advance. First, we will investigate the EU's ability to drive global changes in animal welfare and

exercise a lighthouse effect. Different mechanisms of EU's influence will be presented. One of them is the "Brussels Effect" which is the EU's capacity to export EU norms *de facto* and *de jure* impacting corporate policies of foreign companies and legislation of other governments. Then we will see EU's bargaining power influencing the policies in international organizations and lastly, the international animal welfare activities leading to capacity creation in third countries. In this way, we will present EU as a normative power capable of externalizing its norms beyond its borders. After that, we will acknowledge the limitations of regional advances because of, between others, relocation, and outsourcing activities. As international answers are necessary, possible future normative developments of international animal law will be presented in the last subchapter of this dissertation.

E) Research Methodology

From the above we can see that our dissertation represents interdisciplinary research that plunges into a very topical matter of international animal welfare with focus on animals raised for food. In order to grasp international protection of animal welfare we have to explore historical, philosophical, ethological, legal, and environmental aspects. Because animal welfare issues are so complex, it is necessary to offer the reader a bigger picture portraying different elements. Only in this way we can acquire a profound understanding on the matter. In light of this, this research will not be purely legal. We will touch upon the development of human-animal relationships and different philosophical streams concerning animals, their value and place in the universe. Also, we will delve into the ethology, studying animal behavior

and their capacity to feel pain and emotions. Environmental considerations will be playing important role in our research as well.

Our research is both descriptive and normative. We will not only study current state of affairs, but we will also evaluate them and propose novel reforms. Descriptive research will consist in analyzing primary legal sources such as wide variety of legislation, including national laws, EU Directives, Regulations and policies, international treaties and international case law concerning animal interests. We will also examine secondary sources of law in the area such as summaries of case law and non-legal sources consisting in scholar and non-scholar articles, books, encyclopedias, manuals, and reports created by NGOs.

Legal reasoning used in the research is inductive as well as deductive. We will evaluate the current state of international animal welfare regulation and provide a constructive critique as well as propose legislative changes. We will go from particular facts to general conclusions answering questions such as: is animal welfare a global public interest? But we also need a deductive reasoning. We will go from general premises to specific conclusions: for instance, animals can feel pain and suffering, therefore we need to create a higher standard of their welfare. Further, the research will be explanatory and evaluative. It will consist of identification of international approaches towards animal protection through conceptual, hermeneutic, and argumentative methods. It will also evaluate whether, for instance, existing norms are in the accordance with desirable moral, political, and environmental aims.

E) Concluding remarks

We humbly consider our dissertation as an original academic contribution. The conceptualization of international animal law as general international regime and the application of analytic tools of global public interests, public interest norms and common concern of humankind to animal welfare are novel theories in the field of public international law. We hope that our work will spark the interest of academia and bring more attention to plight of animals. We also hope that through our passionate and thorough effort it will awaken the compassion of the readers and impact them on personal level. Because questions relative to animal welfare are intertwined with our everyday lives. Every time we choose our lunch, every time we buy new cloths, every time we pay for aquarium visit, we can decide to do our portion of a good deed. Because for international legal changes to happen, growing individual interest in animals is crucial. May this dissertation guide you towards better tomorrows.

PART I

HUMANS, ANIMALS AND LAW: FROM PAST TO PRESENT

First part of our dissertation will introduce us to the historico-philosophical causes of animal suffering, to the fitness of international law to regulate such matters and to the growing importance of animal welfare in international jurisprudence. The main purpose of this part is to prepare the breeding ground for further legal analysis of international protection of animal welfare. We believe that in order to propose new ideas on how to advance this protection, we first need to understand the roots of current animal plight. For this reason, we will bring you, in the first chapter, to the forgotten times. Times, when we were integral part of nature, when we were part of a food chain, when we were hunters and hunted at the same time. By illustrating the lives of hunters and gatherers we look back on the initial link we had with other animals. As we will walk together through the time, from our oldest predecessors to antiquity and to current times, we will stop at several occasions. We will see how our personal link with animals progressively changed into an absolute disconnection. Reasons and consequences of this shift will be shown. We will also delve into a most influential philosophical streams that influenced our attitudes to animals. Further, we will demonstrate that animals are sentient beings, that can feel the pain, grief and use tools. Lastly, we will briefly look at the legal status of animals in different countries, which will reflect on one hand the anthropocentric nature of our society and on the other hand, the growing concern for animals.

International animal law...

In the second chapter we will demonstrate changes in the international law, that has transformed itself from traditional legal order characterized by limited number of states, strong territorial sovereignty and the power of nation state; into a kaleidoscopic legal order regulating diverse set of subjects, topics and interests. The aim here will be to illustrate progressive incorporation of new values into international law, that do not proceed exclusively from states but also from the entirety of international community. This will be manifested by analyzing the proliferation of subjects and actors, expenditure of sources of law and changes in the traditional understanding of jurisdiction. By delving into the profound developments of its structure and pointing out to its flexibility and capacity to react to societal interests and needs, we will see that international law it is well-prepared to include increasing number of topics, including animal welfare.

In the third chapter we will establish that animal interests are already partially protected via international jurisprudence. On the example of five different cases decided by the Bering Sea Tribunal of Arbitration, the World Trade Organization, and the International Court of Justice we will manifest slow but steady transformation of international responses towards animals.

In conclusion, first part will provide us with important introductory knowledge to animal questions; it will give us the understanding that international law is not stuck in time, but rather it is an elastic order that is apt for inclusion of animal welfare and lastly; it will illustrate a shift in the international jurisprudence towards higher animal protection.

CHAPTER I

A LOOK TO THE PAST: AN INTRODUCTION TO THE CHANGING NATURE OF HUMAN- ANIMAL RELATIONS

“About 13,5 billion years ago, matter, energy, time and space came into being on what is known as the Big Bang. The story of these fundamental features of our universe is called physics.

About 300,000 years after their appearance, matter and energy started to coalesce into complex structures, called atoms, which then combined into molecules. The story of atoms, molecules and their interaction is called chemistry.

About 3,8 billion years ago, on a planet called Earth, certain molecules combined to form particularly large and intricate structures called organisms. The story of organisms is called biology.

*About 70,000 years ago, organisms belonging to the species *Homo sapiens* started to form even more elaborate structures called cultures. The subsequent development of these human cultures is called history.”¹*

YUVAL HARARI

In order to answer the elemental questions of this dissertation, we need to go back in time. We need to decompose basic notions; we need to understand who we are as *Homo sapiens* and what our relations to other species are. Because the construction of international animal law is a new legal challenge, it is necessary to start our mission at the beginning. The beginning of humans, the inception of our interactions with non-human animals and their evolution to present times. The perspective

¹ HARARI, Noah, YUVAL, *Sapiens, A Brief History of Humankind*, New York 2015, p. 15.

acquired through historical lenses will give us important explanations on what is our link to other living creatures.

It will also remind us of something that we have long forgotten: that we are animals, we are part of the nature, and that for 95% of our human history we were rather an irrelevant species. The predominant anthropocentric view of our importance, our supremacy and uniqueness will be challenged.

Subsequently, we will present the most relevant philosophical schools dealing with human-animal relationships. In this way we will discover roots of our current attitudes towards other animals. Moreover, we will determine and explain our philosophical position, that will set the tone for this dissertation, *i.e.*, the welfarist stance. According to this approach, in the world where we are greatly dependent on animal use, systematic changes have to be pragmatic. We believe that “[o]ne may walk over the highest mountain one step at a time.”² Progressive amelioration of worst practices on a global level would be an important first step.

It will be also necessary to introduce notions of animal sentience, capacity to feel pain, to make tools, to grief, etc. All of this will lead to demystification of our current anthropocentric views. The chapter will end with an overview of legal regulations of animal status in different states. We will see whether animals enjoy meaningful protection in our contemporary society and how the notion of animal differ throughout

² WANAMAKER, John, *Maxims of Life and Business*, New York, London 1923, p. 53.

various jurisdictions. As a result, this chapter provides an introduction to our research on the creation of a new general international regime of international animal law. With the knowledge acquired here, we will be able to delve into more specific questions and problematics.

A) A BRIEF HISTORY OF HUMAN-ANIMAL RELATIONS

Opening subchapter will bring us to times of foragers, first *Homo sapiens*. This can be seen as a big detour, but in order to argue for the de-objectification of non-human animals,³ we need to identify the roots of our current views. We will point out to the main events in history that shaped our attitudes towards them.

1) ANIMALS AND HUMANS: A PERSONAL LINK

If we want to offer history of human-animal relations, we first need to ask: what does it mean to be animal and what does it mean to be human?

We humans are animals as much as chimpanzees, bonobos or gorillas. This claim most probably evokes in the readers feelings of rage, disagreements, maybe even offense. But is it really that bewildering? The truth is that our anthropocentric attitudes towards other living beings blinded the obvious facts.

We, *Homo sapiens*, are part of species *Sapiens*,⁴ of the genus *Homo*⁵ and family of great apes. What does that mean? In biology, all organisms

³ We will use the terms animals and non-human animals interchangeably.

⁴ Meaning wise.

⁵ Meaning man.

are classified into certain boxes. Animals belong to the same species if they mate with each other, producing fertile offspring, sharing the same DNA.⁶ “Species that evolved from a common ancestor are bunched together under the heading genus⁷ (plural genera).”⁸ Genera are grouped into families- cats, dogs, etc. “All members of a family trace their lineage back to a founding matriarch or patriarch. All cats, for example, from the smallest house kitten to the most ferocious lion, share a common feline ancestor who lived about 25 million years ago.”⁹ The same applies to us. Our closest relatives are chimpanzees. “Just 6 million years ago, a single female ape had two daughters. One became the ancestor of all chimpanzees, the other is our own grandmother.”¹⁰ We tend to forget about these elemental facts, because they are in contrast with how we see ourselves. For the most part of the history, archaic humans were irrelevant animals and there was nothing special about them.¹¹ We do not appreciate the fact that to be human means to be an animal that belongs to the genus *Homo*.

Another omitted fact is that, in the genus *Homo*, there were many other humans than just *Homo sapiens*. Our siblings were *Homo rudolfensis*, *Homo erectus*, *Homo neanderthalensis*, *Homo soloensis*, *Homo floresiensis*, *Homo denisova*, etc. All of them were human beings, although they looked and lived differently. It is a common misconception that human species

⁶ HARRAI, YUVAL, *op.cit.*, p. 5.

⁷ For example Genus *Panthera* for lions, tigers, jaguars and leopards.

⁸ HARARI, Yuval, *op.cit.*, p. 5.

⁹ *Ibid.*, p. 5.

¹⁰ *Ibid.*

¹¹ *Ibid.*, p. 4.

existed in a “straight line of descent, with Ergaster begetting Erectus, Erectus begetting the Neandertals, and the Neandertals evolving into us.”¹² This would mean that there was a linear evolution with just one type of human living at particular point of time. But *Homo sapiens* inhabited the Earth with many other sisters and brothers from *Homo* genus. “It’s our current exclusivity, not that multi-species past, that is peculiar- and perhaps incriminating.”¹³

All of the above shows that for the vast majority of evolution, humans were just marginal creatures, in the middle of the food chain. It was just last 10,000 years that has given us the impression of the importance and specialty of humans as beings outside of animal species, as creatures not connected to the rest of the animal kingdom.

Bearing in mind the true nature of humans, we can look now at the evolution of the relations between us and the other animals. Our antecessor- *Australopithecus*, that lived 4 million years ago was eating leaves, fruits, flowers, tree barks and small number of insects. They were not carnivores, nor omnivores. The majority of their diet was raw plant based. 2,5 million years ago, due to the climate change, plants and fruits became less available and so some of the proto humans started to consume meat in order to survive. Meat eating started with scavenging- finishing the leftovers that other animals had left behind. First tools were used to open the bones in order to eat marrow and hunting represented just a very small percentage of food gathering. It is interesting that event though proto humans turned to eat animal flesh,

¹² *Ibid.*, p. 8.

¹³ *Ibid.*, p. 9.

our bodies never adapted to it.¹⁴ By about 300,000 years ago, our ancestors were using fire on a daily basis. This represented an essential

¹⁴ Humans are *behavioral omnivores* but anatomically we are frugivores (as same as other primates). This means that the natural diet is consisting of plants and occasionally insects and carrion. Meat was not a regular part of our food intake. There are ample grounds for considering humans as frugivores and not as omnivores: omnivores can move their jaws only in two directions (upside down) and they have different tooth structures predetermined to deal with both animal flesh and plants and also, they have different intestinal tract. And we are certainly not carnivores- as we are missing big and sharp canine teeth, we are missing claws to tear the flesh and we have soft and small nails. Also, carnivores swallow the meat whole thanks to their acidic stomach juices that are able to kill the bacteria in the meat. On the contrary, human stomach acids are weak, because strong acids are simply not necessary for us, as raw meat was not in our natural diet. Also, animals that hunt have their intestinal tract much shorter than ours. Long intestines give our body the possibility to break down the fiber from plant-based diet and at the same time it makes it dangerous to digest meat. Even cooked meat starts to rot in very early stage of digestion. As was already noted, our ancestors started first the savaging and bone marrow eating which represented very small percentage of their diet. But our bodies have never adapted to it- when we look at what is *natural* diet of *Homo sapiens*, we need to analyze particular point of time when the main features of our digestion system evolved. And this tells us that our guts were evolved to digest mostly plants, not meat. Humans started to eat meat due to environmental changes and thanks to the invention of cooking they were able to digest it more easily, although our intestines were not evolutionary changed and their functionalities stayed the same- predetermined for plant-based lifestyle. All of this tells us, that we were not hardwired to meat eating and this dramatic change in our diet was the result of the scarcity of plants. So, it could be argued that we can return to our antient eating patterns as we have plants at our disposal and as we know, industrial meat production is leading cause of climate emergency. To conclude, to think about our natural diet and evolution of our food habits is very significant, as the transition from scavenging to hunting represented important change in our relationships towards other animals. However, even more dramatic change occurred with the domestication of plants and animals and new sedentary life. *See e.g.*; FRESTON, Kathy, “Shattering The Meat Myth: Humans Are Natural Vegetarians”, https://www.huffpost.com/entry/shattering-the-meat-myth_b_214390, (last accessed 1.1.2022, applicable to all subsequent searches); MILLS, Milton, “The Comparative Anatomy of Eating”, <https://adaptt.org/documents/Mills%20The%20Comparative%20Anatomy%20of%20Eating1.pdf>; ZARASKA, Marta, “How Humans Became Meat Eaters”, <https://www.theatlantic.com/science/archive/2016/02/when-humans-became-meateaters/463305/>; ZARASKA, Marta, *Meatbooked: The History and Science of Our 2.2-Million-Year Obsession with Meat*, New York 2016; KEMENY, Richard, “Fat Not Meat, May Have led to Bigger Hominin Brains”,

impulse in our development, thanks to the invention of cooking.¹⁵

In the times of hunters and gatherers, proto humans were facing the animal eye to eye, one of them would be the victim and the act of killing was between equals. Back then the human supremacy was nonexistent. There was a direct connection between human and non-human animals. They would use every part of the animal, leaving nothing for the waste. They were part of the nature, honoring the killed animal with rituals including sacred songs, dances and prayers.¹⁶ “The luxury to conceptualize, analyze, and categorize the creatures of the world in a ladder of moral supremacy where humans look down derisively on their animal ancestors did not yet exist.”¹⁷ We were not yet the rulers of the Earth, there were no hierarchical men-made structures. Hunter-gatherer peoples did not “consider animals inferior beings but instead regarded them as equals, perhaps even superiors, beings who are different from us but are capable of thoughts and feeling analogous to our own.”¹⁸ They had anthropomorphic understanding of animals,¹⁹ which created

<https://www.scientificamerican.com/article/fat-not-meat-may-have-led-to-bigger-hominin-brains/>.

¹⁵ Interestingly enough, most novel studies show that our brains grew due to cooking starchy food, not just due to consumption of cooked meat, thus giving carbohydrates primordial role in the development of human brain. So, the traditional view of our ancestors as mostly hunters is exaggerated as they consumed much more plant-based material than previously thought. *See e.g.*, HARDY, Karen/BRAND-MILLER, Jennie/BROWN, Katherine/THOMAS, Mark/COPELAND, Les, “The Importance of Dietary Carbohydrate in Human Evolution”, *The Quarterly Review of Biology*, Vol. 90, No. 3, (2001).

¹⁶ KELCH, Thomas, G., *Globalization and Animal Law: Comparative Law, International Law and International Trade*, Second Edition, Alphen aan den Rijn 2017, p. 2.

¹⁷ *Ibid.*, p. 2.

¹⁸ RICARD, Matthieu, *A plea for animals*, Boulder 2017, p. 9.

¹⁹ *Ibid.*, p. 9.

a moral conflict- we all are equals so killing another species is not justified. “Among these peoples, a sense of guilt at the killing of animals and the need to expiate it are frequently present.”²⁰ Therefore, hunters and gatherers developed rites and rituals to morally deal with the act of killing and to honor the preys. As Thomas Kelch writes, the link between us and them was personal. One day we were the hunters, another day we were the preys. There was inevitable proximity, a personal connection with animals, that reflected our position of equal, non-dominant members of the eco-system. Moreover, as was already mentioned, hunting did not represent predominant diet of our ancestors. It was just the environmental changes that made us adapt to changing circumstances. This picture recreates 95% of human history.²¹ But the closeness between human and non-human animals has been long forgotten. For many people it represents an unimaginable reality, undermining our current views on the importance of human beings.

2) ANIMAL DOMESTICATION

Second stage of our attitudes towards animal was their domestication during *Agrarian Revolution* 10, 000 years ago. Domestication can be defined as “situation where humans force changes on the animal’s seasonal subsistence cycle”²² or “the systematic practice of violence in which social animals are enslaved and biologically manipulated,

²⁰ *Ibid.*, p. 9.

²¹ KELCH, Thomas, *op.cit.*, p. 2.

²² NOSKE, Barbara, *Humans and Other Animals: Beyond the Boundaries of Anthropology* London 1989, p. 6.

resulting in their objectification.”²³ This transition from hunting to domestication “may be seen as the most important change in social and cultural behavior to have occurred through the history of human species.”²⁴ The shift to sedentary life begun in south-eastern Turkey, Levant and Iran.²⁵ It was a very slow process started by domestication of goats and wheat- around 9000 BC.²⁶ Thousand years later they achieved the domestication of peas and lentils, by 4000 BC horses became domesticated and so on.

How did our ancestors managed to domesticate animals? It all started with selective hunting. “Hunters learned that it was to their advantage to hunt only adult rams and old or sick sheep.”²⁷ Next, they protected them from predators thus creating a herd. Afterwards selective breeding took place- they first killed the weakest ones, adapting the animals to human needs. “By the time of Christ, farmers and livestock herders had already ousted the hunters from at least one-half of the inhabited earth.”²⁸ This change from hunting to farming represents a fundamental change in human relationships with non- human animals. They were no more equal to us. Domestic animals became dependent on the “will of humanity and for the majority of species involved, this loss of

²³ NIBERT, David, *Animal Oppression and Human Violence: Domesecration, Capitalism, and Global Conflict*, New York 2013, p. 12.

²⁴ CLUTTON-BROCK, Juliet, *Animals as domesticates: A World View through History*, Michigan 2012, p. 24.

²⁵ BAR-YOSEF, Ofer/BELFER-COHEN, Anna, “The Origins of Dedentism and Farming Communities in the Levant”, *Jornal of World Prehistory*, Vol. 3, No. 4, (1989), pp. 447-498.

²⁶ HARARI, Yuval, *op.cit.*, 2015, p. 87.

²⁷ *Ibid.*, p. 103.

²⁸ SERPELL, James, *op.cit.*, p. 5.

independence had some fairly devastating long-term consequences.”²⁹ Nonetheless, it still was an eye-to-eye relationship, where animals were killed by their owners, where the family knew where the meat proceeded from.³⁰

According to a spread misconception, the transition to agriculture and animal domestication was a “great leap forward humanity”³¹ and towards more safe and pleasant life. But as many authorities in history and anthropology declared, it is not as straightforward as it seems. “There is a general agreement that agriculture is actually more labor intensive than hunting, scavenging, and gathering”³² and “rather than heralding a new era of easy living, *Agrarian Revolution* left farmers with lives generally more difficult and less satisfying than those of foragers.”³³ Farmers were at higher risk of starvation and diseases as diet consisting of cereals and little variation in plants results in heavy malnutrition. Why then humans decided to undergo this harsh change? Simply because this development was very gradual, and it consisted of thousands of years of small alterations that led us to sedentary lifestyle. Each generation made small modification to make their life easier. “Paradoxically, a series of “improvements”, each of which was meant to make life easier, added up to a milestone around the neck of these farmers.”³⁴ But with dramatic increase of population, more food was

²⁹ *Ibid.*

³⁰ Here, we talk about subsistence farming.

³¹ HARARI, Yuval, *op.cit.*, p. 89.

³² FITZGERALD, Amy, *Animals as Food*, Michigan 2015, p. 3.

³³ HARARI, Yuval, *op.cit.*, p. 90.

³⁴ *Ibid.*, p. 97.

needed to be harvested and more work was necessary to be done. The change was irreversible. The amount of people living was so big, that it would be impossible for them to go back to forager lifestyle.³⁵

3) THE DEVELOPMENT OF COMMERCE AND DIVISION OF ROLES

A direct effect of agriculture was the development of commerce and division of roles in the society which represent a third change of human-animal relationships. According to several authors, there is a connection between capitalism, agriculture and social injustice.³⁶ Animals whose domestication represented a fundamental change in our society was cattle and its transformation into commodity was an origin of the societies as we know them now. It all started with the kurgan people “the first real proto-capitalist, transforming cattle into a vast store of mobile wealth that could be used to exert power over both people and territory.”³⁷ Kurgans are known for their domestication of horses, which they rode as fearless warriors that started the Indo-Europeanization of Europe.³⁸ The lesser-known story is concerning their contribution to the modern capitalism. During their invasions, warriors were expropriating cattle and used it as transferable capital. Even the word capital has its roots in the word cattle. These Eurasian

³⁵ With more people, more animals would have to be hunted, which would result into a very competitive fight for survival.

³⁶ See e.g., PRICE, Douglas/ GEBAUER, Anne, B., *New Perspectives on the Transition to Agriculture*, Santa Fe 1995, or NIBERT, David, *Animal Oppression and Human Violence*, *op. cit.*

³⁷ RIFKIN, Jeremy, *Beyond Beef: The Rise and Fall of the Cattle Culture*, New York 1992, p. 28.

³⁸ GIMBUTAS, MARIJA, “The Indo-Europeanization of Europe: The Intrusion of Steppe Pastoralists from South Russia and the Transformation of Old Europe”, *World*, Vol. 44, No. 2, (1993), pp. 205-222.

herders “helped prepare the economic ground for modern capitalism and the colonial era in world history.”³⁹

In this third stage, where the roles in the society were already divided, the relations between humans and animals were no longer personal. The society was divided into those that were farmers, those that were shepherds, weavers, grocers, etc. And so, the interpersonal link between the prey and the hunter was destroyed. We were dependent on others for the food supply. But still, even though members of the society did not have to kill the animal and to produce their daily food themselves (as there was a farmer, shepherd, butcher responsible for this), the “food” was still local, animals did not have to endure very long transportations and the consumers knew who the butcher was, how he treated his animals and in what conditions animals lived.⁴⁰

4) THE MASS PRODUCTION

Fourth change was initiated by the *Industrial revolution* that brought developments in mass production. This led to industrial farming factories as we know them nowadays. Subsistence farming was transformed into a market farming. “Animal agriculture became prolific during this period. Because people were moving to urban areas and plagues were reducing the human population, it became increasingly difficult to find people to work farming plant-based foods. Landowners, therefore, embraced production that required less labor power: raising

³⁹ RIFKIN, James, *op.cit.*, p. 28.

⁴⁰ See e.g., KELCH, Thomas, *op. cit.*, p. 4.

and killing livestock animals for food.”⁴¹

“Today, the world contains about a billion of sheep, a billion pigs, more for a billion cattle, and more than 25 billion chickens.”⁴² These animals are one of the most miserable beings on the planet. Here, we talk about the global relationships between animals and us. The trade became global, the economy became global, the environmental perils became global, the financial crises became global. Global is the word representing our current times. Here, there is no link between our food and the animal. As Peter Singer put it, we come into interactions with animals mostly thru our plates.⁴³ Yet, there is a strong censorship regarding the reality on factory farms. “[T]he overwhelming majority of these abusive practices are inflicted on animals far from public view.”⁴⁴ Many children in the USA living in urban areas don’t even know where the meat comes from.⁴⁵ We are truly disconnected from the meat production which contributes to our ignorance or toleration of inhumane practices on farm animals. “We are indifferent, passive, blasé, aloof, uncaring, callous, vaguely complicit, and bloated with humanistic good conscience and we are made that way by the unfeeling collusion of monotheistic culture, technoscience, and economic imperatives. Once again, the fact of not knowing what other do for us, of not being informed, is far from constituting an excuse, rather it represents an

⁴¹ FITZGERALD, Amy, *op.cit.*, p. 6.

⁴² HARARI, Yuval, *op.cit.*, p. 104.

⁴³ SINGER, Peter, “Vegetarianism as a form of protest”, in SAPONTZIS, Steve, F. (coord.), in *Food for Thought: The Debate over Eating Meat*, New York 2004, p. 108.

⁴⁴ RICARD, Matthieu, *op.cit.*, p. 41.

⁴⁵ *Ibid.*

aggravating circumstance for beings endowed with consciousness, recall, imagination and responsibility, which is what with quite good reason we pretend to be.”⁴⁶ We need to understand that the world is interdependent, and that with approximately 57 billion land animals and thousands of billion marine animals killed every year for the consumption, our current food model has far reaching consequences towards our environment, health and poverty. “The inescapable truth is that factory farming is failing to feed the world; it uses more food than it produces. It breaks the link between livestock and the land and is fundamentally unsustainable.”⁴⁷ In this brief history of human-animal relationships we can see the deep transformation of our attitudes towards other living beings on Earth. What started as personal link between us and non-human animals, continued as a local link and developed into a truly global attitude.⁴⁸ With each change, the closeness in our relationship was diminished, leading to a state where we are absolutely disconnected from the food source. We acquired anthropocentric position based upon the idea that humans are central points and entities, superior to nature, that we are beings with intrinsic value, unlike other animals. This position is omitting the vast part of the evolution, taking into consideration just very small fraction of our history. Our perception of human dominance is based on myth

⁴⁶ FONTENAY, Elisabeth, *Sans offenser la genre humain: Réflexions sur la cause animale*. Paris 2008, p. 205.

⁴⁷ LYMBERY, Philip, “Strategic Plan 2013-2017: For Kinder, Fairer Farming Worldwide”, https://www.ciwf.org.uk/media/3640540/ciwf_strategic_plan_20132017.pdf.

⁴⁸ These changes were not linear, but they happened gradually. At one point in time there were s hunters and farmers at the same time. The same applies to division of roles in society and origins of commerce.

portraying humans as virulent hunters, as fearless creatures on the top of the food leather. These stereotypes are being debunked and with them also the image of humans as dominant creatures of the Universe.

B) ETHICS, MORAL PHILOSOPHY AND LAW RELATING TO HUMAN-ANIMAL RELATIONS

“To end the tyranny, we must first understand it.”⁴⁹

Peter Singer

Extreme destruction of nature, contamination of natural resources, intense animal agriculture, experimentation on animals and climate emergency represent the outcomes of our views on other animals and the environment. All our actions towards other animals “can be properly understood only as the manifestations of the ideology of our species- that is, the attitudes which we, as dominant animal, have toward the other animals.”⁵⁰ When certain behavioral structures are so profoundly fixed in our minds, we regard them as unequivocal facts. What is then the best strategy to undermine these attitudes? One of them would be to compromise the validity of the prevailing thoughts by explaining their historical origins⁵¹ and at the same time, to offer philosophical grounds for considering animal welfare as a global concern. Therefore, we need to delve into the philosophical thoughts on which we could rebuilt our relations towards nature and non-human

⁴⁹ SINGER, Peter, *Animal Liberation*, New York 2009, p. 271.

⁵⁰ *Ibid.* p. 185.

⁵¹ *Ibid.* p. 272.

animals.⁵² We need to look for philosophical anchors that will provide us with arguments for the construction of international animal law. It is of crucial importance to define ethical and philosophical grounds of our legal arguments. We need to realize that there is more than two thousand years of moral philosophy concerning animal well-being. Normative principles and guidelines existed long before the law became concerned with animal protection. Clearly, law has been inspired by moral philosophy, thus we need to address this topic as well. By asking basic questions (for example: is it morally justifiable to subject farm animals to life on industrialized farms where they live in crowded, unnatural conditions?), we will see how moral theory relates to animal law concerns. We believe that law and morality should go hand in hand, thus departing from jurisprudential theory of legal positivism. “Law should reflect fundamental moral principles that are generally accepted by emotionally sound people of good faith.”⁵³ And this law is based on “moral theories founded on reason and human nature.”⁵⁴

Our actions towards animals proceed mainly from two different views- Christianity and *cartesian doctrine*. But before we delve into these two pillars of current attitudes towards other animals, we will look at the era of Greek antiquity and its positions towards animals.

1) PRECEDENTS OF OUR ATTITUDES TOWARDS ANIMALS

⁵² We will present the development of the Western philosophical attitudes towards other animals, as in order to offer worldwide view would require separate dissertation with special focus on moral philosophy and world religions.

⁵³ KELCH, Thomas, *op.cit.*, p. 29.

⁵⁴ *Ibid.*, p. 29.

a) *Greek philosophy*

Philosophical thought of the ancient Greeks paved the way for all subsequent western philosophical reflections. There was no uniform predominant philosophy in Greece. On the contrary, several rival schools existed, with conflicting views upon the most elemental philosophical questions. Each school had its founder, him being the father of the school's doctrines.

i) *Pythagoras*

Several philosophers were dedicated to the question of human-animal relations. One of the most conflicting clashes were between Aristotle and Pythagoras. Pythagoras was a vegetarian and so were his students. Interestingly, he invented the word “philosopher”⁵⁵ as he did not want to call himself “wise”.⁵⁶ His views upon other animals were deeply influenced by Egyptian priests that would not wear clothes from other animals or eat animal flesh. And so, Pythagoras “was never willing to wear fabrics derived from the bodies of animals, and he abstained from eating meat and from all sacrifices that cost the life of an animal being.”⁵⁷ He also believed in reincarnation.⁵⁸ “If souls of humans enter into bodies of animals, all creatures must be viewed as kin.”⁵⁹

⁵⁵ Lover of wisdom.

⁵⁶ POPOVA, Maria, “Pythagoras on the Purpose of Life and the Meaning of Wisdom”, <https://www.themarginalian.org/2018/05/23/pythagoras-olympic-games/>.

⁵⁷ APPOLONIUS DE TYANA, *Sa vie, ses voyages, ses prodiges*, Paris 1972, p. 9. (Own translation).

⁵⁸ Migration of soul into humans or animals.

⁵⁹ VIOLIN, Mary, Ann, “Pythagoras-The First Animal Rights Philosopher”, *Between the Species*, Vol. 6, No. 3, (1990), p. 123.

Pythagoras expressed horror of men who inserted the dead bodies of living breathing creatures into their bodies, eating the sad flesh of the murdered beast.”⁶⁰ Pythagoras can be considered as the first animal rights philosopher and he was “the first to introduce these beliefs to Greece and the Western world.”⁶¹ He believed that the soul is of higher importance than body. In order to keep the soul pure, it was, necessary, according to the philosopher, to abstain from animal flesh.⁶² He introduced the notion of vegetarianism to western civilization, thus reflecting his attitude to animals as sentient beings. Beings that are equal to each other, without the superiority of humans. His ideas lived in many different forms and were spread by many philosophers, for example Empedocles or Neoplatonic Porphyry.

Porphyry was author of several writings about vegetarianism, such as *On Abstinence from Animal Food* where he states that “if we depend on the argument of necessity or utility, we cannot avoid admitting by implication that we ourselves were created only for the sake of certain destructive animals, such as crocodiles and snakes and other monsters, for we are not in the least benefited by them. On the contrary, they seize and destroy and devour men whom they meet - in so doing acting not at all more cruelly than we. Nay, they act this savagely through want and hunger; we from insolent wantonness and luxurious pleasure, amusing ourselves, as we do, also in the Circus and in the murderous sports of

⁶⁰ *Ibid.* p. 123.

⁶¹ *Ibid.*

⁶² MORGAN, Nathan, “The Hidden History of Greco-Roman Vegetarianism”, <https://www.britannica.com/explore/savingearth/the-hidden-history-of-greco-roman-vegetarianism>.

the chase. By thus acting, a barbarous and brutal nature becomes strengthened in us, which renders men insensible to the feeling of pity and compassion. Those who first perpetrated these iniquities fatally blunted the most important part of the (civilized) soul. Therefore, it is that Pythagoreans consider kindness and gentleness to the lower animals to be an exercise of philanthropy and gentleness.”⁶³

Stoics and cynics also followed his vegetarian rules. The great Ovid, transmitted Pythagorean ideas in his *Metamorphosis*: “There are crops, there are apples weighing down from the branches, and ripening grapes on the vines, there are flavorsome herbs, and those that can be rendered mild and gentle over the flames, and you do not lack flowing milk, or honey fragrant from the flowering thyme. The earth, prodigal of its wealth, supplies you with gentle sustenance, and offers you food without killing or shedding blood... Oh, how wrong it is for flesh to be made from flesh, for a greedy body to fatten, by swallowing another body, for one creature to live by the death of another creature!”⁶⁴

ii) Aristotle

A very different position towards non-human animals was represented by Aristotle. He was a supporter of slavery and women’s inferiority to men⁶⁵ and his position to animals was based on these premises. He acknowledged that humans are animals- animals that can reason. But

⁶³ WILLIAMS, HOWARD, *The Ethics of Diet- A Catena of Authorities Deprecatory of the practice of Flesh-Eating*, London 1883, p. 71.

⁶⁴ OVIDIUS NASO, Publius, *Metamorphoses*, Translated by KLINE, A.S, London 2004, Book XV:60-142.

⁶⁵ See more on this, e.g., HOROWITZ, Maryanne Cline, “Aristotle and Woman”, *Jornal of the History of Biology*, Vol. 9, No. 2, (1976), pp. 183-213.

this did not mean that other animals should be treated with equal consideration. He saw nature as hierarchy between plants, animals and humans. “Plants exist for the sake of animals, and brute beasts for the sake of man-domestic animals for his use and food, wild ones (or at any rate most of them) for food and other accessories of life, such as clothing and various tools. Since nature makes nothings purposeless or in vain, it is undeniably true that she has made all animals for the sake of man.”⁶⁶ According to him both humans and other animals are *anima sensitive*,⁶⁷ but only humans are *anima rationalis*.⁶⁸

Aristotelian views not those of Pythagoras became part of the later Western tradition.⁶⁹ “At the dawn of the Christian era, abstinence from meat was regarded as a superstition and was prohibited on Rome by the emperor Tiberius. Despite all this, the prestige of Pythagoras conferred an intellectual standing on this abstinence that it had never enjoyed before.”⁷⁰

b) Christian doctrine

Thoughts of Aristotle were followed in the scholastic tradition by saint Thomas Aquinas. According to him, other animals do not have any reason and spiritual soul. These creatures, stated Aquinas, cannot be close to human beings. Humans, therefore, do not have any obligations

⁶⁶ ARISTOTLE, LORD, Carnes, *Aristotle: Politics*, Chicago 2013, p. 112.

⁶⁷ Ability to feel.

⁶⁸ Animals that can reason.

⁶⁹ SINGER, Peter, *op.cit.*, p. 189.

⁷⁰ RICARD, Matthieu, *op.cit.*, p. 17.

and responsibility towards them.⁷¹ He put together Aristotle's teaching about the hierarchy of souls with Christianity. This meant, that everything that is less perfect, has to serve to what is more perfect—plants serve animals, animals serve humans. Thomas Aquinas interpreted Bible only for the sake of man. This position profoundly influenced Christian attitudes that moved other animals to the edge of their interests. “Pope Pius XII, for example, refused to grant his permission for the formation of a society for the prevention of cruelty to animals because such a permission would have implied that human beings have duties and obligations toward inferior creatures.”⁷² Despite the official church theology, there were many dissenting opinions. The most famous one represents saint Francis from Assisi. He became the patron of all animals, seeing all creatures as equals, that we should love and embrace. He represented universal love to all living beings, although he did not abstain himself from meat eating and therefore, he did not rebel against the predominant teachings.

So, the first important influence that shaped our current attitudes towards animals was Christianity, unifying Judaism and Greek philosophy. According to predominant Christian doctrine, the unique position in nature is given only to humans, that have immortal soul. Only humans have dominance over other living creatures. Animals are missing the soul and they are subordinated to man. “To kill other animals became part of “responsible” administration of non-human

⁷¹ BIRCH, Charles/ VISCHER, Lucas, *Living with the Animals: The Community of God's Creatures*, Sydney 1997.

⁷² RICARD, Matthieu, *op.cit.*, p. 14.

beings.”⁷³ At this point it is necessary to stress out, that writers and scholars (actual and past) are only the interpreters of Bible. Bible is a piece of work of a small circle of initiates, and it was not meant to be spread out for vast masses. These sacred writings describe different spiritual states in a symbolic way. Spiritual symbolism was inherent part of a Jewish nation. There were many schools that taught the science of symbolism, but only a small number of selected individuals had access to them. Literal interpretation of Bible led to misunderstandings and missed the deep symbolism. This also applies to sections of Old Testament that had many vegetarian mentions, and it was just the latter redactors that added their “corrections.”⁷⁴ It is worth mentioning that during the times of disciples there were many different vegetarian streams. The most predominant one was represented by above mentioned Essenes- according to the Dead Sea Scrolls,⁷⁵ Jesus was born into this sect, which solidifies the position that he was also a vegetarian. Later also Gnostics, Nestorians and in in the Middle Ages the Katars were abstaining from eating animal flesh as well.

Many Christians justify animal suffering inflicted on other animals on the basis of Bible. For example, Jesus ate lamb and fish with his disciples. If we look at it from a symbolic approach, eating the lamb or division of fish between the masses, has its allegoric meaning. In the

⁷³ ČEJKA, Jan, “Práva zvířat a povinnosti člověka”, p. 121, in ČEJKA, Jan, *Zvířata sou naši bližní*, Praha 2010. (Own translation).

⁷⁴ For example, Genesis 29.

⁷⁵ Also known as Qumran Cave Scrolls were discovered in 1947. They have immense historical, linguistic and religious importance. They include the 2nd oldest surviving manuscript of writings that were included in the Hebrew Bible canon.

symbolism it is known that the lamb means silence, sacrifice and patience and fish mean the soul and feelings, the same applies to notions such as blood, woman, vine, etc.⁷⁶ These words described certain spiritual state. According to many philosophers⁷⁷ and theologians, protection of animals represents a never-ending fight for higher moral and social life. For many, ethical treatment of animals is a natural consequence of correctly understood religion.⁷⁸ Nevertheless, the anthropocentric view prevailed. Teachings of Thomas Aquinas became the basics of Scholastica, and they are still present in Church doctrine as well as in our minds.

c) *Cartesian doctrine*

The second profound influence on our attitudes towards other animals had the *cartesian doctrine* based on the teachings of the philosopher Rene Descartes. According to Descartes and his students, other animals do not have consciousness and are not able to feel the pain. Their status was *animal automata*- mechanical robots that have no right for life and respect. “This mechanistic vision permitted the scientists of the time to ignore the pain of the animals they used in their experiments.”⁷⁹ Descartes was not only a thinker and mathematician but also a Christian. “Under the influence of the new and exciting science of mechanics, Descartes held that everything that consisted of matter was

⁷⁶ PITTER, Přemysl, “Ježíš a vegetarismus”, p. 80, in ČEJKA, Jan, *op. cit.*

⁷⁷ Matthew Scully, Humphy Primatt, Andrew Linzey, Luise Rinser, Charles Birch, Mark Rowlands, Herman Dagget, Norm Phelps, Lev Nikolajevic Tolstoj, James Rachels.

⁷⁸ PITTER, Přemysl, *op. cit.*, p. 82.

⁷⁹ RICARD, Matthieu, *op. cit.*, p. 15.

governed by mechanistic principles, like those that governed a clock. An obvious problem with this new view was our own nature. The human body is composed of matter and is part of the physical universe. So, it would seem that human beings must also be machines, whose behavior is determined by the laws of science.”⁸⁰ He brought in his teachings the idea of the soul, dividing everything in the universe into things with the spirit and things of a material origins. As we humans are conscious beings, we cannot have our roots in the matter. He made a link between the immortal soul and the consciousness, excluding from this equation other living beings. The consequences of his thoughts were and still are devastating for non-human animals- not only they do not have soul, but they do also not have consciousness either. They do not experience pleasure nor pain. Descartes and his students “administered beatings to dogs with perfect indifference and made fun of those who pitied the creatures as if they felt pain. They said the animals were clocks, that the cries they emitted when struck were only the noise of a little spring that had been touched but that the whole body was without feeling. They nailed poor animals up on boards by their paws to vivisect them and see the circulation of the blood was a great subject of conversation.”⁸¹

d) *Kantian model*

⁸⁰ SINGER, Peter, *op.cit.*, p. 200.

⁸¹ FONTAINE, Nicholas, *Memories por servir a l'histoire de Port Royal*, Cologne 1738, in ROSEMFIELD, *From Beast Machine to Man-Machine: The Theme of Animal Soul in French Letters from Descartes to La Mettrie*, New York 1940, p. 52-53.

Few centuries later, Immanuel Kant held similar position as Rene Descartes. The capacity to reason was centric for both of them. According to Kant, animals are irrational and not autonomous beings. Only rational beings can be moral beings able to treat other rational beings as ends, rather than as means.⁸² Animals are, therefore, excluded from ethical considerations because they do not reason. In Kantian model, the sole purpose of animals is to serve the humans and their objectives. We do not have any direct obligations towards them as animals are not worth to be object of our moral duties.⁸³ Further, cruelty to animals is wrong only because it can lead humans to brutality towards other human beings.⁸⁴ Pain and misery of animals as such was not ethically relevant for Kant. It was only the influence of cruelty on our morality that played role in his ethics.⁸⁵ Strong dissenting opinion towards Kantian views of animals was the one of leading utilitarian philosopher,⁸⁶ Jeremy Bentham. In the *Introduction to the Principles of Morals and Legislation* his answer to Kant was: “The question is not, can they *reason*? Nor Can they *talk*? But Can they *suffer*?”⁸⁷ “Bentham was perhaps the first to denounce “man’s dominion as tyranny rather than legitimate government.”⁸⁸ He included humans and other animals in the

⁸² KANT, Immanuel, *Ethical Philosophy*, Indianapolis 1994, p. 35-36.

⁸³ KANT, Immanuel, *Lectures on Ethics*, New York 1997, p. 212.

⁸⁴ MANNING, Aubrey/ SERPELL, James/ MACHALE, Andreas-Holger, *Animals and Human Society: Changing Perspectives*, London 1994, p. 92.

⁸⁵ At least, Kant contrasted Cartesian’s absolute indifference towards animals.

⁸⁶ Utilitarian moral principle says that the right action is the one that has as a consequence the maximum quantity of good for the maximum quantity of people.

⁸⁷ BENTHAM, Jeremy, *An Introduction to the Principles of Morals and Legislation*, London 1823, p. 311.

⁸⁸ SINGER, Peter, *op.cit.*, p. 204.

same category of conscious beings, being capable of different feelings-pain, suffering, happiness, etc. In this way he embraced animals in the moral considerations. If we acknowledge that animals are conscious beings that have their own “inner” life, they become objects of our moral responsibility and have moral standing irrespective of their rational abilities.⁸⁹ Suffering of animals is the same evil as suffering of humans as their pain has the same weight.

Another strong voice for the protection of other animals proceeded from Voltaire and J.J. Rousseau. Voltaire asked “There are barbarians who seize this dog, who so greatly passes man in fidelity and friendship, and nail him down to a table and dissect him alive, to show you the mesaraic veins! You discover in him *all the same organs of feeling as in yourself*. Answer me, mechanist, has nature arranged all the springs of feeling in this animal *to the end that he might not feel*?”⁹⁰ J.J. Rousseau also highlighted the animal sentience. According to him, animals form part of natural law precisely because they are sentient. Their capacity of incapacity to reason is irrelevant. He was also a very strong propagator of vegetarianism.⁹¹

2) CURRENT PHILOSOPHICAL INFLUENCES

⁸⁹ ČEJKA, Jan, *op. cit.*, p. 126.

⁹⁰ VOLTAIRE, *Dictionnaire Philosophique*, in FLEMING, William, *The Works of Voltaire*, Vol. III, New York 1901, p. 223.

⁹¹ ROUSSEAU, Jean-Jacques, *Discours sur l'origine et les fondemens de l'inégalité parmi les hommes*, in GAGNEBIN, Bernard/ RAYMOND, Marcel, *Oeuvres complètes*, Vol. 3, Paris 1959.

Jumping to current times, we will focus on two philosophers representing two different streams- Peter Singer based in utilitarian theory and advocating for animal interests and Tom Reagan that represents animal rights movement. In our current society, there is a very sharp division between animal welfare approach and animal rights approach. Or to say it in a different way, a clash between those that advocate for bigger cages and those that advocate for no cages at all.

a) Peter Singer: The principle of equal consideration of interests

Peter Singer, currently the most important bioethical philosopher, developed the ideas of Jeremy Bentham. His book *Animal Liberation* woke up many individuals from their indifference towards animal suffering and gave impetus to the birth of a modern movement for the animal liberation. According to Singer, in suffering we are equal to animals.⁹² The central point of his argument is the idea of speciesism. Speciesism means to ignore *moral* rights of other animals for careful treatment and life without suffering, on the basis of the fact that other animals are not part of the species *Homo sapiens*.⁹³ He describes it as morally inadmissible and inexcusable and compares it to other forms of exploitation- such as racism and gender or religious inequalities. The atrocities of this ignorance can be seen especially in modern factory farming and animal experimentation.

Singer's key argument for better treatment of animals is the principle of *equal consideration of interests*: the interests of human and other animals

⁹² SINGER, Peter, *Animal liberation*, Fourth Edition, New York 2009, p. 15.

⁹³ *Ibid.*, pp. 6 and 241.

have the same weight, and they have to be respected in the same way.⁹⁴ What are the basic interests? First and foremost, the interest for being free of pain and suffering.⁹⁵ The principle of *equal consideration of interests* therefore includes all beings that have interests.⁹⁶ The sole fact that the human or other animal is capable of suffering is sufficient to have the moral standing irrespective of the rational abilities.⁹⁷ This means that we have to take into consideration the interests of nonhumans and be aware of any negative consequences on those interests that could result from our actions. But in our speciesism dominated society we overwhelmingly omit nonhuman interests on grounds of their incapacity to feel the pain or other biased justifications.

However, his principle does not mean that all lives are equal⁹⁸ nor that animals cannot be exploited as long as their interests were taken into a consideration and the exploitation was not based on speciesism.⁹⁹ This is because Singer is a consequentialist- *e.g.*, follower of the utilitarian philosophy. Classical utilitarian philosophy provides that the correctness or incorrectness of our actions depend on the consequences produced by our actions. Just those actions are correct that have as a consequence the biggest amount of good for the biggest number of individuals.¹⁰⁰ Therefore, for Singer, whether the conduct is right or

⁹⁴ *Ibid.*, p. 5.

⁹⁵ *Ibid.*, p. 7.

⁹⁶ *Ibid.*, p. 5.

⁹⁷ *Ibid.*, p. 16.

⁹⁸ *Ibid.*, p. 20.

⁹⁹ See the example with free ranged eggs. *Ibid.*, p. 175.

¹⁰⁰ BENTHAM, Jeremy, *op. cit.*, p. 2.

wrong depends on its consequences, and not on the violation of rights. For example, he opposes animal experimentation, because in most cases acquired results are insufficient in order to justify suffering that the animal had to undergo. However, he is not against all animal experimentation. He asks hypothetically: “Would we be prepared to let thousands of humans die if they could be saved by a single experiment on a single animal?”¹⁰¹ Therefore, Singer is not a proponent of animal rights. Actually, he does not believe in rights and sees them as irrelevant. According to his philosophy, only the consequences of actions matter. Rights on the other hand cannot be violated even though the consequences of the violation would be more desirable than the consequences of following that right. Singer’s consequentialist principle is used especially by the modern welfare movement advocating for better treatment of animals.

b) Tom Regan: The case of animal rights

The second influential philosopher of our times is Tom Regan, father of animal rights movement. In his book *The Case for Animal Rights*,¹⁰² Regan argues that the only way animals can be free from human exploitation, is granting them rights. Animals are considered to be our property without any inner value. This attitude is the root of the existence of factory farming, experimentation, circuses, zoos, pets, etc. According to Regan, human and non-human animals have “*inherent value*.”¹⁰³ All beings that can feel the pain and suffering and have

¹⁰¹ Singer, Peter, *op. cit.* p. 81.

¹⁰² REGAN, Tom, *The Case for Animal Rights*, Los Angeles 2004.

¹⁰³ *Ibid.*, p. xvii.

emotions, have the inherent value. This means that human and non-human animals have the fundamental right to be treated with respect.¹⁰⁴ This principle says that individual animal cannot be mistreated even if it would bring utility to greater number of others. This theory is therefore in contrast with utilitarian philosophy.

The rights theory does not, however, advocate same rights for humans and animals. The aim is, first and foremost, to move them from the category of things to category of persons. What would that mean? It would oblige our society to treat other animals in a human way. Reluctance of governments and international organizations to grant other animals this status is understandable. Nonhuman animals would have to be protected from exploitation and cruelty¹⁰⁵ and current factory and fur farming could not continue operating anymore. It would ideally lead to an institutionalized abolition of animal exploitation. On the other hand, the welfarist approach tries to implement reforms. For example, to ameliorate the conditions of farm animals instead of perusing total abolition of factory farming. Or, to allow only experiments that are absolutely necessary.

On which principles should international animal law be constructed? Which philosophical stream would be the best fit for the creation of this new sub-system of general international law? At the moment, our standing is that we need to adopt a pragmatic (welfarist) approach. This means that bearing in mind the ideal outcome (represented by animal

¹⁰⁴ *Ibid.*

¹⁰⁵ ČEJKA, Jan, *op. cit.*, p. 132.

rights movement) we need to focus on what is achievable right now. Instead of insisting on abolitionism, which is too radical for the majority of people, we need to develop global welfare regulations, global policy and corporate policy changes, while educating people about impacts of our individual behavior on animals, and in this way progress towards the world without animal suffering. Current intolerance between welfarist and animal rights approach is adding fuel to the fire and animals are the ones that are affected by it the most. Both groups want to ameliorate the situation of our fellow beings but to demand total abolishment of factory farming and all other forms of animal exploitation is at least nowadays, just a mere vision. The change has to be adopted in stages. First, it is necessary to put in motion consistent *international* reforms that would terminate the worst practices. At later stages we will be able to focus on all other forms of animal cruelty that will, in the end, hopefully lead to absolute animal liberation. But this change has to be gradual in order to be effective. First stage will, therefore, clear the ground for next achievements that could introduce the concept of animal rights. Meanwhile we need to educate ourselves and others in all possible ways,¹⁰⁶ about animal exploitation and promote feelings of kindness towards them. This means that our proposal for international animal law will go towards welfarist approach, but at the same time seeing animal rights reforms as desired and necessary continuation of international welfare approach. What

¹⁰⁶ Whether we are animal rights advocates or welfare advocates. A great example is vegan movement that changes the landscape of our food choices, and it also has a direct consequence on food production and promotion.

would be the content of this welfarist approach will be shown in the following chapters.

C) ANIMAL SENTIENCE

“Only if we understand, can we care. Only if we care, we will help. Only if we help, we shall be saved.”¹⁰⁷

Patti Denys, Mary Holmes

Discoveries concerning animal behavior, sentience, capacity to feel emotions, to grief, to feel the pain and to suffer are dating back to the 17th century. However, it is just recently that modern science is truly concerned about animal sentience. As a result, we witness growing number of new scientific facts that are debunking our anthropocentric views. We see that there is a continuity between us and them and we start to understand that the differences between us are not as straightforward as we were taught. These proofs are the engine for the change in our relations with non-human animals and the increasingly obvious similarities are forcing us to rethink our speciesist narcissism.¹⁰⁸

1) SCIENTIFIC DISCOVERIES ON ANIMAL SENTIENCE

a) General considerations

Scientific discoveries are important part of shaping the global opinion on our treatment of animals. They confute all the arguments for

¹⁰⁷ DENYS, Patti/HOLMES, Mary, *Animal Magnetism: At Home with Celebrities and Their Animal Companions*, New York 1998, p. 106.

¹⁰⁸ KYMLICKA, Will, at a conference “El Fin de la Supremacía humana” in Barcelona, 5.11.2018.

instrumentalization of animals- sentience, consciousness, ability to suffer and to feel the pain, ability to have interests, ability to feel embarrassment, to grieve, to lie, to plan the future, etc. Therefore, we need to pay attention to scientific discoveries as the connection of moral philosophy and science create strong basis for reforms in international animal law.

For a long time, the predominant opinion of biologist, ethologist, philosophers and lawyers was that “personality, mind and emotions were uniquely human attributes, and that the behavior of other-than-human animals was for the most part merely a response to some environmental or social stimulus.”¹⁰⁹ It was the break grounding work of Jane Goodall and other pioneers that mapped the spectrum of animal emotions and consciousness. These discoveries proved something that we know or feel thru our common sense. Further extensive scientific data demonstrated that other animals indeed have emotions and experience very similar emotional life. “There is ample evidence that for many animals, especially vertebrates, the real question of interest is not *whether* they have emotional lives but rather *why* different emotions have evolved, what they are good for. To deny animals’ emotions is to deny a large part of who these beings are.”¹¹⁰

To openly agree that animals are sentient beings has a severe implication. It is much easier to subject animals to horrific experimentations, industrial factory farming or circuses if we think that they are just mere objects without capacity to feel anything. But under

¹⁰⁹ BEKOFF, Marc, *Lives of Animals*, Novato 2007, p. 12.

¹¹⁰ BEKOFF, Marc, *Minding Animals. Awareness, Emotions, and Heart*. Oxford, New York 2002, p. 100.

the weight of scientific data coming from cognitive biology, genetics, neurobiology, biopsychology, affective neuroscience, ecology, ethology, evolutionary biology, and other fields, we are losing our arguments for the uniqueness of *homo sapiens* and our consequent domination over other animals.

b) Darwinian heritage

Person that deeply changed our perceptions on who we are and what is our connection to other beings was Charles Darwin. He demonstrated that the differences between human and non-human animals are not as profound as was thought. He noted that mammals “experience (to greater or lesser degree) anxiety, grief, dejection, despair, joy, love, tender feelings, devotion, ill temper, sulkiness, determination, hatred, anger, disdain, contempt, disgust, guilt, pride, helplessness, patience, surprise, astonishment, fear, horror, shame, shyness and modesty.”¹¹¹ He wrote that “we have seen that the senses and intuitions, the various emotions and faculties, such as love, memory, attention, curiosity, imitation, reason, etc., of which man boasts, may be found in an incipient or even sometimes in a well-developed condition, in the lower animals.”¹¹² Darwin stressed out that *differences among the species are differences in degree rather than kind* and that biological continuities between human and non-human animals are very strong. “According to Darwin, there is evolutionary continuity among animals not only in anatomical structures such as hearts, kidneys, and teeth, but also in brains and their

¹¹¹ RACHELS, James, *Created from animals: The moral implications of Darwinism*, Oxford, New York 1990, p. 133.

¹¹² DARWIN, Charles, *The Descent of Man and Selection in Relation to Sex*, London 1901, p. 85.

associated cognitive and emotional capacities.”¹¹³ “If sentience is more a matter of degree than of a kind, then the force of evidence suggests that there are fundamental ontological continuities between humans and non-human animals.”¹¹⁴ Evolutionary continuity means therefore that similarities and differences between the species are “nuances or shades of gray, not stark black-and-white differences.”¹¹⁵

Cutting-edge scientific dates back up Darwin’s discoveries. Humans have 3 billion genetic building blocks. Only a very little amount of these blocks is unique to us as individuals. By 99,9 % we are similar to the next person. But the similarities are not limited only to *homo sapiens*. Chimpanzees share with us 96% of genetic blocs and cattle share 80% of genes with humans. “And while egg-lying and feathered body are pretty different from a human’s, about 60% of chicken genes have a human gene counterpart.”¹¹⁶

We will look more closely into the capacity of other animals to feel the pain, to grief, to use the language and create tools, as these are one of the most important human attributed capacities.

2) SPECIFIC EXAMPLES OF SCIENTIFIC DISCOVERIES ON ANIMAL SENTIENCE

¹¹³ BEKOFF, Marc, *op.cit.*, p. 33.

¹¹⁴ KELLER, DAVID, *Ecology and Justice: Citizenship in Biotic Communities*, Salt Lake City 2019, p. 50.

¹¹⁵ BEKOFF, Marc, *op.cit.*, p. 33.

¹¹⁶ RAMSEY, Lydia/LEE, Smantha, “Our DNA is 99,9% the Same as the Person Next to Us-and We’re Suprisingly Similar to a Lot of Other Living Things”, <https://www.businessinsider.com.au/comparing-genetic-similarity-between-humans-and-other-things-2016-5>.

a) *Animal pain*

Many experiments (outside and inside the laboratories) have been performed, in order to study animal pain. Pain can be defined as “an aversive sensation and feeling associated with actual or potential tissue damage.”¹¹⁷ We know that mammals share the same nervous system as us, together with neurochemicals, perceptions and also emotions. All of these elements are making it possible to feel the pain.¹¹⁸ It is also known that birds have “pain receptors, thermo-receptors, and physical-impact receptors responsive to noxious (tissue damaging) stimuli”¹¹⁹ and that they perceive pain as mammals.¹²⁰ With regards to the use of language, many philosophers including Descartes were stressing out that while animals can communicate, they are unable to share their experience about the pain in a detailed way, which meant that they do not feel the pain at all. When it comes to pain, language is not the most important factor. Even though other animals cannot tell us what experience they are going through, there are non-linguistic modes of communication that we can understand. “The basic signals we use to convey pain, fear, anger, love, joy, surprise, sexual arousal, and many others, and many other emotional states are not specific to our own species.”¹²¹ There is also a developed “grimace scales” that are indicators of degree of pain. However, this does not mean that animals that cannot make facial

¹¹⁷ BROOM, Donald, “Evolution of pain”, *Flemish Veterinary Journal*, No. 70, p. 17.

¹¹⁸ LANGLEY, LIZ, “The Surprisingly Humanlike Ways Animals Feel Pain”, <https://www.nationalgeographic.com/news/2016/12/animals-science-medical-pain/>.

¹¹⁹ DAVIS, Karen, “Pain and Suffering in Birds”, https://www.upc-online.org/thinking/pain_and_suffering.html.

¹²⁰ See e.g., BRAITHWAITE, Victoria, *Do Fish Feel Pain?*, Oxford 2010.

¹²¹ GOODALL, Jane, *In the Shadow of Man*, Boston 1975, p. 225.

expressions do not feel any pain. “Reptiles, amphibians, and fish have the neuroanatomy necessary to perceive pain. Additionally, they possess descending modulatory pathways and express behavioral changes that would be indicative of pain in mammals. It is therefore logical to conclude that these species experience pain.”¹²² This is a very recent discovery, especially with connection to fish pain. It was a conventional knowledge that fish do not feel anything. According to marine biologist Culum Brown “fish produce the same opioids- the body’s innate painkillers- that mammals do. And their brain activity during injury is analogous to that in terrestrial vertebrates. Sticking a pin into goldfish or rainbow trout, just behind their gills, stimulates nociceptors and a cascade of electrical activity that surges toward brain regions essential for conscious sensory perceptions.”¹²³ Fish and crustaceans (crabs and lobsters) are usually excluded from animal welfare protection because of our current erroneous understanding of these animals. This might be because it is difficult to emphasize with animals that are so different from us. Fortunately, there are signs of a more progressive approach in this area of animal welfare. For example, Swiss government decided that lobsters cannot be dropped alive into boiling water.¹²⁴ Although the discussion about ability to feel pain in the case of crustaceans is still open, extensive research of biologist Robert Elwood has shown that crabs have incredibly sophisticated behavior like motivational trade-

¹²² EGGER, Christine/ LOVE, Lydia/ DOHERTY, Tom, *Pain Management in Veterinary Practice*, Ames 2014, p. 422.

¹²³ JABR, Ferris, “Fish Feel Pain, Now What?”, <https://www.smithsonianmag.com/science-nature/fish-feel-pain-180967764/>.

¹²⁴ SWISSINFO, “Switzerland Bans Crustacean Cruelty”, https://www.swissinfo.ch/eng/animal-welfare_switzerland-bans-crustacean-cruelty-/43814438.

offs, conditioned place avoidance and existence of reflexes that are credible indicators of pain. “After all the abstract intellection, there remain the facts of the frantically clanking lid, the pathetic clinging to the edge of the pot. Standing at the stove, it is hard to deny in any meaningful way that this is a living creature experiencing pain and wishing to avoid/escape the painful experience.”¹²⁵

The question is- which animals should we include in welfare regulations of international animal law? Our standing is that we need to be backed up by extensive scientific data, as we are just in the first stage of creating of a new sub-system of general international law. In the adoption of new hard law or soft law instruments, a big number of experts, politicians, lawyers, NGOs, citizens is involved and therefore we need to create welfare proposals built on relevant discoveries concerning animal pain in order to achieve adoption of global reforms. Nevertheless, the line between sentient animals and animals that do not feel pain has to be made just with a pencil.¹²⁶ It is incredibly difficult to study these questions and to understand that other species do not have to feel the pain in the way we do. Fish can feel fish pain, lobsters lobster pain, humans human pain, so pain is a subjective experience. In the case of animals where expert opinions about animal pain differ, I agree with Johnathan Birch according to which “where there are threats of serious, negative animal welfare outcomes, lack of full scientific certainty as to the sentience of the animals in question shall not be used as a reason

¹²⁵ WALLACE, DAVID FOSTER, “Consider the Lobster”, <https://genius.com/David-foster-wallace-consider-the-lobster-annotated>.

¹²⁶ REGAN, Tom, “Tom Regan: Draw Our Moral Lines in Pencil”, <https://www.youtube.com/watch?v=YrU1BWJ7jAU>.

for postponing cost-effective measures to prevent those outcomes.”¹²⁷ To conclude, scientific discoveries regarding animal pain are important for the de-construction of artificially man-made distance and human indifference towards suffering of the *others* and they are an important part of justification for stronger welfare policies.

b) *Animal grief*

There are several emotions that are contributed to humans, presumably differentiating us from other animals. For example, grief is considered as inherently human. Nevertheless, there is sufficient data from cognitive biologists, primatologists and ethologist proving the contrary. Some of the animals with discovered feelings of grief are elephants. “Some scientists even say that the demeanor of elephants suffering from the loss of friends and the disruption of social bonds resembles post-traumatic stress disorder (PTSD).”¹²⁸ Their response to death of family member is a mystery for science. “Every time it happens (death of family member), it’s not the same, but it is striking behavior-not based on survival or necessity but based on some sort of emotion. The fact that they interact and have behavioral interactions with their dead in a form that is not explainable in any simple, evolutionary context speaks to the deeper emotional lives of elephants that we can’t easily study.”¹²⁹ Another strong case of animal grief is represented by

¹²⁷ BIRCH, Jonathan, “Crabs and Lobsters Deserve Protection From Being Cooked Alive”, <https://aen.co/ideas/crabs-and-lobsters-deserve-protection-from-being-cooked-alive>.

¹²⁸ BEKOFF, Marc, *op.cit.*, p. 63.

¹²⁹ PARKER, Laura, “Rare Video Shows Elephants Mourning Matriarch’s Death”, <https://www.nationalgeographic.com/news/2016/08/elephants-mourning-video-animal-grief/>.

chimpanzees. They were observed cleaning the fur of dead family member, looking for the signs of life and refused to leave the place where the body was for several days.¹³⁰ Crows were also seen performing grief by forming cacophonous aggregations, which is mobbing in a big group as a response to dead of another crow.¹³¹ Another case was a highly medialized case of orca calf that died off the coast of Vancouver. His mother was pushing the dead calf for seventeen days. This was “an unprecedented show of mourning that drew international attention.”¹³² There are countless other stories of animals grieving. The amount of scientific data concerning animal mourning gave place to the inception of *evolutionary thanatology*,¹³³ which is a brand-new field of study dedicated to responses to deaths in humans and non-humans, “developing a more explicit evolutionary consideration of all aspects of studies of death and dying across the biological and sociological fields.”¹³⁴

c) Use of tools

¹³⁰ ANDERSON, James/ GILLIES, Alasdair/LOCK, Loieuse, “Pan thanatology”, *Current Biology*, Vol. 20, No. 8, (2010).

¹³¹ LANGLEY, Liz, “Do Crows Hold Funerals for Their Dead?”, <https://www.nationalgeographic.com/news/2015/10/151003-animals-science-crows-birds-culture-brains/>.

¹³² CUTHBERT, Lori/ MAIN, Douglas, “Orca Mother Drops Calf, After Unpercedented 17 Days of Mourning”, <https://www.nationalgeographic.com/animals/2018/08/orca-mourning-calf-killer-whale-northwest-news/>.

¹³³ ANDERSON, James/BIRO, Dora/PETTTTT, Paul, “Evolutionary Thanatology”, *Philosophical Transactions of the Royal Society B*, Vol. 373, No. 1754, (2018), pp. 1-5.

¹³⁴ *Ibid.*, p. 2.

Other defining features of humans are for instance, the creation and use of tools. Are these abilities a dominion of *homo sapiens* or are we sharing them with other animals? Increasing discoveries show chimpanzees hunting with spears, gorillas creating bridges and dolphins using sponge in order to protect their noses or octopuses using coconut shells as armor.¹³⁵ It was thought that “humans and only humans use made tools; we were defined as man the tool maker.”¹³⁶ So, these discoveries are essential for understanding our connection to the rest of animals as they debunk our uniqueness as species. Moreover, chimps and dolphins¹³⁷ are using tools not only for food but also to play, which has a serious implication regarding their intelligence. We could also write about the capacity of animals to feel joy, to express the gratitude, awe, wonder or embarrassment. Or we could go deeper into discussion whether animals are self-conscious, whether they can plan the future and remember the past. Extensive research is being conducted also in these areas and many philosophical works were published about the importance of existence of these elements in order to grant the animals their rights and personhood.

Present sub-chapter showed us, that the differences between us and the other animals are not as straightforward as we might think. This leads us to the demystification of human uniqueness and to challenging our

¹³⁵ CHOI, Charles, “10 Animals That Use Tools”, <https://www.livescience.com/9761-10-animals-tools.html>.

¹³⁶ MASTERCLASS, “Dr. Jane Goodall Explains Chimpanzee Tool Use”, <https://www.masterclass.com/articles/jane-goodall-explains-chimpanzee-tool-use#chimpanzees-and-tool-use-behavior-differences-and-intelligence>.

¹³⁷ HAMILTON, Jon, “Myth Busting: The Truth About Animals and Tools”, <https://www.npr.org/2011/12/23/143833929/myth-busting-the-truth-about-animals-and-tools?t=1568563580994>.

current anthropological attitudes. The knowledge, scientific research, but also philosophical and moral arguments represent firm justifications for the necessity of more robust legal protection of non-human animals.

D) LEGAL STATUS OF ANIMALS IN DIFFERENT COUNTRIES: ANIMALS ARE NOT THINGS

The aim of this section is to provide an overview of current legal regulation of animals, more specifically what is their legal status in different countries. Here, we will not go into the detailed comparisons of regulations concerning animals throughout the various regions of the world, nor we will analyze jurisprudence, as this will be done later on. This subchapter will, therefore, only answer the basic question regarding the legal status of animals which will help us to understand the current legislative attitudes and the position that animals have in our society. It is an introduction to the exploration of animal protection laws in different parts of the world. Because only when we comprehend how the laws have developed, we will be able to formulate next desirable reforms improving the legal protection of animals.

Roman law having a dramatic influence upon the Western law established three essential categories of law- things (*res*), persons (*personae*) and actions (*action*).¹³⁸ “From the beginning, “person” in Roman law comprehended every being who had rights, while “thing” included everything that could be considered as the object of the right

¹³⁸ GAIUS, *Gai Institutiones or Roman Law by Gaius, Book 1*, Fourth Edition, Oxford, 1904.

of a person.”¹³⁹ Therefore, beings that had no rights belonged the category of legal thinghood or legal properties. Such beings were slaves, women, children, the insane and non-human animals.

The division into legal properties and legal personhood preserved until today. It was just until recently that animals were considered, in the pervasive majority of states, as things. Due to the concerns of society such as raising awareness on treatment of farm animals, worries regarding extinction of animal species, use of animals for entertainment, experiments and many others led to immense pressure towards the legislators. Nowadays, this shift in the perception of nonhuman animals is visible- many countries changed their laws, recognizing animals as sentient beings.

1) EUROPEAN CONTEXT

a) Negative formulation

Countries expressly stating that animals are not things in their respective civil codes are Austria (1988), Germany (1990), Switzerland (2003), Lichtenstein (2003), province of Spain, Catalonia (2006), Moldova (2008), the Netherlands (2011), Czech Republic (2012). In those jurisdictions, animals have a “non-thing” status but unfortunately, the legislators did not create a new category for them. They only stated what animals are not, without innovative creation of a new legal status. Another downside is that although animals are not considered to be things in those countries, the majority of provisions applying to legal

¹³⁹ WISE, Steven, “The Legal Thinghood of Nonhuman Animals”, *Boston College Environmental Affairs Law Review*, Vol. 23, No. 3, (1996), p. 493.

thinghood are also applied to animals. This means that animals still belong to the property regime of things to a certain extent, despite not being considered as such.¹⁴⁰ Hence, animals are in a “twilight zone”, not belonging to things nor to persons.

Let’s have a closer look to some of the states, that took this first important step stating that animals are not things. Austria, already in 1988 established that animals are not things, that they are protected by laws and that provisions applied to property will also be applied to animals only if there is no other *lex specialis*.

The Austrian Civil Code in Art. 285a. titled “*Animals are not things*” states that *they are protected by special laws. The orders referred to things are applied to animals if there is no alternate provision.*¹⁴¹ They have thus adopted a negative wording – animals are not things.

Germany followed Austria and in 1990 made change in its Civil Code. According to the Art. 90a titled “*Animals*”, *animals are not things. They are protected by special statutes. They governed by the provisions that apply to things, with the necessary modifications, except insofar as otherwise provided.*¹⁴² Germany

¹⁴⁰ BRELS, Sabine, “The evolution of the legal status of animals: From things to sentient beings”, <https://www.theconsciouslawyermagazine.com/the-evolution-of-the-legal-status-of-animals-from-things-to-sentient-beings/>.

¹⁴¹ JGS Nr. 946/1811, Allgemeines Bürgerliches Gesetzbuch [ABGB], *Rechtsinformationssystem des bundes*, [online], 1.1.1812, Republik Österreich, Art. 285 a: *Tiere sind keine Sachen, sie werden durch besondere Gesetze geschützt. Die für Sachen geltenden Vorschriften sind auf Tiere nur insoweit anzuwenden, als keine abweichenden Regelungen bestehen.*

¹⁴² *Ibid.*, Art. 90a “Tiere”: *Tiere sind keine Sachen. Sie werden durch besondere Gesetze geschützt. Auf sie sind die für Sachen geltenden Vorschriften entsprechend anzuwenden, soweit nicht etwas anderes bestimmt ist.*

also adopted a negative formulation stating what animals are not, but not expressly creating new category for them.

Third European country to reform its Civil Code was Switzerland in 2002. Art. 641 A II titled “*Animals*” states the following: *Animals are not objects. Where no special provisions exist for animals, they are subject to the provisions governing objects.*¹⁴³

In 2003 Lichtenstein also reformed its Civil Code and adopted negative formulation stating in the Art. 20a titled “*Animals*” that *animals are not things. Insofar as no special regulations exists for animals, they are subject to the regulations applicable to objects.*¹⁴⁴

In 2006 Catalonia modified its Civil Code. In the Art. 511- 1 (3) titled “*Things*” states: *the animals, which are not considered as things, are under the special protection of the laws. The statutes referred to things are applied to them only to the extent that this does not conflict with its nature.*¹⁴⁵

Moldova, a small post-soviet country also amended its Civil Code. Art. 287 states that *animals are not considered things. They are protected by special*

¹⁴³ Schweizerisches Zivilgesetzbuch, [online], 10.12.1907, Art. 641a “*Tiere*”: (1) *Tiere sind keine Sachen.* (2) *Soweit für Tiere besonderen Regelungen bestehen, gelten für sie die auf Sachen anwendbaren Vorschriften.*

¹⁴⁴ Allgemeines bürgerliches Gesetzbuch, [online], 1.6.1811, Fürstentum Liechtenstein, *Ibid.*, Art. 20 a “*Tiere*”: (1) *Tiere sind keine Sachen.* (2) *Soweit für Tiere keine besonderen Regelungen bestehen, gelten für sie die auf Sachen anwendbaren Vorschriften.*

¹⁴⁵ Ley 5/2006, Codi civil de Catalunya i legislació complementària, *Boletín Oficial del Estado* [online], n. 148, Catalunya, Art. 511- 1 “*Cosas*”: (3) (2) *Los animales, que no se consideran cosas, están bajo la protección especial de las leyes. Solo se les aplican las reglas de los bienes en lo que permite su naturaleza.*

*laws. Second paragraph continues saying that with regards to animals, provisions regulating things shall apply, except for cases provided by law.*¹⁴⁶

The Netherlands in 2011 proceeded to reformation of their Civil Code in relation to legal status of animals. Book 3., Article 2a titled “*Animals*” states that *Animals are not things*. Second article stipulates that: *Provisions relating to things are applicable to animals, with due observance of the limitations, obligations and legal principles based on statutory rules and rules of unwritten law, as well as of public order and public morality.*¹⁴⁷

First country within Visegrád Group¹⁴⁸ to reform Civil Code in relation to animals was Czech Republic in 2012. Art. 494 titled “*Things and their division*” says that *a living animal has a special meaning and value as a sensually gifted living creature. A live animal is not a thing and the provisions on things apply mutatis mutandis to a live animal only to the extent that this does not conflict with its nature.*¹⁴⁹

Above mentioned countries reformed their civil codes using a negative

¹⁴⁶ Cod. Nr. 1107, Codul Civil al Republicii Moldova, *Monitorul Oficial nr. 66-75*, [online], 6.6.2002, Republica Moldova, Art. 287 “*Animalele*”: (1) *Animalele nu sînt lucruri. Ele sînt ocrotite prin legi speciale.* (2) *În privința animalelor se aplică în mod corespunzător dispozițiile legale referitoare la lucruri, cu excepția cazurilor stabilite de lege.*

¹⁴⁷ Nieuw Burgerlijk Wetboek Boek 3, BWBR0005291, 1.7.2021, [online], Koninkrijk der Nederlanden, Art. 2a. (1) *Dieren zijn geen zaken.* (2) *Bepalingen met betrekking tot zaken zijn op dieren van toepassing, met in achtneming van de op wettelijke voorschriften en regels van ongeschreven recht gegronde beperkingen, verplichtingen en rechtsbeginselen, alsmede de openbare orde en de goede zeden.*

¹⁴⁸ It is a political and cultural alliance consisting of Hungary, Poland, Slovakia and Czech Republic.

¹⁴⁹ Zákon č. 89/2012 Sb., Občanský zákoník, *Sbírka zákonů České Republiky*, [online], 22.3.2012, Česká republika, Art. 494: *Živé zvíře má zvláštní význam a hodnotu již jako živý tvor. Živé zvíře není věc a ustanovení o věcech se na živé zvíře používají obdobně jen v rozsahu, ve kterém to neodporuje jeho povaze.*

formulation- animals are not things. Regrettably, they did not go far enough as they did not create a new legal category for animals. Property status of animals has been to a great extent upheld which creates an oxymoronic situation- animals are not things but they are governed (into a great extent) by property regime. Therefore, these changes are more symbolic than practical. Their importance though, should not be overlooked as they represent a crucial first step towards the legal reformation of status of animals.

b) Positive formulation

France (2015) and Portugal (2016) also proceeded to de-objectification of animals in their Civil Codes, but their approach was different. Those two countries abandoned the negative formulation, opting for positive wording, stating that animals are living beings endowed with sensibility.

Article 515-14 of the French Civil Code states: *Animals are living beings gifted with sentience. Subject to the laws that protect the animals, they are subjected to the regime of goods.*¹⁵⁰ Articles 522, 524, 528, 533, 564 and 2051 were also reformed in order to remove all references to animals as things-moveable or immovable.¹⁵¹ “new provisions relating to animals continue to be found in Book II, relating to things and the different forms of property; this does not close the debate on the legal status of animals, but has instead facilitated a process of discussion and reforms

¹⁵⁰ Code Civil, *Journal officiel de la République française*, [online], 15.3.1803, France, Art. 515-14: *Les animaux sont des êtres vivants doués de sensibilité. Sous réserve des lois qui les protègent, les animaux sont soumis au régime des biens.*

¹⁵¹ GIMENÉZ-CANDELA, Marita, “The De-Objectification of Animals in the Spanish Civil Code”, *Derecho Animal*, Vol. 9, No. 3, (2018), p. 34.

that strongly indicate that animals, defined now in the Civil Code as living beings endowed with sensibility, do not figure in the category of things, of which there are abundant examples not only in academic literature, but in recent French jurisprudence also.”¹⁵² This reform did not establish a new category for animals, especially because of strong criticism from agro-industry. “Therefore, in France the legislator has not managed to change the “*summa divisio*” persons-things- this remains a calculated ambiguity that will possibly not cause a fracture between economic operators linked to agricultural and farming operatives.”¹⁵³ The change was more cosmetic than practical, it did not really challenge their relations with other animals as the property regime is still applicable to them and no independent category was created for them.

Similarly, to other countries Portugal also regulated animals as moveable things. At the end of the year 2016, their Parliament approved *Law 8/2017* according to which: *A present law establishes a legal status for animals, recognizing their nature of a living beings endowed with sentience.*¹⁵⁴ This reform creates a new classification pursuant to which animals belong to a separate legal category of “*Animals*”.

Portuguese Civil Code introduced the changes in the following way: A new subtitle “*I A- About animals*” was added between “*I- About Persons*” and “*II- About things*”. There, Art. 201-B “*Animals*” says the following:

¹⁵² *Ibid.* p. 34.

¹⁵³ GIMENÉZ-CANDELA, Marita, *op.cit.* p. 34.

¹⁵⁴ Lei n. 8/2017, de 3 de março, *Diário da República n. 45/2017*, [online], Portugal, Art. 1: *A presente lei estabelece um estatuto jurídico dos animais, reconhecendo a sua natureza de seres vivos dotados de sensibilidade.*

*Animals are living beings endowed with sensibility and the object of legal protection by virtue of their nature.*¹⁵⁵

Article 201-C titled “*Legal protection of animals*” states: *The legal protection of animals operates through the provisions of this Code and special legislation.*¹⁵⁶

Article 201-D titled “*Subsidiary regime*” says: *In the absence of any special law, the provisions concerning things shall apply to animals, provided that they are not incompatible with their nature.*¹⁵⁷

Once again we can see that although animals are not considered things, the property regime is applied to them, in the absence of *lex specialis*, which means that the Portuguese reform was not so ambitious as it might have seemed. Also, animals were not endowed with legal personality. However, we cannot deny that it is a very important development. Granting animals an autonomous legal category required a restructuring of their Civil Code. “Essentially, the Portuguese Civil Code recognises that animals do not fit as things in the classification of things in property and, for this reason it has created a third legal figure- that of animals- that is not to be confused with things or human beings that, legally, we tend to call “persons”, in itself it is nothing more than an abstraction categorised by the representation with which something (a society, an entity, a collective desire, a human being) acts in Law, and

¹⁵⁵ Código Civil, Decreto-Lei n. 47344, de 25 de novembro, *Diário do Governo* n. 274/1966, [online], 25.11.1966, Portugal, Art. 201-B: *Os animais são seres vivos dotados de sensibilidade e objeto de proteção jurídica em virtude da sua natureza.*

¹⁵⁶ *Ibid.*, Art. 201-C: *A proteção jurídica dos animais opera por via das disposições do presente código e de legislação especial.*

¹⁵⁷ *Ibid.*, Art. 201-D: *Na ausência de lei especial, são aplicáveis subsidiariamente aos animais as disposições relativas às coisas, desde que não sejam incompatíveis com a sua natureza.*

hence the great expansion of the concept of “persons” in the legal realm.”¹⁵⁸

Another country that opted for a positive formulation was Slovakia in 2019. The paragraph 118 (1) of Slovak Civil Code states the following: *The subject of civil relations are things, live animals and, if their nature permits, rights or other property values.*¹⁵⁹ *According to the paragraph 118 (3), a living animal has a special meaning and value as a living creature that is able to feel with its own senses and has a special status in civil relations. Live animals are subject to provisions applicable to movable things, this does not apply if it contradicts the nature of a living animal as a living creature.*¹⁶⁰ Ministry of Agriculture stated that “This is a historic step towards improving the position of animals in our country, In the area of animal protection, we will move with this law into the cultural world.”¹⁶¹

Most recently, Spain has also made an important step towards the recognition of animal sentience. Once again, a positive formulation has been chosen to describe the status of animals in the sense that their nature is different from the nature of persons, things, and other forms of life, such as plants. Art. 333 of Spanish Civil Code says “*Animals are*

¹⁵⁸ GIMENÉZ-CANDELA, Marita, *op.cit.* p. 36.

¹⁵⁹ Zákon č. 40/1964 Zb., Občianky zákonník, *Zbierka zákonov Slovenskej Republiky*, [online], 5.3.1964, Slovensko, Art. 118 (1): *Predmetom občianskoprávných vzťahov sú veci, živé zvieratá, a pokiaľ to ich povaha pripúšťa, práva alebo iné majetkové hodnoty.*

¹⁶⁰ *Ibid.*, Art. 118 (3): *Živé zvieratá majú osobitný význam a hodnotu ako živý tvor, ktorý je schopný vnímať vlastnými zmyslami a v občianskoprávných vzťahoch má osobitné postavenie. Na živé zvieratá sa vzťahujú ustanovenia o hnutelných veciach; to neplatí ak to odporuje povahy živého zvieratá ako živého tvora.*

¹⁶¹ TASR, “Parlament potešil ochranárov zvierat. Schválil zákon zvieratá nie je vec”, <https://slovensko.hnonline.sk/1751585-parlament-potesil-ochranarov-zvierat-schvalil-zakon-zvierat-nie-je-vec>.

*living endowed with sentience. The legal regime of goods and things will only be applicable to them to the extent that it is compatible with their nature or with the provisions intended for their protection.*¹⁶² Furthermore, “[w]hat is desirable de *lege ferenda* is that this protective regime gradually extends to the different areas in which animals are involved, thereby restricting the supplementary application of the legal regime of things.”¹⁶³

2) NON-EUROPEAN CONTEXT

Outside of the European context, there are countries that consider animals as living beings endowed with sentience. For example, the Code Civil of Quebec in the article 898.1 states: *Animals are not things. They are sentient beings and have biological needs. In addition to the provisions of special Acts which protect animals, the provisions of this Code and of any other Act concerning property nonetheless apply to animals.*¹⁶⁴ Animals are also legally considered and sentient beings in New Zealand. The Animal Welfare Bill stipulates that the animals are sentient and that owners of the animals, and persons

¹⁶² Código Civil: Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil, *Boletín Oficial del Estado* [online], 25.7.1889, n. 206, España, Art. 333: *Los animales son seres vivos dotados de sensibilidad. Solo les será aplicable el régimen jurídico de los bienes y de las cosas en la medida en que sea compatible con su naturaleza o con las disposiciones destinadas a su protección.*

¹⁶³ Ley 17/2021 de 15 de diciembre, de modificación del Código Civil, la Ley Hipotecaria y la Ley de Enjuiciamiento Civil, sobre el régimen jurídico de los animales, BOE, núm. 300, 16.12.2021, para. II.

¹⁶⁴ Bill 125, Civil Code of Quebec, SQ 1991, c. 64, *Publications du Québec*, [online], 8.12.1991, Quebec, § 898.1: *Les animaux ne sont pas des biens. Ils sont des êtres doués de sensibilité et ils ont des impératifs biologiques. Outre les dispositions des lois particulières qui les protègent, les dispositions du présent code et de toute autre loi relatives aux biens leur sont néanmoins applicables.*

in charge of the animals, have to attend properly to the welfare of those animals.¹⁶⁵

In Colombia, *Law N. 1774/2016* modified the Colombian Civil Code, adding in the article 655. titled “*Movables*” sentence according to which animals are sentient beings.¹⁶⁶ Brazil¹⁶⁷ and Argentina¹⁶⁸ also started the project of reformation of their Civil Codes.

There have been also changes on constitutional level. Constitutions that take into consideration interests of animals as “matters of intrinsic constitutional concern”¹⁶⁹ are Switzerland, India, Brazil, Slovenia, Germany, Luxembourg, Austria and Egypt.

From the analysis we can clearly see that these countries¹⁷⁰ are responding to a growing pressure from civil society, endowing animals with sentience and changing their legal status, although leaving them under the property regime in the absence of specific regulations. Countries are willing to take that first steps consisting in recognition of

¹⁶⁵ Public Act 1999 No. 142, Animal Welfare Act, [online], 14.10.1999, New Zealand, Section 11 (1).

¹⁶⁶ Ley 1774 de 2016 medio de la cual se modifican el Código Civil, la Ley 84 de 1989, el Código Penal, el Código de Procedimiento Penal y se dictan otras disposiciones, El Congreso de Colombia, 6.1.2016.

¹⁶⁷ Senado Federal, “Projecto do Lei do Senado n. 351, de 2015” <https://www25.senado.leg.br/web/atividade/materias/-/materia/121697>.

¹⁶⁸ Senado Argentina, “Proyecto de Ley del Senado de la Nación Argentina, modificando la Ley 26.994 – Código Civil y Comercial de la Nación-, respecto de incorporar a la misma el régimen de los animales”, <http://www.senado.gov.ar/parlamentario/comisiones/verExp/1555.16/S/PL>.

¹⁶⁹ Eisen, Jessica, “Animals in the Constitutional State”, *International Journal of Constitutional Law*, Vol. 15, No. 4, (2017), p. 909.

¹⁷⁰ Especially within European Union.

animal sentience and confirmation that they are not things. However, much more has to be done, as these changes do not have sufficient positive effects for animals. We believe that it is important to move animals to a new category of personhood. However, as pragmatic welfarist we have to accentuate the fact that it is possible to develop effective laws that could minimize the suffering of animals even without being embroiled in the personhood problematics.

To conclude, this chapter has illustrated historical and philosophical roots of current animal welfare problems which is essential for a good understanding of our topic of research. It is important to know why and when did we lose, as humans, the connection with other animals and what are the influences that shape our current positions towards them. Only when we unveil the hidden background of the problem, we can fully realize its impact, its interconnections, and its seriousness. Identifying the causes of our anthropocentric society allows us to move forward and to change the patterns. This chapter can be seen as very personal, as it questions indirectly our own attitudes towards animals and our own actions. Are we aware of the speciesism as individuals? How do we perceive animals? Are they only a product, or do we see them as living beings? Do we know that animals can feel pain, and do we care? By no means, we want to morally judge the readers, however it is paramount to introspect our own thoughts and our relations to other living beings. And not only because it is important for the animals, but also because it is vital for our planet and for us as well. All these interconnections will be shown in the chapters to come.

CHAPTER II
TRANSFORMATION OF TRADITIONAL
INTERNATIONAL LEGAL ORDER: THE
INCORPORATION OF ANIMAL WELFARE INTERESTS

In the introductory chapter we learnt that throughout the history the status of non-human animals has been significantly changing. In the second chapter we continue with the exploration of these changes. More specifically, we explain thorough transformation of international law in order to establish its readiness for encompassing animal welfare interests.

Consequently, the primary aim of this chapter is to demonstrate that international law has opened itself to a new type of values and interests that proceed not only from the states but also from the international community as a whole. We will see that international law has been *humanized*.¹ This means that a person is “becoming the centre of ever-growing legal concern and regulation”² and that there is an “appearance of sum of the collective interests which are qualitatively different from individual interests of states.”³ Passing through the chapter you will see that although the original aim of international law was to govern relationships between nations, throughout its development it has become clear, that it encompasses a broader range of needs and that it

¹ CASANOVAS, Oriol/ RODRIGO, Ángel, J., *Compendido de Derecho Internacional Público*, Tenth Edition, Madrid 2021, p. 347.

² *Ibid.*

³ *Ibid.*

embraces wider range of subjects and rules.⁴ New actors, new rules, and new international courts are changing the terrain of international law.⁵ By understanding this, we can comprehend why international law is capable of addressing issues of non-human animals. Only by analysing the transformation of the international law's landscape we will be able to conclude that animal protection can and should be governed from an international level.

In order to understand these profound changes in international law, we will present, identify, describe and compare the characteristics of traditional international law and international law of present days. In this way, we will acquire a wholesome picture on the evolution of the international legal order. Various sources are used as points of reference. The publication that illustrates the characteristics of traditional international law or the *Law of Nations* from early 20th century is Lassa Oppenheim's *International Law: A Treatise*.⁶ It is a widely known literary work considered as one of the most important references in the area of international law. On the other hand, diverse and complex contemporary international law is portrayed by Brown Weiss's *International Law in a Kaleidoscopic World*⁷ and by other authors such as James Crawford, Cedric Ryngaert, Bruno Simma, ... Their writings

⁴ SANDS, Philippe, "Turtles and Torturers: The Transformation of International Law", *New York University Journal of International Law and Politics*, Vol. 33, No. 2, (2001), p. 527.

⁵ Ibid.

⁶ OPPENHEIM, Lassa, *International Law, A Treatise*, London 1905.

⁷ WEISS, Brown, E., "International Law in the Kaleidoscopic World", in *Recueil des Cours, Collected Courses of the Hague Academy of International Law*, Leiden, Boston 2018.

describing globalization, decentralization, fragmentation and integration of current international legal order are shedding light on the profound shifts that are happening in the area of public international law.

From structural point of view, present chapter consists of four subchapters describing the evolution of subjects and actors of international law, its sources, jurisdiction and international regimes. In this way we will answer how and why the proliferation of international law's interests happened.

We reckon that it is primordial to demonstrate these transformations in order to build strong pillars for international animal law. We are only in the beginning of its creation and therefore, it is important to justify its existence and place in international legal order. As the architects, drawing plans for future buildings, we are preparing a solid basis for the construction of international animal law.

A. DEVELOPMENT OF SUBJECTS AND ACTORS OF INTERNATIONAL LAW

1) SUBJECTS AND ACTORS OF TRADITIONAL INTERNATIONAL LAW: STATES

International law at the begging of 20th century was referred to as the *Law of Nations*. *Law of Nations* could be described as a “law of international society of mutually recognized states, (...)”⁸ States were

⁸ KINGSBURY, Benedict, “Legal Positivism as Normative Politics: International Society, Balance of Powers and Lassa Oppenheim’s Positive International Law”, *European Journal of International Law*, Vol. 12, No. 2, (2002), p. 409.

considered as the only subjects⁹ and actors¹⁰ in this field. According to Oppenheim, *Law of Nations* “is solely based on common consent of individual states, and not on individual human beings. International law is law for the international conduct of states, and not of their citizen. Subjects of the rights and duties arising from the *Law of Nations* are states *solely and exclusively* (cursive added).”¹¹ It was a continuation of the Benthamite rationale according to which international law was limited only to relations between states regulated on the foundations of a reciprocity.¹²

⁹ To be subject of international law means to have a legal personality under international law. There is a narrow and a broad understanding of legal personality. According to the broad understanding, it means to have rights and or obligations under concrete legal order. According to the narrow view, legal personality means the capacity to create new rights and obligations. Throughout the development of international law, the broad perspective gained predominance.

¹⁰ To be an actor in international law means, in simple terms, to have some sort of influence in international relations. Actors are all the entities as well as persons that are present in international arena and interact in this field. For example, States or international organizations, but also transnational corporations and NGOs. Further those could be terrorist groups, rebellious movements or even migrants. Thusly, the concept of actors represents a broader category than subjects of international law as subjects are bound to have international legal personality. In more technical terms, there are several criteria according to which we can define the concept of international actors. See, e.g., GARCÍA SEGURA, Caterina, “La Evolución de Actor en la Teoría de las Relaciones Internacionales”, *Revista de Sociología*, Vol. 41, (1993), p. 29, (First of all, the actors have “the ability to mobilize certain resources to achieve certain objectives” and also, they have “the ability to influence the behavior of other actors in the international system.” Further actors can have relative and temporal nature. I.e., “the consideration of entity, group or individual as an international actor can change according to circumstances.” And lastly, actors are diverse. International actors represent a very diverse categories “with different level of autonomy”). (Own translation).

¹¹ OPPENHEIM, *op. cit.*, p. 13.

¹² See e.g., BENTHAM, Jeremy, *An Introduction to Principle of Morals and Legislation*, Oxford 1907.

The international legal order of that era was, therefore, “European in origin and centred on States.”¹³ Non-state actors were unquestionably rejected as subjects of *Law of Nations* because the interstate relations only were considered as appropriate subjects for international regulation. This also means, that the idea of international rights for individuals was categorically denied. In the atmosphere where only, limited interests were regulated and where no human rights existed, there was no space for protection of animals.¹⁴ This position was a reflection of the times characterized by the absence of international organizations, NGO’s and other actors.

Moreover, the *Law of Nations* was comprised exclusively by so called “*civilized nations*.” The original members of international community were European Christian states, and the *Law of Nations* was a fruit of their custom and treaties. This group was also made by Christian states that have arisen outside of Europe- the American States.¹⁵ The admission of Turkey¹⁶ in 1856 meant that this community was no longer created only by Christian states and that they opened up to more diversity. Another non-Christian addition was Japan.¹⁷ Those two countries were seen as full members of the community as according to Christian states, they met “the requisite of standard civilization (...).”¹⁸ Then there was a further group of nations that belonged to the *Family*

¹³ WEISS, Brown, E., *op. cit.*, p. 67.

¹⁴ This will be demonstrated in the case law.

¹⁵ Containing also The Christian Negro Republic of Liberia and Haiti.

¹⁶ In 1856 Austria, France, England, Prussia, Russia and Sardinia accepted Turkey to the European Concert.

¹⁷ Considered as such since the war with China in 1895.

¹⁸ KINGSBURY, Benedict, *op. cit.*, p. 412.

of *Nations* only partially.¹⁹ All the other states outside of the scope of the civilized nations were not protected or obliged by the *Law of Nations*. Their treatment was not regulated by international norms which often resulted in barbaric and arbitrary practice.²⁰ States' sovereignty was not limited by, for example, human rights treaties, hence states had the "monopoly on the use of violence to achieve political ends."²¹ So, the traditional international law was not applied to so called non-civilized, barbaric or non-Christian states. Factual inequality between states had a profound influence on the creation and functioning of international law until the first half of the 20th century. Due to this inequality, civilized states used international law as a means to protect and promote their own interests.

2) SUBJECTS AND ACTORS OF CONTEMPORARY INTERNATIONAL LAW

Much has changed since the times of Oppenheim. Two world wars, intense inter-state cooperation, decolonization, globalization, decentralization, material expansion of international law, technological advancements, emergence of global public interests and other factors have changed the territory of international law leading to the growth of

¹⁹ These countries (Persia, Siam, Abyssinia, Korea, China) were not protected by the laws of the war but they were entering into relations with full members throughout different treaties.

²⁰ OPPENHEIM, Lassa, *op. cit.*, p. 29.

²¹ COHAN, John, A., "Sovereignty in a Postsovereign World", *Florida Journal of International Law*, Vol. 907, No. 18, (2006), p. 4.

its subjects. As a result, “we are transitioning to a much more complex globalized legal system”²² with a plurality of subjects and actors.

a) States

In the contemporary international law states remain their central position. However, the scenario is much different from early 20th century. As a result of closer interaction between states after Second World War²³ and the decolonization process,²⁴ the parochial notions such as the division of states to civilized and uncivilized become obsolete. “It is of the essence of modern international law that it is universal.”²⁵ This universality is expressed in the treaties referring to “all states”²⁶ or “international community as a whole”.²⁷ In 1947 the International Law Commission wrote “the States of the world form a community governed by international law.”²⁸ Notions such as newly independent states or developing states²⁹ or international legal

²² OPPENHEIM, Lassa, *op. cit.*, p. 52.

²³ After Second World War, the right of states to go to war was restricted and international law evolved to a system based on the cooperation and mutual benefits.

²⁴ Important change in the composition of international community was the emergence of the socialist block. But perhaps the most influential change was the decolonization based upon the principle of self-determination during the 1960’ and 1970’. Creation of a new independent states transformed the arena of international community as alliances between socialist countries and newly created states were formed in General Assembly of the UN.

²⁵ CRAWFORD, James, “International Law and the Rule of Law”, *Adelaide Law Review*, Vol. 24, No. 3. (2003), p. 232.

²⁶ *Ibid*, p. 241.

²⁷ *Ibid*.

²⁸ UNITED NATIONS, Yearbook of the International Law Commission, New York 1949, p. 287.

²⁹ CRAWFORD, James, “Universalism and Regionalism from the perspective of the work of the international law commission”, p. 99, in United Nations, International

community have been introduced.³⁰

The overcoming of the differences in the 20th century represented an important change in the transformation of international law- from its regional nature reflecting inequality between states to the system of universal international law applied in the same way to all states, independently on their economic or social development or their size.³¹ Also, new rules started to arise with the objective to protect collective interests of international community, not only the interests of certain states.³² As a result, international law lost its European nature and it was broadened to include most of the existing states which form a heterogeneous group with regards to political, religious. economic, cultural, and other factors.³³

States are still the alfa and omega of international law despite the “demise of national sovereignty in international law.”³⁴ They “have the responsibility to develop and implement public international law.”³⁵ But many other subjects and actors were incorporated to the scope of international law- from international intergovernmental organizations, individuals, corporations to NGOs and other non-state actors.

Law Commission/ TOMUSCHAT, Christian (ed.), *International law on the Eve of the Twenty-first Century: Views from the International Law Commission*, New York 1997.

³⁰ *Ibid.*

³¹ KEUČKA, Ján, *Medzinárodné Právo Verejné*, Bratislava 2008, p. 18.

³² *Ibid.*

³³ *Ibid.*

³⁴ WEISS, Brown, E., *op. cit.*, p. 52.

³⁵ *Ibid.*, p. 80.

Nowadays “[m]ultinational companies, international banks, and non-governmental health organizations play critical roles in developing and implementing legal instruments.”³⁶ This is crucial for the development of international animal law as with more actors on international arena, more voices have the power to influence the state of animal welfare.

b) International Intergovernmental Organizations

The system of traditional international law as a sum of legal norms regulating only the relations between the states persisted until the first half of the 20th century.³⁷ From this point on, a new process of important changes took place. States felt the need for a closer cooperation with one and other which led them to the creation of new legal entities- international intergovernmental organizations. Those were constructed as new subjects of international law, that could act in clearly determined areas in the name of states, having limited legal personality and being legally different from states. Until First World War, several international organizations were founded, and their objective was to coordinate the activity of member states in different sectors such as telecommunications,³⁸ transportation,³⁹ intellectual property.⁴⁰ This means that there was a need to regulate a wider scope of interests through more suitable subjects.

³⁶ *Ibid.*, p. 80.

³⁷ KEUČKA, Ján, *op. cit.*, p. 33.

³⁸ International Telecommunication Union was founded in 1865.

³⁹ Central Commission for navigation on the Rhine was founded in 1815.

⁴⁰ The United International Bureaux for the protection of Intellectual Property was founded in 1893. In 1970 it become the World Intellectual Property Organization (WIPO).

In this way, new subject emerged on the scene of international law. The position of international intergovernmental organizations as subjects of international law was confirmed by a ground-breaking decision of International Court of Justice⁴¹ according to which “[t]he subjects of an 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 its 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.”⁴² “Since *Reparations for Injuries* international organizations have joined states as a recognized category of legal persons, and this has facilitated acceptance of quite limited or marginal entities as such (...).”⁴³ Subjectivity under international law, therefore, depends on the social needs in a particular period of time. It is not a sealed, unchangeable concept as it was perceived in traditional international law.

The creation of intergovernmental organization- the *World Organization for Animal Health*⁴⁴ in 1924 is a nice example reflecting the development of societal needs with regards to animal issues. Although the organization was first created to fight animal diseases, its scope was

⁴¹ Hereinafter the ICJ.

⁴² *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion: I.C.J. Reports (adopted April 11.1949), p. 178.

⁴³ CRAWFORD, James, *Brownlie's Principle of Public International Law*, Eight Edition, Oxford 2012, p. 115.

⁴⁴ The work of this organization will be discussed in more detail in the chapter no. IV.

substantially broadened to encompass animal welfare questions. Its intent to increase animal welfare materializes the worry of general public, NGOs and also states over this topic. It is a manifestation of the fact, that animal welfare is a global problem that requires international regulation.

c) Individuals

As a result of terrible atrocities of First World War a new discussion regarding subjects of international law emerged. The focus was on the individuals in order to cope with severe violations of international law. In 1919 *Versailles peace treaty* confirmed the responsibility of German emperor Wilhelm II, for the infringement of rules of international law of war. This was the first time holding individual responsible for crimes of international nature. Later on, after Second World War, individual criminal responsibility for war crimes was fully recognized, meaning that individuals have the ability to bear international obligations. During this time, it also became clear that unlimited state powers over individuals and groups needed to be regulated. Therefore, international treaties granting rights and freedoms to individuals and groups were born, restricting states' sovereignty and creating international human rights.⁴⁵ In this way, individuals obtained the capacity to bear rights under international law. Hence, international law opened itself to relations comprising non-state actors and "the international system

⁴⁵ See, e.g., REISMAN, Michael, "Introduction" in REISMAN, Michael, *Jurisdiction in International Law*, Dartmouth 1999, pp. xi-xii, ("since the Second World War, an increasing number of international norms of both customary and conventional provenance (...) now restrict or displace specific law-making and applying competences of states").

began a slow, hesitant move from state values towards human values.”⁴⁶ Nevertheless, this change was progressive and international law after Second World War was still mostly state oriented and derived from practice of states.⁴⁷

In order to be technically accurate, individuals are subjects of international law having only a passive legal personality. According to the broad definition of international legal personality, in order to be subject of international law it is necessary to have rights and/or obligations under the particular legal order. Nevertheless, the international legal personality of individuals is only passive because they cannot create new international rules- new rights and obligations. Those are created by only by states and international organizations which have active legal personality. According to Crawford, “[t]here is no general rule that the individuals cannot be subjects of international law, and in particular contexts individuals have rights *inuitu personae* which they can vindicate by international action, notably in the field of human rights and investment protection.”⁴⁸

⁴⁶ HENKIN, Louis, “Human Rights and State “Sovereignty”, *Georgia Journal of International and Comparative Law*, Vol. 25., No. 1, (1996), p 33.

⁴⁷ See e.g., SCHWARZENBERGER, Georg, *International Law*, London 1957, pp. 34-36.

⁴⁸ CRAWFORD, James, *op. cit.*, p. 121. It has to be noted that his position regarding individuals as subjects of international law is more conservative. E.g., in CRAWFORD, James, *Ibid.*, (“to classify the individual as a “subject” of the law in unhelpful, since this may seem to imply the existence of capacities which to not exists”). There is not a unanimous agreement on this, but we take more progressive angle and consider individuals as subjects with passive legal personality.

Hence, in the first half of the 20th century the triad of subjects of international law was completed. This was a fundamental change, as for a very long period of time states were considered as the only actors and subjects of international law. International legal order was created by the states for themselves, all the norms were created solely by them and were applicable exclusively to them. Nevertheless, this dogmatic position was molded by the requirements of new societal needs that led to the transformation of international legal order.

Furthermore, with the pass of time and arrival of second wave of globalization, “*individuals* are becoming important *actors* in influencing the development and implementation of international law, and in carrying out (or not carrying out) the obligations. This is the new individualized and globalized world.”⁴⁹ Individuals have an unprecedented access to internet and social media via which they can communicate irrespective of borders and participate in diverse actions, from financial, political, entertainment to educative.⁵⁰ They can also “help organize coalitions that can lead to direct action within and across countries”⁵¹ and spread awareness about pressing social issues. The increasing role of individuals is an example of changing international landscape.

d) Transnational corporations

⁴⁹ WEISS, Brown, E., *op. cit.*, p. 58.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

However, the arena of international legal order also consists of transnational corporations as subjects with passive legal personality. The activities of these corporations encompass various states and “[t]he resources available to the individual corporation may be greater than those of the smaller states, and they may have powerful diplomatic backing from their home government.”⁵² Transnational corporations have never been so relevant as they are at present times. “Their influence on the economic and political life of international society is undeniable. Its autonomous and unrestrained actions have been favored by the defense of almost absolute trade liberalization by the WTO.”⁵³ Transnational corporations are not only economic actors but also “political actors not only because of a certain action in relation to a government but because in many cases they resort to political power to modify the elements of power, whether of the states or of other actors.”⁵⁴

Similarly to individuals, corporations can be understood as subjects with passive legal personality as they cannot create new international legal instruments, but they do have rights and obligations. For example, corporations have rights stemming from the international investment treaties but also, they can directly access international arbitration in case of violations of their rights. There is an ample academic debate regarding the international legal personality of corporations. European

⁵² *Ibid.*, p. 122.

⁵³ LÓPEZ-JACOISTE DÍAZ, Eugenia, “Los Actores No Estatales Internacionales A La Luz Del Derecho Internacional: El Caso De Las Empresas Transnacionales”, *Cuadernos de Derecho Transnacional*, Vol. 11, No. 2, (2019), p. 194.

⁵⁴ *Ibid.*, p. 211.

positivists like James Crawford or Christopher Greenwood⁵⁵ deny corporations the status of subjects of international law.⁵⁶ Nevertheless, the opinion of Judge Schwartz in the case *Presbyterian Church of Sudan v. Talisman Energy INC.*,⁵⁷ stated that corporation is a subject of *jus cogens* at least for acts like torture, rape, genocide, war crimes, crimes against humanity and also it can be condemned as abettor or aider in above mentioned acts or other violations of human rights, making it a subject of international law. We take the position of broad definition of international legal personality; hence we state that corporations are subjects with passive legal personality.

Multinational corporations reflect first and foremost the will of their shareholders. The growing signals of the unsustainability of the current system of industrial production, agriculture, transportation and global energy do not go unnoticed. Many multinational corporations have started to address global problems due to the transfer of power influence of interest groups. Increasing number of business groups are calling for emission reductions and disengagement from for example, the hydrocarbon economy. For instance, The Global Roundtable on Climate Change created in 2007 encompassed more than a hundred large companies. It called on the governments of all countries to reduce greenhouse gas emissions, to adopt new strategies so that the world economy is not threatened by energy shortages, etc. At present, more

⁵⁵ See affidavits of James Crawford and Christopher Greenwood in the United States District Court, S.D. New York, *Presbyterian Church of Sudan v. Talisman Energy*, 244 F. Supp. 2d 289, (S.D.N.Y. 2003). 19. 3.2003.

⁵⁶ ALVAREZ, José, E., "Are corporations "Subjects" of International Law?", *Santa Clara Journal of International Law*, Vol. 9, No. 1, (2011), p. 3.

⁵⁷ United States District Court, *op. cit.*

than thousand companies, including Nike,⁵⁸ Apple⁵⁹ or Ikea,⁶⁰ have committed to reduce their environmental impacts. Corporate environmental and social responsibility commitments are integral parts of majority of companies.⁶¹ This can be characterized as so called “bottom-up empowerment”⁶² which highlights the fact that subjects other than states address global problems. It is a result of world composed of different subjects and actors, “new patterns of interactions (that) emerge quickly, new problems (that) demand rapid responses, and change (that) is integral to the system.”⁶³

With regards to animal law, it has to be noted that the growth of transnational corporations has a direct impact on how animals are treated. Food and touristic companies are examples of a profound business’ influence on animals. In 2018, due to increasing international pressure towards animal welfare, a Global Coalition for Animal

⁵⁸ NIKE, “Investing in Our Future”, <https://purpose.nike.com/planet>.

⁵⁹ APPLE, “We’re Carbon Neutral”, <https://www.apple.com/environment/>.

⁶⁰ IKEA, “Sustainability- caring for people and the planet”, <https://about.ikea.com/en/sustainability>.

⁶¹ With that being said, we are aware of “greenwashing” which is used mainly where more resources and efforts have been made to present a green approach than to actually fulfil the facts. See e.g., JONES, Ellis, “Rethinking Greenwashing: Corporate Discourse, Unethical Practice, and the Unmet Potential of Ethical Consumerism”, *Sociological Perspectives*, Vol. 65, No. 5, (2019), pp. 728-754; RAMUS, Catherine, A./ MONTIEL, Ivan, “When Are Corporate Environmental Policies a Form of Greenwashing?”, *Business & Society*, Vol. 44, No. 4, (2005), pp. 377-414; GATTI, Lucia/ SEELE, Peter/ RADEMACHER, Lars, “Grey Zone In- Greenwash Out. A Review of Greenwashing Research and Implications for the Voluntary- Mandatory Transition of CSR”, *International Journal of Corporate Social Responsibility*, Vol. 4, (2019), pp. 1-15.

⁶² BROWN, Weiss, *op. cit.*, p. 59.

⁶³ *Ibid.*

Welfare⁶⁴ was created. It connects animal welfare advocates with companies⁶⁵ with the aim to ameliorate industrial farming practices. It is “the world’s first food industry-led initiative aimed at advancing animal welfare globally.”⁶⁶ This is another example on how the interests of the international community shifted towards a more humane use of animals. Consumer demands and NGOs’ campaigns are shaping the corporate policies and multinational companies are creating international networks in order to adapt themselves to new realities.

e) Other non-state actors in international law

The realm of modern international law also consists of multiple actors, such as NGO’s, local communities, indigenous communities, informal and *ad-hoc* coalitions,⁶⁷ terrorist groups, etc. This multitude of actors materializes complex international legal order of the age of globalization. As Brown puts it, “international legal system based solely on sovereignty is no longer sufficient today.”⁶⁸ The role of state has been clearly diminished with comparison to early 20th century. This could lead us to the assumption of “demise of national sovereignty in international law or the withering away of the State.”⁶⁹ But states remain the most important subjects of international law and they still

⁶⁴ See more at GCAW, “Global Coalition for Animal Welfare”, <https://www.gc-animalwelfare.org>.

⁶⁵ IKEA Food Services, Nestlé, Elior Group, Aramark, Compass Group, Unilever, Sodexo.

⁶⁶ GCAW, “Over 70 billion animals are farmed for food annually”, <http://www.gc-animalwelfare.org>.

⁶⁷ WEISS, Brown, E., *op. cit.*, p. 52.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

have many crucial functions, even though their power has been decreased.⁷⁰

The fact is that changes in the international arena are fast and deep, and they result into increasing number of actors with an important impact on international relations. “This is taking place in the context of an increasingly globalized world and a world in which much of what happens locally is of international concern.”⁷¹ Consequently, all these different actors are creating a chaotic and intertwined network of international community.

A good example of a non-state actor with considerable influence in international area are the NGOs. They cannot be considered as subjects of international law in a classical sense of the word, but they are very active actors with ever growing importance and global voice. Non-governmental networks are part of “complex, postnational social formation”⁷² and many scholars see them as actors with normative influence in international legal order. On one hand they often confront states’ sovereignty, especially in the area of human rights, acting in favor of globalization; on the other hand, they fight for eradicating the negative outcomes of globalization.⁷³ NGO’s have an incredible voice that is able to persuade multinational corporations to change their behaviors. This is especially important in the area of labor rights,

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² BERMAN, Paul, S., “From International Law to Law and Globalization”, *Columbia Journal of Transnational Law*, Vol. 43, No. 2, (2005), p. 505.

⁷³ *Ibid.*, p. 546.

human rights, environmental protection and animal welfare policies. In this way, they “formulate global standards of corporate behavior,”⁷⁴ creating codes of conduct. “[O]ne of the most important roles that NGOs play in the in the international system is to scrutinize local bureaucratic actors and apply various forms of pressure.”⁷⁵ These pressure groups can organize strong campaigns, mobilize consumers, educate them and demand on their behalf actions towards an outcome they consider as just. However, we do not want to idealize non-governmental organizations. Many times, their activities depend on the interests of those funding them.⁷⁶ Although they can represent a global opinion or civil society, “NGOs are more appropriately seen as interest groups focused on specific issues than as representatives of “bottom-up” constituencies.”⁷⁷ Nevertheless, they have an important influence on the international norm creation as they push variety of issues on the order of business of states and corporations and they do so even without having formal coercive power.

The existence of NGOs in the international arena and their importance accentuates the fact that states do not have any more their hegemonic position. “We see the bureaucratic institutions of the nation-state facing pressures from the international, the subnational, and the transnational.”⁷⁸ They are part of a complicated web of normative communities and myriad of interests of a global society which

⁷⁴ *Ibid.*, p. 547.

⁷⁵ *Ibid.*, p. 549.

⁷⁶ Those could be individuals, governments, international organizations, etc.

⁷⁷ BERMAN, Paul, S., *op. cit.*, p. 548.

⁷⁸ *Ibid.*, p. 550.

represents striking difference with the *Law of Nations* from early 20th century. “Indeed, once we recognize that the state does not hold a monopoly on the articulation and exercise of legal norms, we can see law as a terrain of engagement, where various communities debate different visions of alternative futures.”⁷⁹

With regards to animal welfare, the role of NGOs is crucial, and it will be analyzed in the fourth chapter. For now, it suffices to say that the campaigns of NGOs like PETA, Compassion in World Farming, Human Society International, International Fund for Animal Welfare, Eurogroup for Animals, and many others have a tremendous impact on the practices of multinational companies and also on the international norm creation, especially on the EU level.

In conclusion, actual international order is very complex. It has “193 States that are members of the United Nations and several more who claim statehood; about 69,000 international organizations, thousands of multinational companies, many religious entities, numerous illicit actors, and over 6 billion individuals.”⁸⁰ Our analysis concerning the evolution of subjects and actors of international law showed us the transition from traditional, Benthamite notion of international law, where only inter-state relations were considered as valid areas of international regulation, to an era characterized by variety of the subjects and multitude of actors. Contemporary international law is not

⁷⁹ BERMAN, Paul, “A Pluralist Approach to International Law”, *The Yale Journal of International Law*, Vol. 32, No. 2, (2007), p. 308.

⁸⁰ BROWN, Weiss, *op. cit.*, p. 51.

anymore, a homogeneous field with uncontested position of state. It is an interplay of many voices and of “multiple norm-generating communities.”⁸¹ It is a colorful array with broad variety of interests, subjects and actors. The bottom line is that complex global challenges cannot be solved only by states. Actions taken by local communities, NGOs, corporations and individuals are therefore becoming increasingly important.

The proliferation of subjects and actors of international law shows us that the scope of interests tackled by international law is expanding. This is crucial for the evolution of new international regimes, such as the regime of international animal law. Throughout this subchapter we saw that different subjects and actors are expressing their interests for higher animal welfare. More than that, they are also adopting relevant responses. In this way they influence states to take actions not only locally but also globally. In the next subchapters we will analyze the transformation of other elements of international law, which will give us a holistic picture of thorough shifts happening in international legal order. All these changes are the evidence of possibility of protecting animal issues from a global level.

B) DEVELOPMENT OF SOURCES OF INTERNATIONAL LAW

1) SOURCES OF TRADITIONAL INTERNATIONAL LAW

In its *Treatise*, Oppenheim distinguished only two types of sources of *Law of Nations*: treaties and international custom. This was because the

⁸¹ BERMAN, Paul, *op. cit.*, p. 311.

foundation of the *Law of Nations* was the common consent of its member states. The consent could be given in two ways: “directly by an express declaration or tacitly by conduct which it would not follow in case it did not consent.”⁸² Treaties then represent an express consent, and they depend on custom meaning that they are binding because there is a customary rule according to which treaties have a binding force. What is then the inception of the existence of international custom that represents a tacit consent? Oppenheim explained that customary rules are the original sources of any law. They are formed “when a clear and continuous habit of doing certain actions has grown up under the aegis of the conviction that these actions are legally necessary or legally right.”⁸³ Treaties were regarded as a second source of *Law of Nations*. However, only law-making treaties had the badge of sources of *Law of Nations*. Those are the treaties that “either stipulate new rules for future international conduct or confirm, define, or abolish existing customary rules.”⁸⁴ Opinions and textbooks of famous writers on international law, court judgements and arbitral awards or soft law instruments did not belong to the sources of *Law of Nations*. These could be according to Oppenheim only the causes of the advancement of international law, but not its sources. For example, he claimed that the books of authorities could not be considered as law because these writers could mistake their opinion for what is generally recognized by the

⁸² OPPENHEIM, Lassa, *op. cit.*, p. 16.

⁸³ *Ibid.*, p. 17.

⁸⁴ *Ibid.*, p. 18.

international community, and they could also be influenced by their political affiliations and country specifics.⁸⁵

2) SOURCES OF CONTEMPORARY INTERNATIONAL LAW

Similarly, to the emergence of new subjects and actors, sources of international law also expanded over the last decades. In 1928, fourth edition of Oppenheim's books included general principles of law as sources of international law. "Although they (treaties and custom) are the principal sources of Law of Nations, they cannot be regarded as its only sources"⁸⁶ One section of this book was dedicated to general principles of law as sources of law. In this way, international law started to open itself to new sources.

In 1945, the ICJ's Statute was adopted following the Statute of the Permanent Court of International Justice. Its Article 38 (1) and (2) of includes non-exhaustive list of the sources of international law: except treaties, international custom and general principles of law recognized by civilized nations, it also mentions judgements and doctrine of the most qualified experts of different nations as subsidiary sources that help to determine and interpret legal rules. Also, ICJ can decide a case according to the principle *ex aequo et bono*, if parties agree so. But there are also other sources of law, especially obligatory resolutions of international organizations, unilateral acts or other

⁸⁵ OPPENHEIM, Lassa, "The Science of International Law: Its Task and Method", *The American Journal of International Law*, Vol. 2, No. 2, (1908), p. 345.

⁸⁶ OPPENHEIM, Lassa, *International Law: A Treatise*, Fourth Edition, London 1928, p. 27.

sources such as the non-binding norms,⁸⁷ voluntary commitments,⁸⁸ best practices and other sources.⁸⁹ “In the twenty-first century, we have another level of legal instruments, which do not require a consensus, namely voluntary commitments by States and other entities in which the specific content of the commitment is not determined by a binding international agreement, or even a non-binding legal instrument.”⁹⁰ Soft-law can also lead to the adoption of a binding treaties. For example, the *London Guidelines for the Exchange of Information and Chemicals in International Trade* and *International Code of Conduct on the Distribution and Use of Pesticides* led to the adoption of the *Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*.⁹¹ Similarly, the *Universal Declaration on Animal Welfare* has the ambition to result to a convention on animal welfare, using as example the *Universal Declaration on Human Rights*. Non-binding legal instruments are becoming very popular “especially with the emergence of many new problems and the rapid pace of the change in the kaleidoscopic world, non-binding legal instruments can be fashioned in

⁸⁷ Recommendations, declarations, charters, protocols, international organizations decisions, governmental statements, gentlemen’s agreements, etc.

⁸⁸ WEISS, Brown, E., *op. cit.*, p. 85.

⁸⁹ See e.g., SHELTON, Dinah, *Commitment and Compliance: The role of non-binding norms in the international legal system*, New York 2000.

⁹⁰ WEISS, Brown, E., *op. cit.*, p. 81.

⁹¹ Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Rotterdam, 10 September 1998.

a timely manner and can convey important signals about how States and other relevant actors are expected to behave.”⁹²

One of the reasons behind the proliferation in sources of international law is the “increase in the number of international legal bodies-organizations, institutions, conferences, and tribunals-which all, as one of their roles, draft and issue international law instruments.”⁹³ International law transitioned from an arena regulating only inter-state relations to regulation of myriad of interests and societal needs as a result of globalized, interdependent world that requires unified conduct in many areas.⁹⁴ This evolution is primordial for the creation and development of international animal law. As we will see in the chapter no. IV, soft law instruments and other non-classical sources of law play an important role in its advancement. Later, we will also analyze which sources are best suited for international animal law’s creation and why.⁹⁵

C) DEVELOPMENT OF JURISDICTION IN INTERNATIONAL LAW

1) JURISDICTION IN TRADITIONAL INTERNATIONAL LAW

To begin with, it is important to define the abstract concept of jurisdiction. The meaning of this term is relatively complex depending on the context. Jurisdiction, from the Latin “*ius*” in the sense of “law”

⁹² WEISS, Brown, E., *op. cit.*, p. 94.

⁹³ STERIO, Milena, “The Evolution of International Law”, *Boston College International and Comparative Law Review*, Vol. 31, No. 2, (2008), p. 219.

⁹⁴ Especially environmental questions, global health issues, economic matters, etc.

⁹⁵ See chapter no. IX, C).

and “*dicere*” in the sense of “statement”, most often refers to the power exercised by the state over persons, property and events. James Crawford defines it as “(...) an aspect of sovereignty: it refers to a state’s competence under international law to regulate the conduct of natural and juridical persons.”⁹⁶ In other words, it is a competence or international legal authority of the state to exercise specific powers as regards to both the area within which the State exercises sovereign power and persons associated with it by a legal link of citizenship.⁹⁷ In summary, this means that the state enacts laws that apply to anyone and anything in its territory, the state can prosecute anyone in its territory, and at the same time it can enforce its laws after anyone who violates them.⁹⁸

States’ competences are exercised in three forms. First, there is the prescriptive jurisdiction, which is a competence to prescribe laws with regards to persons, property and events. In a criminal context, prescriptive jurisdiction refers to the authority of a state under international law, to enforce the applicability of its criminal law to a given conduct, whether by law or regulation, government regulations or, under certain conditions, even by court decisions. Simply put, prescriptive jurisdiction refers to the state authority that allows it to criminalize a given behavior. Second, the adjudicative jurisdiction is a competence to hear cases with regards to aforementioned persons,

⁹⁶ CRAWFORD, James, *op. cit.*, p. 456.

⁹⁷ ŠTURMA, Pavel, *Mezinárodní a Evropské Kontrolní Mechanismy v Oblasti Lidských Práv*, Praha 2010, p. 90.

⁹⁸ ABASS, Ademola, *International Law, Text, Cases, and Materials*, New York 2012, p. 525.

properties and events and finally the enforcement jurisdiction refers to the power of a state under international law to apply its criminal law through the police and other enforcement bodies and through the courts. It authorizes the state, *inter alia*, to arrest and detain, prosecute, imprison, and punish a person for committing acts so criminalized.

Traditionally, jurisdiction was understood as a sovereign's power to establish and enforce its laws on the subjects considered as its own and in its judicial organs.⁹⁹ Sovereignty as a “monopoly of power for the highest authority of what evolved as the “nation state” began with the 1648 Treaty of Westphalia.”¹⁰⁰ Consequently, physical location was the main factor by which the jurisdiction was analyzed. This was a Westphalian nation-state system with fixed conception of territorial boundaries¹⁰¹ and jurisdiction based on the geographical location of persons or things.¹⁰²

Extraterritorial jurisdiction was reserved to exclude the diplomatic representatives, armed forces and men-of war from local jurisdiction. Also, as a result of Euro-centric world, Eastern non-Christian states were limited in territorial jurisdiction over foreign residents from Christian Powers.¹⁰³

⁹⁹ STERIO, Milena, *op. cit.*, p. 222.

¹⁰⁰ JACKSON, John, H., “Sovereignty- Modern: A New Approach to an Outdated Concept”, *The American Journal of International Law*, Vol. 97, No. 4, (2003), p. 786.

¹⁰¹ *Ibid.*, p. 530.

¹⁰² *Ibid.*, p. 532.

¹⁰³ OPPENHEIM, Lassa, 1905, *op. cit.*, p. 143.

With regards to the extraterritorial criminal jurisdiction, Oppenheim stated that states could not claim their jurisdiction and apply punishments for acts committed by foreigners in foreign countries¹⁰⁴ once these foreigners were on their own territory. He said that “[f]or at the time such criminal acts are committed the perpetrators are neither under the territorial nor under the personal supremacy of the States concerned. And a State can only require respect for its laws from such foreigners as are permanently or transiently within its territory. No right for a State to extend its jurisdiction countries can be said to have grown according to the Law of nations (...).”¹⁰⁵

The concept of jurisdiction closely intertwined with the geographical territory was a reflection of an international community made of norms regulating behavior of one state towards another state/s, with no international individual rights or international tribunals, without multitude of subjects and actors, with simpler and strictly horizontal organization. No individual interests were taken into account and the state power was not limited by norms.¹⁰⁶ It was the “role of the domestic law to define what a sovereign may do to its subjects.”¹⁰⁷ Consequently, it was a system in which the states could act on their own territory in a way they wanted to, which was backed up by a customary rule.

¹⁰⁴ *Ibid.*, p. 147.

¹⁰⁵ *Ibid.*

¹⁰⁶ STERIO, Milena, *op. cit.*, p. 229.

¹⁰⁷ *Ibid.*

Geographical boundaries delimitating strict territorial principle worked well during the times of sparse international business activities, simpler models of government and not so complex inter-state relations. In the world characterized by the distance and division, the main feature of territorial jurisdiction- efficient coordination of jurisdictional space- made sense and reflected the organization of the world at that era. However, the globalization processes have shrunken our world and transformed it into a highly inter-connected space portrayed by a plethora of common interests and multifaced realities. Therefore, in the next section we will discover how the jurisdiction has evolved and what is its place in the contemporary international law.

2) JURISDICTION IN CONTEMPORARY INTERNATIONAL LAW

*"In 1492 Christopher Columbus set sail for India, going west. He had the Nina, the Pinta and the Santa Maria. He never did find India, but he called the people he met "Indians" and came home and reported to his king and queen: "The world is round." I set off for India 512 years later. I knew just which direction I was going. I went east. I had Lufthansa business class, and I came home and reported only to my wife and only in a whisper: "The world is flat"."*¹⁰⁸

Thomas Friedman

As Thomas Friedman wrote it- the world is flat. Globalizations 2.0 and 3.0¹⁰⁹ have brought us to present days characterized by the convergence

¹⁰⁸ FRIEDMAN, Thomas, "It's a Flat World, After All" <https://www.nytimes.com/2005/04/03/magazine/its-a-flat-world-after-all.html>.

¹⁰⁹ FRIEDMAN, Thomas, *The World is Flat*, New York 2005, pp. 24- 28, (according to Friedman, there are three stages of globalization: Globalization 1.0 (1492 to 1800) was characterized by geographical discoveries. The main forces of globalization were states globalizing for Empire, for resources or for power. Globalization 2.0 (1800 to 2000) characterized by the corporations globalizing for markets, labour, and for resources. Globalization 3.0 (2000 until now) is driven especially by non-Western individuals and characterized by levelling the playing field. Main flatteners of current

of vibrant social and political events, innovations, and companies. As a result, many obstacles for transnational circulation of goods, services, people and capital have disappeared. Communication and transportation advancements have reduced the distances and made global neighbors of all of us. Information is traveling around the world in seconds, borders between states are getting blurry, governments progressively lose their capacity to lead their economies, ...

How are the concepts of state sovereignty and territoriality fitting in these intricate realities? Is their primary position still feasible in the world “without” distance? Even though state sovereignty is still considered as a fundamental feature of the international legal order, it has not escaped profound shifts in its understanding. “The main factors that drive globalization- political, economic, social, and ecological activities- have caused seismic shifts in traditional conceptions of sovereignty.”¹¹⁰ “Globalization “unbundles” territoriality from state sovereignty, “deteritorializing” both the concept and practice of state sovereignty.”¹¹¹ Vast changes triggered by geoeconomics and technology that are molding our perception of jurisdiction are among

stage of globalization are for example, the invention of pc via which persons can create their own content; then the construction of global internet access; progress in software technology making the workflow more seamless; offshoring, outsourcing; supply-chaining, etc).

¹¹⁰ BLATTNER, Charlotte, E., *Protecting Animals Within and Across Borders*, New York 2019, p. 22.

¹¹¹ GORDON, Suzanne, E., “Changing Concepts of Sovereignty and Jurisdiction in the Global Economy: Is There a Territorial Connection?”, *The Canadian Centre for German and European Studies*, Working Paper Series, No. 1, (2001), p. 2.

others: shifts from state independence to state interdependence,¹¹² the change from state sovereignty to people's sovereignty¹¹³ and the development of global legal pluralism.¹¹⁴

From the above we can summarize that the traditional understanding of state jurisdiction which is limited solely by state territory encounters practical problems caused by intricate realities of our current world. The question is, how has the jurisdiction evolved? We identified three specific ways through which jurisdiction has been evolving. First, the extraterritorial jurisdiction in form of personality, protective and universality principles. Second, the extraterritorial application of human right treaties and third, the unilateral state action via cosmopolitan

¹¹² Behind one product there is a complicated web of actions such as outsourcing, offshoring, supply chaining, insourcing, etc. For example, different components of the product can be manufactured in various states, they are then sent to a place of final competition. Then, a complex web of supply chain delivers the product to shops in different countries. A myriad of producers, suppliers, buyers from different countries are taking part in this process. See e.g., BLATTNER, Charlotte, *op. cit.*, p. 22, (“[s]eemingly trivial business decisions made in one state may fundamentally shape the interests of foreign individuals, groups, or states, so government institutions cannot satisfactorily coordinate these actions without cooperating, or at least coordinating, across borders. In an attempt to recover their capacity to solve problems caused and exacerbated by globalization, states resort to global, nonterritorial regulatory structures. Sovereign independence thus has given way to state interdependence”).

¹¹³ See e.g., BLATTNER, Charlotte, *op. cit.*, p. 22, (with the emergence of universal jurisdiction that protects persons from the most heinous crimes “the Westphalian model of sovereign, exclusive state power no longer matches reality: matters are no longer left as far as possible to states’ discretion”). See also PETERS, Anne, “Humanity as the Λ and Ω Of Sovereignty”, *European Journal of International Law*, Vol. 20, No. 3, (2009), p. 513, (“[s]tate sovereignty is not merely limited by human rights but should be seen to exist only in function of humanity. It has thus been humanized”).

¹¹⁴ See e.g., *Ibid.*, p. 23, (the creation of international adjudicatory bodies such as International Criminal Court, International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda, the progressive fragmentation of international law leads to “a new structure of regulation that is heterogeneous, multilayered, and overlapping” leading to a global legal pluralism).

selfless jurisdiction. All these three actions mold our understanding of jurisdiction into a more flexible concept.

a) Extraterritorial jurisdiction in form of personality, protective and universality principles

High interconnectivity between actors and subjects of international law and the abundance of cross-border activities led to the development of extraterritorial jurisdiction. The territoriality principle of jurisdiction has been amended by three exceptions: the personality principle, protective principle and principle of universality. Territorial principle is however still predominant ever since the Westphalian peace and according to the customary international law it represents a basic principle of jurisdiction.¹¹⁵ Nonetheless, this principle allows for certain exceptions that give raise to the extraterritorial application of laws as long as they are covered by one of the principles of extraterritorial jurisdiction under public international law: the active personality principle,¹¹⁶ the passive personality principle,¹¹⁷ the protective principle,¹¹⁸ or the universality principle.¹¹⁹ These grounds of jurisdiction function as “exceptions to

¹¹⁵ RYNGAERT, Cedric, *Jurisdiction in International Law*, First Edition, New York 2008, p 88.

¹¹⁶ *Ibid.*, p. 88, (“[u]nder the nationality or active personality principle, a State is entitled to exercise jurisdiction over its nationals, even when they are found outside the territory, and even then, the perpetrator is no longer a national or has only become a national after committing the crime”).

¹¹⁷ *Ibid.*, p. 92, (nationality of the victim constitutes a legitime interest of the state).

¹¹⁸ *Ibid.*, p. 96, (“[t]he protective principle protects the State from acts perpetrated abroad which jeopardize its sovereignty or its right to political independence”).

¹¹⁹ *Ibid.*, p. 106, (jurisdiction that may be exercised by any State over a (specific) offence, without the offence having any link with the State).

the cornerstones of international law-territoriality, sovereign equality and non-intervention.”¹²⁰

How can we understand *extraterritoriality*? Jurisdiction becomes a concern of international law when a state, in its eagerness to promote its sovereign interests abroad, adopts laws that govern matters of not purely domestic concern.¹²¹ International jurisdiction therefore “determines how far, *ratione loci*, a State’s laws might reach.”¹²² The international law of jurisdiction is often referred to as the law of extraterritorial jurisdiction because jurisdiction becomes a concern of international law where a State regulates matters which are not exclusively of domestic concern.¹²³ In this way, the extraterritorial jurisdiction represents jurisdiction “over persons, property, activities which have no territorial nexus whatsoever with the regulating State, *i.e.*, assertions based in the personality, protective, or universality principle of jurisdiction.”¹²⁴

As Ryngaert stated, “in an era of globalization, the exercise of extraterritorial jurisdiction is often inevitable.”¹²⁵ The expansion of commercial and financial interstate links has increased the vulnerability of states to adverse domestic effects of foreign activities.¹²⁶ We live in a highly interconnected world with “events that occur nowhere and

¹²⁰ *Ibid.*, p. 29.

¹²¹ *Ibid.*, p. 6.

¹²² *Ibid.*

¹²³ *Ibid.*, p. 7.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, p. 187.

¹²⁶ *Ibid.*, p. 188.

everywhere”¹²⁷ Subsequently, “[t]he traditional image of states as bodies with prescriptive authority limited to their territories cannot capture the complexities of modern life or serve the plethora of interests that international community at large have.”¹²⁸

With the born of human rights, the concept of universal jurisdiction emerged. As a result, any state can punish those responsible from international crimes that are of universal concern for international community in its entirety,¹²⁹ such as genocide, crimes against humanity,¹³⁰ slave trade or war crimes.¹³¹ without the necessity of having “territorial or substantive links to the prosecuting forum.”¹³² In the *Eichmann* case, District Court of Jerusalem stated that abhorrent crimes committed by him were “*delicta juris gentium*” and that is why serious crimes need to be punished by any state, in the interest of humanity.¹³³ As we can see, the application of universal jurisdiction is triggered by nature of the committed crime. These crimes are so called universal or international crimes and they are characterized by their heinousness with regards to their nature and range. In such cases, it is not possible

¹²⁷ BLATTNER, Charlotte, *op. cit.*, p. 24.

¹²⁸ *Ibid.*

¹²⁹ DUNOFF, Jeffrey, et al., *International Law: Norms, Actions, Process*, Second Edition, Aspen 2006, p. 38.

¹³⁰ Augusto Pinochet was charged with the crimes against humanity as a result of his actions against Spanish citizens in Chile during his regime.

¹³¹ For example, Adolf Eichmann was tried in Israel even though he was German living in Argentina.

¹³² STERIO, Milena, *op. cit.*, p 223.

¹³³ Israel, District Court of Jerusalem, Criminal Caen No. 40/61, *Eichmann case*, 12 December 1961, Art. 12.

to sit and wait whether the offender will be brought to justice before the competent authority. The action is necessary as their impunity should not occur given the egregiousness of committed crimes.

Could be the universality rationale used in the area of animal interests? In the chapter no. V, we will argue that animal welfare is a universal value and a common concern of humankind that encompasses interests and concerns of a global community as a whole. It is a matter of a global public interest as its protection and enforcement has intergenerational dimension. And also, that it is protected by public interest norms. In addition, in academia, there are claims that animal welfare is a general principle of law.¹³⁴ However, we see them as premature. Crimes against animal interests are not *yet* considered as core crimes of international law and at the current state of affairs, the use of universality principle in this area is a far stretch. Nonetheless, we do not disregard the possibility that in the future, animal welfare evolves into a general principle of international law and that this principle will form a norm of customary international law.¹³⁵ “If this proves true, states could criminalize animal cruelty and unnecessary suffering that undermine fundamental values of humanity and are condemned by the world community, wherever and by whoever they are committed.”¹³⁶ In this way, the most abhorrent crimes against animals could be covered by the principle of universality.

¹³⁴ SYKES, Katie., “Nations Like Unto Yourselves’: An Inquiry into the Status of a General Principle of International Law on Animal Welfare”, in *Canadian Yearbook of International Law*, British Columbia 2011, Vol. 49.

¹³⁵ More on this subject will be discussed in the chapter no. V.

¹³⁶ BLATTNER, Charlotte, “Can extraterritorial jurisdiction help overcome regulatory gaps of animal law? Insights from Trophy Hunting”, *American Journal of International Law*, Vol. 111, (2017), p. 422.

The principle that could be applied easier to animal questions is the active personality principle. States could prescribe obligations¹³⁷ towards their nationals (or residents) that are in foreign countries in order “to avoid impunity for crimes that are either not qualified as criminal by foreign states, or that are not enforced by them.”¹³⁸

Another principle that could be applied is the protective principle under which states can establish their jurisdiction over a foreign national who committed an offence abroad and which is harmful to essential state interest, even if the offense is not criminal in the state of offence commitment. What are essential state interests? State’s security, political independence and territorial integrity are considered as classical vital state’s interests. However, currently we could consider as essential state interests “environmental pollution, technological hazards, and artificial intelligence (...)”¹³⁹ Those interests are vital for the state existence. Interests concerning animals “interests of animals are not standardly seen as affecting the core functions of a state, so the protective principle cannot be used to directly protect animals abroad.”¹⁴⁰ However, as Charlotte Blattner points out, protective principle could be used indirectly, “where foreign animal industries considerably pollute a state’s environment.”¹⁴¹ As will be detailly analyzed in the third part of this dissertation, intensive animal agriculture has multitude of negative

¹³⁷ For example, the prohibition of hunting, prohibition of animal cruelty, obligations with regards to proper transportation and slaughter, etc.

¹³⁸ BLATTNER, Charlotte, *op. cit.*, 2017, p. 421.

¹³⁹ BLATTNER, Charlotte, *op. cit.*, 2019, p. 247.

¹⁴⁰ *Ibid.*, p. 248.

¹⁴¹ *Ibid.*

anthropogenic effects. Water pollution, air pollution, loss of biodiversity, climate change and global pandemics.¹⁴² “The current use of animals is thus not an elitist concern of privileged minority world countries; it is an issue of global concern.”¹⁴³ As we will demonstrate later on, these important consequences of animal agriculture can realistically put the state’s environment and correct operation into a danger in reaction to which states could use protective principle.¹⁴⁴

To sum up, questions of jurisdiction are especially important to us as the extra-territorial jurisdiction could play an important role in the protection of animals across the borders. Animal law is fully influenced by the globalization, and it is no longer only a domestic concern. In the last thirty years international trade in animals and meat products expanded fourfold, and trade in egg and dairy escalated more than threefold.¹⁴⁵ Number of animals used for research and transported across borders is also growing. “The economic globalization of animal industries has led to a host ethical, social, and environmental problem (...)”¹⁴⁶ These questions, especially with regards to farm animals, will be discussed in the chapters to come.

b) Extraterritorial application of human rights treaties

The extraterritorial application of human rights treaties emerged in order to amplify their effects and strengthen their protection.

¹⁴² H5N1, H7N7, MERS, H1N1, COVID 19 as a result of wet markets, ...

¹⁴³ BLATTNER, Charlotte, *op. cit.*, 2019, p. 249.

¹⁴⁴ *Ibid.*, p. 250.

¹⁴⁵ FAOSTAT, “Food and agriculture data”, faostat.fao.org.

¹⁴⁶ BLATTNER, Charlotte, *op. cit.*, 2019, p. 53.

Territoriality of these treaties was seen as a limitation and need for a more flexible approach became predominant in the international community. Nowadays the extraterritorial application of treaties protecting human rights is accepted, although it is still a very complex matter that lacks jurisprudential coherence. But what do we mean by the extraterritorial application of human right treaties? First, we need to say that “human rights notion of “jurisdiction” departs from the traditional jurisdiction rules and refers to a certain factual relationship or nexus between the state and the individual.”¹⁴⁷ By the extraterritorial application of human rights treaties we, therefore, refer to the expansion of the scope of application of the treaties into extraterritorial zones. The underpinning rationale for an extraterritorial application of human rights treaties is “the claim to universality: the idea that every person (whatever her location) enjoys (the same) human rights.”¹⁴⁸ Basically, we point out to the fact that “states are bound by human rights law when acting outside their borders.”¹⁴⁹ As a result, states, parties to the human rights treaties, “are obliged to respect and ensure the rights of persons they have the power to affect.”¹⁵⁰ “Where a state has lawful competence to act in relation to a person under international law principles of jurisdiction, that person is within its “jurisdiction” for human rights purposes, and the state has a commensurate obligation to respect and

¹⁴⁷ VORDERMAYER, Markus, “The Extraterritorial Application of Multilateral Environmental Agreements”, *Harvard International Law Journal*, Vol. 59, No. 1, (2018), P. 74.

¹⁴⁸ *Ibid.*, p. 87.

¹⁴⁹ LUBELL, Noam, *Extraterritorial Use of Force Against Non-State Actors*, New York 2010, p. 193.

¹⁵⁰ KING, Hugh, “The Extraterritorial Human Rights Obligations of States”, *Human Rights Law Review*, Vol. 9, No. 4, (2009), p. 521.

ensure his or her rights.”¹⁵¹ Moreover, “states also bring persons who are directly affected by their unlawful acts abroad within their “jurisdiction” for human right purposes.”¹⁵² ICJ has adopted a position according to which states can be bound by human rights treaties with regards to activities taken on foreign territories.¹⁵³ Moreover, the UN Human Rights Committee has declared that “extraterritorial activity can be subject to the obligations of international human rights law.”¹⁵⁴ The European Court of Human Rights¹⁵⁵ and Inter-American system of human rights concluded this statement in various cases as well.¹⁵⁶

It is clear that earlier conceptions of jurisdiction are affected by complex challenges faced by international community. Moreover, the conception according to which state jurisdiction is exclusively connected to its territory and cannot be exercised in any form outside of this territory is outdated. As a result, different approaches towards extraterritoriality

¹⁵¹ *Ibid.*, p. 522.

¹⁵² *Ibid.*

¹⁵³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion: I.C.J. Reports, (July 9.2004), p. 136; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgement: I.C.J. Reports, (December 19.2005), p. 168; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment: I.C.J. Reports, (April 11.2011), p. 70.

¹⁵⁴ LUBELL, Noam, *op. cit.*, p. 194.

¹⁵⁵ *Loizidou v. Turkey*, Application no. 15318/89, Council of Europe: European Court of Human Rights, 23 February 1995, paras. 62-4; *Cyprus v. Turkey*, Application no. 25781/94, Council of Europe: European Court of Human Rights, 10 May 2001, para. 77.

¹⁵⁶ *Alejandro Jr and ors v. Republica de Cuba (“Brothers to the Rescue”)*, Case 11.589, Report no 86/99, OEA/Ser.L/V/II.106 Doc. 3 rev. At 586 (1999), para. 23; *Coard and Others v. United States*, Case 10.951, Report no 109/99, IACHR, 29 September 1999, para. 37.

emerged, some of them more restrictive,¹⁵⁷ some of them more extensive.¹⁵⁸ From the above we can conclude that the international community is expanding the protection of human rights treaties to territories outside of its parties. For our purposes, international animal law does not come into a consideration as there is no binding universal treaty dealing with animal issues.

c) The exercise of Jurisdiction in the common interest

Finally, the third element of jurisdictional evolution is represented by the cosmopolitan jurisdictional unilateralism. Cedric Ryngaert in his monograph *Selfless Intervention, The Exercise of Jurisdiction in the Common Interest* inquires whether states could unilaterally safeguard global values and react to global ills, when other members of international community fail to address them. In other words, he examines “whether

¹⁵⁷ *Banković and Others v. Belgium*, Application no. 52207/99, Council of Europe: European Court of Human Rights, 12 December 2001. Here, the Court allowed only one exception to the territorial model of the ECHR’s application which is the situation when the people living in a certain territory are under the effective territorial control of one of the ECHR’s Contracting States. The Court decided that the NATO member states that carried out the aerial bombing in Kosovo did not exercise effective control over the territory of Yugoslavia and as a result the application was not admitted.

¹⁵⁸ *Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, Council of Europe: European Court of Human Rights, 7 July 2011. This judgement amplified the personal model of extraterritorial application of ECHR from *Banković and Others v. Belgium* case. See e.g., CASANOVAS, Oriol/ RODRIGO, Ángel, J., op.cit., pp. 487-488, (The Court created a model connected to the territoriality via the exercise of certain form of public power normally exercised by the sovereign government that does not belong to any of the four categories of the territorial model. Here, even in the lack of effective control over the territory, the inhabitants of the territory may be under that state’s jurisdiction. In addition, the court adopted a second exception. This second model of extraterritorial application of the ECHR, so called “spatial model”, allows extraterritorial exercise of jurisdiction in form of an “effective control over a certain territory as a result of military action, whether legal or not”).

states could unilaterally exercise their (prescriptive) jurisdiction (...) to compensate for regulatory failures of the multilateral system.”¹⁵⁹ This means that bystander states¹⁶⁰ can get involved, alone and outside of the multilateral framework, in situations beyond their borders, with the aim of reacting to global challenges. This would mean that the jurisdiction has evolved from an instrument protecting only national concerns to an instrument protecting and fostering international interests. Hence, jurisdiction is exercised in the common interest.

Selfless jurisdiction is needed in order to correct¹⁶¹ constraints of the multilateralism. The most important limitation seems to be, according to Ryngaert, the problem of reaching the consensus. “Consent, which remains a central characteristic of the international legal system, implies that progress on global governance issues requires the participation of all, or at least a substantial number of members of the international community.”¹⁶² As a result there is a difficulty in concluding international treaties and creating institutions that would “deliver the expected global benefits.”¹⁶³ Multilateral treaties often seek some sort of cosmopolitan action, such as human rights and environmental protection. However, they are usually considered as toothless.¹⁶⁴ Moreover, international institutions characterized by their democratic

¹⁵⁹ RYNGAERT, Cedric, *Selfless Intervention. The Exercise of Jurisdiction in the Common Interest*, New York 2020, p. 1.

¹⁶⁰ States that do not necessarily have the strongest connection with the situation at hand. The nexus between the state that intervenes selflessly, and the extraterritorial situation is the global dimension of the concern/interest/value.

¹⁶¹ At least for the moment, until acceptable multilateral response is adopted.

¹⁶² RYNGAERT, Cedric, *op. cit.*, 2020, p. 22.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*, p. 7.

deficit, often fight with scarcity of finances, ambition and power as they are obstructed by the principle of consent.¹⁶⁵ Unilateral cosmopolitanism is, therefore, a reaction to deficiencies in current international legal order, especially its lack of effectiveness as “human rights are still trampled on, corruption remains rampant and global warming continues unabated.”¹⁶⁶

Is selfless jurisdiction in its purest form even possible? Can states act completely selflessly? If we identify that behind selfless application of extraterritorial jurisdiction is some sort of national interest or goal, does that mean that the jurisdiction was not exercised selflessly? The answer is negative because global values reflect domestic values as they are shared by majority of international community. “[S]tates exercising “cosmopolitan” jurisdiction rarely do so only because it is the right thing to do, but rather because it is -also- in their national interest.”¹⁶⁷ In this way, parochial interests that are at the same time global common interests can trigger states to extraterritorial intervention. States may therefore “recast global problems in local terms in order to take advantage of local political or social recourses.”¹⁶⁸

It is important to highlight that the unilateral extraterritorial jurisdiction is not an attack to the multilateralism. “Contextualized unilateralism may in fact resemble multilateralism, where the unilaterally acting actor

¹⁶⁵ *Ibid.*, p. 22.

¹⁶⁶ *Ibid.*, p. 17.

¹⁶⁷ *Ibid.*, p. 74.

¹⁶⁸ BUXBAUM, Hannah, L., “National Jurisdiction and Global Business Networks”, *Indiana Journal of Global Legal Studies*, Vol. 17, No. 1, (2010), p. 167.

enforces multilaterally shared norms and values.”¹⁶⁹ But what are these shared norms and values of international community? According to Bruno Simma, they represent a “consensus according to which respect for certain fundamental values is not to be left to the free disposition of States, individually or *inter se*, but is recognized and sanctioned by international law as a matter of concern to all States.”¹⁷⁰ They have an intergenerational dimension seeing that its beneficiary is the humanity in its entirety.¹⁷¹ James Crawford also affirms the existence of “global, communal or collective interests”¹⁷² such as the “preservation of species from avoidable extinction, the protection of the ozone layer- and the prevention as far as possible of wars of destruction and weapons of mass destruction.”¹⁷³ Even though there are vast cultural, religious and social differences among the states, “persons throughout the world possess certain morally relevant properties in common”¹⁷⁴ and they “converge on some basic moral norms.”¹⁷⁵ Sure, communities live in different realities because they face peculiar challenges but this does not mean that they disagree on basic moral values.¹⁷⁶ In the substantive law we can see a materialization of this rationale as there are several

¹⁶⁹ RYNGAERT, Cedric, *op. cit.*, 2020, p. 26.

¹⁷⁰ SIMMA, Bruno, *From Bilateralism to Community Interest in International Law*, Leiden 1994, p. 217.

¹⁷¹ RODRIGO, Ángel, J., *op. cit.*, p. 70.

¹⁷² CRAWFORD, James, “The Current political Discourse Concerning International Law”, *The Modern Law Review*, Vol. 81, No. 1, (2018), p. 4.

¹⁷³ *Ibid.*

¹⁷⁴ CANEY Simon, *Justice Beyond Borders. A Global Political Theory*, New York 2005, p. 45.

¹⁷⁵ *Ibid.*, p. 46.

¹⁷⁶ *Ibid.*, p. 46.

examples of treaties that protect concerns that are common to humankind¹⁷⁷ and treaties that protect shared values.¹⁷⁸

What are the practical examples of corrective cosmopolitan justice? States may for example, apply trade measures in form of higher tariffs, quantitative restrictions or process and production requirements on foreign goods as conditions to enter their markets. This is especially visible in case of environmental legislation. European Union, for instance, fights in this way against global warming,¹⁷⁹ disappearance of rainforests,¹⁸⁰ protects biodiversity¹⁸¹ and also, maybe surprisingly, animal welfare standards.¹⁸² Such unilateral actions have far-reaching

¹⁷⁷ See e.g., Convention on Biological Diversity of The United Nations Environment Program adopted 1992 in Rio de Janeiro, which declared the biological diversity conservation as common concern of humankind. See also United Nations Framework Convention on Climate Change adopted 1992 in New York and Paris agreement to the United Nations Framework Convention on Climate Change adopted 2015 in Paris that declared climate change as common concern of humankind.

¹⁷⁸ Kyoto Protocol on the UN Framework Convention on Climate Change adopted 1997 in Kyoto; UN Convention against Corruption adopted 2004 in New York; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions' adopted 1997 in Paris, etc.

¹⁷⁹ Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, OJ L 8, 13.1.2009, through which aviation activities have been integrated into the Community greenhouse gas emission trading scheme.

¹⁸⁰ Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber products on the market, OJ L 295, 12.11.2010, that comprehensively solves the issue of control and monitoring of wood and wooden products entering the EU market and sanctions in case of identified deficiencies.

¹⁸¹ European Parliament, Resolution of 4 April 2017 on palm oil and deforestation of rainforests (2016/2222 (INI)).

¹⁸² Regulation 2015/1775 of the European Parliament and of the Council of 6 October 2015 amending Regulation (EC) No 1007/2009 on trade in seal products and repealing Commission Regulation (EU) No 737/2010, OJ L 262, 7.10.2015, which modifies the Regulation 1007/2009 on trade in seal products adopts harmonized

consequences in the era of global supply chains, especially if they are adopted by economically strong states or regional organizations such as the EU as many foreign producers are dependent on these markets. Similarly, states “may wish to regulate corporations’ overseas business practices that adversely affect human rights or the environment (...).”¹⁸³ We want to point out that selfless jurisdiction could be a very effective tool for states fearing that their stricter environmental or welfare legislations could provoke offshoring of companies to places with more lenient rules. There are many examples proving that states are often inactive because of pressure from multinational corporations threatening to leave. For instance, the intent to ban shredding of male chicks in egg production industries in Germany was not approved by the *Bundestag* for the fear of companies’ relocation.¹⁸⁴ Similarly, European Commission did refuse to act on the “Stop Vivisection” Initiative signed by 1,17 million EU citizens. The reasoning was once again aimed at the relocation of biomedical laboratories outside of the EU to states with lower animal welfare standards.¹⁸⁵ Actions exercised via selfless cosmopolitan jurisdiction can, therefore, “level the

conditions governing the marketing of products derived or obtained from seals. The Regulation bans the importation of aforementioned products to the EU market with certain exceptions. See more in chapter no. III.

¹⁸³ RYNGAERT, Cedric, *op. cit.*, 2020, p. 21.

¹⁸⁴ Deutscher Bundestag, 18. Wahlperiode, Gesetzesentwurf des Bundesrates zur Änderung des Tierschutzgesetzes, Drucksache 18/6663, Nov. 11, 2015, Stellungnahme der Regierung, at 10-1. Second intent was, however, successful and the practice is banned from January 2022 according to the Animal Welfare Act. See more Federal Ministry of Food and Agriculture, “Phasing-out of chick culling”, <https://www.bmel.de/EN/topics/animals/animal-welfare/research-poultry-in-ovo.html>.

¹⁸⁵ Commission of the European Communities, Communication from the Commission on the European Citizens’ Initiative “Stop Vivisection C”, (2015) 3773 final.

international playing field and (...) protect the integrity of domestic business regulation tackling transnational challenges (...).”¹⁸⁶ Extraterritorial application of domestic *e.g.*, animal welfare norms can help domestic companies that would be otherwise damaged as a result of more flexible foreign regulation and it also eliminates harmful activities “from being relocated abroad where they would go unpunished and adversely affect global welfare.”¹⁸⁷ Thusly, states can feel encouraged to adopt stricter legislation in order to react to global problems knowing that they can “extraterritorialize” it later on.

Accordingly, current development within the international law of jurisdiction suggests that it is necessary to resort to cosmopolitan jurisdiction because there is a significant gap between the existing norms and their application in real life. In the world where collective action often fails and global problems remain unsolved, unilateral cosmopolitan jurisdiction represents a viable option for planetary survival and protection of human rights. This rationale could be very suitable for matters of animal welfare. With it we could escape the problematic application of universal jurisdiction as it is understood today¹⁸⁸ and include animal interests into the scope of selfless jurisdiction. Case law that will be analyzed in the chapter no. III will show us a growing doctrinal acceptance of animal welfare as a universal value and in the chapter no. V, we will identify other legal, ethical,

¹⁸⁶ RYNGAERT, Cedric, *op. cit.*, 2020, p. 79.

¹⁸⁷ *Ibid.*

¹⁸⁸ This means that globally harmful activities that are not considered as international crimes can be tackled by bystander states in the common interest.

philosophical, sociological and political reasons to consider animal well-being as a global public interest, global public good and universal value that can be qualified as a common concern of a humankind. Considering that animal questions are part of shared values and common concerns of international community, states could pursue their protection via selfless cosmopolitan jurisdiction. In this way they could help to solve alarming challenges we face as humanity with regards to animal questions.¹⁸⁹

To put it in a nutshell, this subchapter examined thorough transformation of a concept of jurisdiction. Waves of changes happening in our interconnected world have touched upon every element of international law, jurisdiction included. Raising economic, cultural, and political globalization, technological progress and emergence of shared global problems challenge our traditional understanding of jurisdiction based on narrowly delimited territorial principle. Even though sovereignty and territorial principle still remain relevant, what changed is what they mean in practice.¹⁹⁰ This means that the concept of territorial sovereignty is being reshaped into a more flexible form that acknowledges multi-layered realities of pluralistic international legal order. The rise of extraterritorial exceptions, the extraterritorial application of human right treaties and cosmopolitan

¹⁸⁹ Areas that could be considered as common concerns and shared values with regards to animals are for instance protection of species extinction, environmental consequences of intensive farming, elimination of unhuman conditions of animals used in intensive farming, in tourism, in the entertainment industry (circuses or aquatic establishments), in the fur farms, protection of marine fauna, whaling, trophy hunting, etc.

¹⁹⁰ RUGGIE, John, G., "Territoriality and Beyond: Problematizing Modernity in International Relations", *International Organization*, Vol. 47, No. 1, (1993), p. 172.

selfless jurisdiction are, therefore, natural reactions to these seismic shifts occurring in our international community. Moreover, understanding of these profound changes is imperative for the construction of international animal law. In order to submit relevant and practical proposals for its development, the question of jurisdiction is very relevant.

D) DEVELOPMENT OF INTERNATIONAL REGIMES

Traditional international law regulated only a narrow scope of affairs such as questions related to diplomacy, war or maritime matters. The number of treaties was also limited, as well as the range of subjects, actors and sources. As Simma put it “[e]arly 20th-century accounts conceived of the international system as a hierarchical pyramid structure comprising relatively few norms, in which states, perceived as opaque and unitary actors (“billiard balls”), interacted in a largely unconstrained manner.”¹⁹¹ In our analysis we have shown that a lot has changed since then. Contemporary international law has undergone a very dynamic transformation, and now it “resembles a dense web of overlapping and detailed prescriptions in subject areas as diverse as environmental protection, human rights and international trade.”¹⁹² Proliferation of subjects and norms and the diversity of obligations and relations sparked the growth of international regimes that can be understood as

¹⁹¹ SIMMA, Bruno/ PULKOWSKI, Dirk, “Of Planets and the Universe: Self-contained Regimes in International Law”, *The European Journal of International Law*, Vol. 17, No. 3, (2006), p. 484.

¹⁹² *Ibid.*

bodies of rules.¹⁹³ These are normative subsystems integrated by a set of norms of different nature regulating specific area that based on international treaties, forms part of an international order.¹⁹⁴ This means that contemporary international legal order is characterized by its plurality. It encompasses “plurality of normative sets that cannot be understood as autonomous legal orders.”¹⁹⁵ They are not fully autonomous as they do not exist in a full isolation from public international law. “International legal order is an *inclusive* legal order in the sense that the normative sets constituting its general and special international regimes are included in aforementioned international legal order.”¹⁹⁶ These normative sets create either specific international regimes that regulate specific needs, such as the regime of international river or diplomatic relations or general international regimes protecting general interests of international community. Both regimes contain primary norms and some sort of secondary norms, but they are still part of public international law.¹⁹⁷

As it was mentioned, international regimes can be specific or general depending on whether they protect specific interests or common interests of international community.¹⁹⁸ International Law Commission distinguished three types of specific regimes- specific regimes relative

¹⁹³ CASANOVAS, Oriol/ RODRIGO, Ángel, J., *op. cit.*, p. 347.

¹⁹⁴ KLEIN, Eckart, “International Regimes”, p. 203, in *Encyclopedia of Public International Law*, Vol. 9, Elsevier Science Publishers B.V.: Amsterdam, 1986.

¹⁹⁵ CASANOVAS, Oriol/ RODRIGO, Ángel, J., *op. cit.*, p. 356. (Own translation).

¹⁹⁶ *Ibid.*

¹⁹⁷ If for example, primary or secondary norms are insufficient or the regime lacks some sort of secondary norms, norms of general international law will be used.

¹⁹⁸ *Ibid.*

to a particular geographical area or substantive matter, then specific regimes regulating particular problem area such as environmental law, trade law, human rights law, humanitarian law, etc. Lastly, specific regimes that contain secondary norms regulating the rules on responsibility: the consequences for breach of the primary norms.¹⁹⁹ In this case they can be understood as self-contained regimes but once again not in the sense of a “fully autonomous legal subsystem”²⁰⁰ as they do not exist in a full isolation from public international law. They are self-contained regimes in the sense of a “particular category of subsystems, namely those that embrace a full, exhaustive and definitive, set of secondary rules.”²⁰¹

General international regimes, on the other hand, reflect general interests of international community and their content is universal and transboundary. They embody global public interests and common concerns of humankind. According to Oriol Casanovas and Ángel J. Rodrigo, global public interest has a “community dimension, which makes it different from the interest of the states adopted in individual way.”²⁰² It is not just a simple sum of individual separate interest of states. It is qualitatively different, as it derives from the condition of a member of international community. It is a “rationally constructed abstraction”²⁰³ based on social reality, which is a result of open

¹⁹⁹ For example, diplomatic law.

²⁰⁰ SIMMA, Brunno, *op. cit.*, p. 492.

²⁰¹ *Ibid.*, p. 493.

²⁰² CASANOVAS, Oriol/ RODRIGO, Ángel, J., *op. cit.*, p. 347. (Own translation).

²⁰³ *Ibid.*

participation of all the members of international community. It is a set of all the fundamental interests of international community, that have relevance on domestic as well as on international level. Its protection is not subject to the satisfaction of individual state interests and to a mutual reciprocity between them. It has intergenerational dimension as its beneficiary is the humanity in its entirety. “The acknowledgment, protection and management of general interests can be done through different legal statutes that permit different level of intervention of international community.”²⁰⁴ Therefore, there are various regimes such as the regime of cultural and natural patrimony of the humanity reserved for particular natural and cultural spaces, or the common concern of humanity for loss of biodiversity and climate change or the common heritage of the humanity for International Zone of Seabed and Oceanic Beds and the Moon and others.²⁰⁵

From the above we can clearly see that international law has developed a framework which is able to comprise wide variety of interests and societal needs. Matters that belonged to domestic domains are now being regulated from an international perspective. Municipal law does not enjoy anymore an unlimited power and the state sovereignty has been narrowed. Domestic law “is now supplemented, corrected and, and watched over by international law. Thus, international law has undergone an evolutionary process over recent decades, transforming itself from an instrument of inter-state conflict resolution to a powerful global tool, present in everyday life and influential in many state actors’

²⁰⁴ *Ibid.*, p. 346.

²⁰⁵ *Ibid.*

and non-state entities' decisions and policies.”²⁰⁶ International law reacted swiftly to the needs and growing spectrum of interests of international community. Nowadays it comprises a variety of specific and general international regimes, reflecting a diverse world we live in.

Material expansion of public international law concludes our analysis on the transformation of traditional international law into contemporary international law- a law, that encompasses a wide spectrum of diverse interests. This shift is, in our opinion, primordial for the construction of international animal law. It suggests the following: because the international legal order has opened up to a myriad of new interests, animal interests can be protected globally as well. Reason for this is that animal welfare is essential not only to various states, but to humanity as a whole. Animal issues are interdisciplinary, and they concern humans as much as animals. They are not straightforward problems but rather far-reaching issues with multidimensional factors. They are interconnected with deforestation, soil and water pollution, loss of wildlife habitat, climate emergency, pandemics, etc. Following this line of argumentation, in the chapter no. V we will establish, that international animal law is a general international regime because its objective constitutes global concern of international community and because animal welfare is a universal value, global public good and it represents a global public interest.

To conclude this chapter, we learnt that the theoretical framework of international law “has to be open to successive systematic changes, it

²⁰⁶ STERIO, Milena, *op. cit.*, p. 214.

has to reflect the trends that are being imposed and not be at the service of the perpetuation of a determined vision of the world.”²⁰⁷ Consequently, our main aim here was to describe profound transformation of public international law through the evolution of its main elements- subjects, actors, sources, jurisdiction and international regimes. International law has expanded greatly since the year 1900. The era characterized by the existence of few international treaties, international organizations, restricted areas of legislation and population of 1,6 billion people²⁰⁸ has changed significantly throughout 20th and 21st century. The population of 7,8 billion people,²⁰⁹ 55,577 international treaties,²¹⁰ more than 7,825 active international organizations,²¹¹ more than 66,000 NGOs,²¹² multitude of multinational corporations²¹³ and international regimes represent complex and rapidly changing terrain of present international law. As consequence we see that the “monoglosia” of international society “in which the state is the hero of international law”²¹⁴ is no longer viable and that in reality the international society represent “heteroglosia” with a multitude of no-

²⁰⁷ GARCÍA SEGURA, Caterina, *op. cit.*, p. 30. (Own translation).

²⁰⁸ WORLDOMETER, “World Population by Year”, <https://www.worldometers.info/world-population/world-population-by-year/>.

²⁰⁹ *Ibid.*

²¹⁰ UNITED NATIONS, *Statement of Treaties and International Agreements, Registered or Filed and Recorded with the Secretariat during the month of January 2019*, New York 2019, p. 22.

²¹¹ Union of International Associations, *Yearbook of International Organizations 2021-2022*, Edition 58, Vol. 1 A, Leiden 2020, p. 19.

²¹² *Ibid.*

²¹³ ESPACE MONDIAL, “Multinational Corporations”, <https://espace-mondial-atlas.sciencespo.fr/en/topic-strategies-of-transnational-actors/article-3A11-EN-multinational-corporations.html>. (More than 60, 000 multinational companies).

²¹⁴ LÓPEZ-JACOISTE DÍAZ, Eugenia, *op. cit.*, p. 196. (Own translation).

state actors with ever-growing functions within the international legal order.²¹⁵ These shifts in the traditional international legal order could be described as a transition from *Westphalian state-centred system* to contemporary international law. The latter is characterized by the expansion of new societal needs that were non-existent or less visible during early 20th century as well as by the emergence of new values and interests of the international community.²¹⁶

Our analysis confirmed that we live in a “kaleidoscopic world”²¹⁷ where “global problems can affect all communities and people, both now and in the future. They arise in the context of globalization, fragmentation, and bottom-up empowerment and constantly changing informal groupings, ad hoc coalitions, and innumerable individual initiatives.”²¹⁸ Problems that were considered domestic are now being tackled on international level. We face global problems²¹⁹ that are result of interdependent, interconnected and highly diverse world. Moreover, many of these problems are result of human activities that “are responsible for the major changes to the integrity and resilience of our planet.”²²⁰ Thusly, the traditional international law has clearly undergone a dramatic transformation leading to an international legal order

²¹⁵ *Ibid.*

²¹⁶ Some authors even propose concepts such as Worldphalia, global law, international law for humankind or global republic as a response to this ongoing evolution.

²¹⁷ WEISS, Edith, B., “International Law in a Kaleidoscopic World,” *Asian Journal of International Law*, Vol. 1, No. 1, (2011), p. 30.

²¹⁸ *Ibid.*, p. 30.

²¹⁹ Climate emergency, health threats, cybersecurity, financial crises, etc.

²²⁰ WEISS, Brown, E., *op. cit.*, 2018, p. 54.

regulating kaleidoscopic range of issues and shared values that hold diverse people together.²²¹ This evolution paves the way for the emergence of new international regimes, among them also the regime of international animal law. In the next chapters we will, therefore, delve into the questions on animal welfare and the readiness of international law to regulate them. This will be done in the chapter no. III through a profound jurisprudential analysis of several cases taking place in two different “worlds”.

²²¹ WEISS, Brown, E., *op. cit.*, 2011, p. 32.

CHAPTER III

THE EVOLUTION OF PROTECTION OF ANIMAL INTERESTS IN THE INTERNATIONAL JURISPRUDENCE

Previous chapter demonstrated a wholesome transformation of traditional international law into international law of present times. We learnt that international legal order has opened up to new set of interests as a reaction to societal needs and concerns. In this chapter we will continue to examine these developments, but with a special focus on animal interests. More specifically, we will study the evolution of animal interests' protection in international jurisprudence. We will analyse five relevant cases that arose in different historical moments. First, we will enter into the 19th century by analysing the *Case of Exploitation or Preservation of Pacific Fur Seals*. This controversy reflects negative position of international law towards animal protection and other than human interests. On the other hand, the *Us- Tuna II (Mexico) case*, *Shrimp/turtle case*, *Whaling in Antarctic case* and *EC- Seal Regime case* will indicate that international law has undergone deep transformations. The reason for this has been the need to adjust itself to the interests of society including the protection of animals and the environment.

Following questions will be answered throughout this chapter: is animal well-being receiving more comprehension from international fora? Are animal questions getting importance over economic values? Is the trade law hampering or helping the development of international animal law?

The aim of this analysis is to demonstrate progressive inclusion of animal interests in international law and the capability of international law to regulate animal questions.

A) THE OLD WORLD: THE CASE OF EXPLOITATION OR PRESERVATION OF PACIFIC FUR SEALS

As we already know, the original aim of international law, or the *Law of the Nations* was to preserve peace and harmony between the states. States were the only actors on international level. There were no NGO's, no permanent international courts and there was only a small number of intergovernmental international organizations. Individuals and corporations did not have yet their limited international legal personality. These were the times where the sovereignty of states was unlimited, where states were permitted to do anything which they were not expressly prohibited from doing.¹ In the times without international guarantee of human rights, there was no place for protection of environmental and animal interests.

1) THE CONTEXT OF THE CASE OF EXPLOITATION OR PRESERVATION OF PACIFIC FUR SEALS

In this atmosphere, a case between United Kingdom and USA took place. It was the *Case of exploitation or preservation of Pacific fur seals* from the year 1893, awarded by the Bering Sea Tribunal of Arbitration convened in Paris.² The circumstances of this case reflect presumptions

¹ *S. S. Lotus* (Fr. V, Turk.) 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), p. 18.

² Behring Sea Arbitration: Award of the Tribunal of Arbitration constituted under Art. 1 of the treaty concluded at Washington on the 29th February 1892 between Her

of international law at that era. By analyzing it, we will show the main characteristics of international legal order of this age and its position towards animal issues.

In the center of this case was the valuable herd of fur seals born under the US jurisdiction which very often migrated to the high seas, beyond the limits of US territorial waters. During their migration, British vessels had been catching them, skinning them and sending them to Britain. United States were not approving of these actions and, therefore, they invoked a right of property and protection over the fur-seals frequenting the islands of the US in Bering Sea, even when these creatures were found outside of the US jurisdiction. US had the interest in ensuring that conservation was implemented also outside of their jurisdiction which led to the controversy with Great Britain. US used the principle of *protective jurisdiction* according to which they had the right to protect fur seals in the interest and benefit of mankind as fur seals have been considered as common heritage of humankind. US built a strong case arguing that these intelligent animals were conceived and born on the land belonging to the US³ which could be considered as their home for at least five months of the year. When they leave them, it is always with the intention to return. “The case against pelagic sealing is a very simple and at the same time a very cruel one. In view of the fact that these animals are highly polygamous, and their other peculiar characteristics, it follows as a matter of ordinary barnyard knowledge that any substantial killing of females endangers the stock. Yet (1) over

Britannic Majesty and the United States of America/ presented to both Houses of Parliament by command of Her Majesty, August 1893.

³ The Pribilof Islands in Bering Sea.

80% (probably 90%) of the pelagic catches consisted of females, and (2) virtually all so caught (a) were nursing mothers in search of food for pups which die if their mothers do not return or (b) were with young (gravid).”⁴

2) POSITION OF THE USA IN THE CASE OF EXPLOITATION OR PRESERVATION OF PACIFIC FUR SEALS

In the extensive diplomatic correspondence⁵ prior to the arbitration, the US Secretary of State wrote that according to the US President, the actions of vessels engaging in the killing of the fur seals were *contra bonos mores*,⁶ resulting in permanent and serious injury of the rights of US citizens and government.⁷ Additionally, US representative in London, Mr. Phelps stated that “under these circumstances, the Government of the United States must, in my opinion, either submit to have these valuable fisheries destroyed or must take measures to prevent their destruction by capturing the vessels employed in it. Between these alternatives it does not appear to me there should be the slightest hesitation.”⁸ He continued saying that “it is proposed to destroy this business by the indiscriminate slaughter and extermination of the animals in question, in the open neighboring sea, during period of gestation, when the common dictates of humanity ought to protect them and that it is suggested that US is prevented from defending itself

⁴ WILLIAMS, William, “Reminiscences on the Bering Sea Arbitration”, *American Journal of International Law*, Vol. 37, No. 4, (1943), p. 569.

⁵ Countries were exchanging diplomatic correspondence for four years.

⁶ Against good morals of the society.

⁷ Fur Seal Arbitration, Appendix IX, Appendix to the Case of the United States before the arbitration Vol. 1, Washington, 1892, p. 200.

⁸ *Ibid.*, p. 182.

against such depredation because the sea at a certain distance from the coast is free.”⁹ He also highlighted that “the best international law has arisen from precedents that have been established when the just occasion for them arose, undeterred by the discussion of abstract and inadequate rules.”¹⁰ As a result of this position, the US seized vessels sailing under the British flag engaging in the fur seal killing even when these vessels were operating in the high seas.

3) POSITION OF UK IN THE CASE OF EXPLOITATION OR PRESERVATION OF PACIFIC FUR SEALS

The position of the USA was seen back then as very controversial. Great Britain adamantly claimed their right to harvest seals even to the extinction, invoking the freedom of high seas fisheries. “[e]ven if the result (...) of the unchecked exercise of what we claim to be our right of pelagic sealing were to be the extinction of the fur seal, that would be no reason for prohibiting the exercise of our right, if the right exists (...). If the right exists, and if the consequences of its exercise be the extermination of the fur-seal, we do not shrink from those consequences.”¹¹ Great Britain also stated that the claim of the other party “is opposed to that great principle which lies at the very root of this whole controversy, the principle that upon the sea the ships of all nations are equal (...). The principle that upon the high sea the ships of all nation are part of the territory of that nation, the principle that upon the high seas the nationals of every nation can take at their will, at their

⁹ *Ibid.*, p. 287.

¹⁰ *Ibid.*

¹¹ Fur seal arbitration, Oral argument of Sir Charles Russel Q.C.M.P, on behalf of Great Britain, Washington, 1893, p. 21.

pleasure, according to their ability, from the products of the sea.”¹² Thus, the UK denied the argument of international morality. Apparently “the fact that certain wrongful things are considered *mala in se*,¹³ without the necessity of awaiting an international judgment to make them such”¹⁴ was not yet accepted as a valid claim. It is important to highlight that Great Britain also urged the Tribunal not to create any new law but rather to stick rigidly to the old standbys. They asked the Tribunal to opt for the narrow ground and not to engage in any law making as according to the Great Britain, Tribunal did not have the power to create international law. The sole purpose of the Tribunal was, in the British opinion, only the settlement of the controversy between the two nations. Their reasoning was that the Arbitration Tribunal only possessed the judicial function, without any room for creative law making. It was a “minimalist vision of international law, and one which encourages national and international courts to err on the side of caution in the absence of rules which clearly express limits to state action. It is an approach which seems increasingly less tenable.”¹⁵ This was in the strong contrast with the US approach that asked the Tribunal for an innovative attitude and law creation reflecting new facts and circumstances.

¹² *Ibid.*, p. 401.

¹³ Wrong in itself.

¹⁴ WILLIAMS, William, *op. cit.*, p. 569.

¹⁵ SANDS, Philippe, “Turtles and Torturers: The Transformation of International Law”, *New York University Journal of International Law and Politics*, Vol. 33, No. 2, (2001), p. 548.

4) ARBITRATION AWARD IN THE CASE OF EXPLOITATION OR PRESERVATION OF PACIFIC FUR SEALS

It was no surprise that the Arbitral Tribunal decided that international law could not provide any basis for US to apply its own conservational standards outside of their territory. US had no right to seek the protection of fur seals from the extinction. US did not have the right to protect fur seals in the interest of humankind. According to the award, the coastal state did not have jurisdiction over the marine living resources found in the high seas. However, the arbitrators adopted several regulations in order to establish higher protection of fur seals, such as determining closed seasons for hunting and narrowing the means and methods of the hunting. These restrictions were adopted not in the interest of the fur seals, but in the interest of the human industries.

The fact that a coastal state did not have any right to protect living marine resources outside of its jurisdiction, mirrored the position of international law, in which the protection of sovereignty of state was the most important. The award materialized the “conservatism of the Old World.”¹⁶ NGOs were not there to intervene; international organizations were not there to root to override the immunity of state’s actions, no international treaties existed to protect the lives of fur seals. Permanent international courts were not yet in existence, therefore the countries had to settle their disputes through *ad hoc* arbitrations based on the state’s consent to take part in them. “It was in short, a legal order

¹⁶ BROWN, Stanley, “Fur Seals and the Bering Sea Arbitration”, *Journal of the American Geographical Society of New York*, Vol. 26, No. 1, (1894), p. 364.

promoting a potentially Hobbesian state of nature, to be controlled by establishing a limited number of basic ground rules of intercourse while respecting the equal sovereignty of all nations. Any effort by a tribunal or other third-party institution to restrict sovereignty beyond the base essentials necessary for intercourse would destabilize the situation because sovereigns would not tolerate such restrictions, and the whole effort to establish a minimal international legal order might perish in the process.”¹⁷

As was analyzed in the previous chapter; in the course of the next years many features of international law were adapted to the needs of the society. International law proved to be very flexible to quickly react to the changes that took place on domestic and international level. Proliferation of subjects, actors, sources of international law, its material expansion and growth of international judicial and arbitral bodies are crucial developments permitting international law to protect the interests of non-human animals. The flexibility of international law and its gradual openness to a broader range of issues,¹⁸ most importantly to the environmental ones, shows us its potential to protect other than human animals as well. “Inherent in these developments- but not explicitly conceived- were the seeds for change: the development of a new consciousness of international public law governing legal relations beyond the nation state, available to influence public and administrative law at the national level, and accessible to

¹⁷ SANDS, Philippe, *op. cit.*, p. 530.

¹⁸ Humanitarian Law, Human Rights Law, International Diplomatic Law, International Environmental Law, etc.

an emergent international civil society.”¹⁹

The progressiveness and readiness of public international law to deal with questions regarding animal protection will be analyzed in the following subchapter.

B) THE PROGRESS AND THE TRANSFORMATION: GRADUAL IMPLEMENTATION OF ANIMAL INTERESTS

*“Courts try cases, but cases also try courts”*²⁰

Robert Jackson

In this section we will analyze groundbreaking case decisions regarding animal welfare. *US-Tuna (II)*, *Shrimp/Turtle Case*, *Whaling in Antarctic* and *EC- Seal Product Case* are the most important international cases that reflect the position of GATT, WTO²¹ and the ICJ²² towards animal questions.

1) US-TUNA II (MEXICO) CASE

*US-Tuna II (Mexico)*²³ case reflects changes in the international law concerning the protection of animal interests. Even though its

¹⁹ SANDS, Phillippe, *op. cit.*, p. 530.

²⁰ JACKSON, Robert, “Address by the Hon. Robert H Jackson”, *Proceedings of the Annual Meeting of the American Society of International Law*, Vol. 39, (1945), p. 15.

²¹ World Trade Organization.

²² International Court of Justice.

²³ *United States- Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Panel Report, WT/DS381/R, (*US Tuna II (Mexico)*), (adopted Sep. 15, 2011). *United States- Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Appellate Body Report, WT/DS381/AB/R, (*US Tuna II (Mexico AB)*), (adopted May 16, 2012), *United States- Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Panel Report, Recourse to Art. 21.5 of the DSU by

conclusions are bitter-sweet, the case shows that the WTO is not as contradictory towards animal well-being as it could be perceived. In the next sections we will delve into the long saga of “Tuna cases” and present first hesitant steps towards incorporation of animal interests into the trade.

a) Context of the US-Tuna II (Mexico) case

Because this case is quite long and complicated, we will offer a series of events that preceded the actual *US-Tuna II (Mexico)* case, namely we will describe the dolphin protective measures adopted by the US as a sparkle of the problem; the resulting *Tuna-Dolphin I* case and *Earth Island Inst. V. Evans* case that took place in the US and concerned the “dolphine safe” label.

i) Dolphin protective measures adopted by the US

The USA decided to impose a ban²⁴ on the tuna import from countries, which did not follow the protection of dolphins during the process of

Mexico, WT/DS381/Corr. 1, WT/DS381/RW, WT/DS381/Add. 1, (adopted Apr. 14, 2015). *United States- Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Appellate Body Report, Recourse to Art. 21.5 of the DSU by Mexico, WT/DS381/AB/RW, WT/DS381/AB/Add. 1, (adopted Nov. 20, 2015). *United States- Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Decision by the Arbitrator, WT/DS381/ARB, WT/DS381/ARB/Add. 1, (adopted Apr. 25, 2017). *United States- Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Panel Reports, Recourse to Art. 21.5 of the DSU by the United States WT/DS381/RW/USA, Second Recourse to Art. 21.5 of the DSU by Mexico, WT/DS381/RW2, 26 Oct. 2017. *United States- Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Appellate Body Reports, Recourse to Art. 21.5 of the DSU by the United States, WT/DS381/AB/RW/USA, Second Recourse to Art. 21.5 of the DSU by Mexico, WT/DS381/AB/RW2, (adopted Dec. 14, 2018).

²⁴ Marine Mammal Protection Act, 16 U.S.C., §§ 1362 *et seq.*, 1972. [hereinafter MMPA].

tuna fishing. The issue was that dolphins were being caught in the fisherman's nets, which resulted in the dramatic reduction in their numbers. This was happening because tuna had been harvested with so-called purse seines. This is a method in which fishermen surround a shoal of tuna, with large nylon net often longer than two kilometres, which allows very efficient catching of large numbers of fish. At the same time there is a risk that dolphins, which often swim near flocks of tuna, will be trapped in the net. This was especially the case in the Eastern Tropical Pacific Ocean (called the ETP zone), where fishermen searched for schools of tuna by watching dolphins, which led to the siege not only of the tuna but also of the dolphins themselves. In 1986, about 133,000 dolphins were killed in this way.²⁵ At that time, technological and legislative changes were taking place in the sector, which were aimed at reducing this number. By 1992, the total number of deaths was reduced to about 15, 500 animals.²⁶

The reduction in the population was not the only reason for the measure. The US showed in the proceedings that their aim was also to eliminate stressful situations for dolphins as chasing and setting nets on them has harmful effects that is “beyond observed death and serious injuries.”²⁷ Those are so called “*unobserved* consequences.”²⁸ “Tuna purse seine operations involve well-recognized stressors in other wild animals,

²⁵ Minutes of the 52nd Meeting of the Inter-American Tropical Tuna Commission, La Jolla, California, USA, October 26-27, 1993.

²⁶ Minutes of the 52nd Meeting of the Inter-American Tropical Tuna Commission, *op. cit.*

²⁷ Panel report, *United States- Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 7.484, WT/DS381/R, (adopted Sep. 15, 2011). [hereinafter Tuna II (Mexico) Panel Report].

²⁸ *Ibid.*

and it is plausible that stress resulting from chase and capture could compromise the health of at least some of the dolphins involved (...) they (purse seine fishing) may have a negative impact on the health of some individuals.”²⁹ Cow-calf separation is listed as some of the possible adverse effects. This observation is essential as it is clear that the US measure was not only conservational, but it was also aimed at the protection of individual dolphins. This will be of importance in our later analysis.

In order to protect dolphins, the United States adopted a ban on imports of fish caught using methods that often resulted in the death of dolphins. More specifically, US law banned the importation of fish or fish products caught by methods that resulted in excessive numbers of dead or seriously injured marine mammals.³⁰ A specific strict regime has been set for fish caught in the ETP zone as this region was well known for injuring or killing dolphins during tuna fishing.³¹ A country wishing to import yellowfin tuna from the ETP to the United States had to prove that the average dolphin mortality over time was no more than 1.25 times the average mortality caused by US vessels over the same period.³² At the same time, the country had to prove to US authorities that it runs a program regulating the hunting of marine mammals that meets American standards.³³ As a result of this measure Mexico, Vanuatu and Venezuela have not been authorized to import. At the

²⁹ *Ibid.*, ¶ 7. 496.

³⁰ MMPA, *op. cit.*, § 1361, (2).

³¹ *Ibid.*, § 1371 (a)(2)(B).

³² *Ibid.*, § 1371 (a)(2)(B)(ii)(II) (Supp. 1991).

³³ *Ibid.*, § 1371 (a)(2)(B)(ii).

same time, United States required evidence of imports of tuna from third countries showing that they also banned imports of tuna proceeding from countries that were not authorized to import into the United States. The purpose was to prevent circumvention of the ban through imports through intermediaries in third countries. If this condition was not met, the US authorities banned tuna imports from these countries as well.

ii) Tuna-Dolphin case I

Mexico challenged the US ban, for the first time in 1991.³⁴ It objected that the ban represented an unreasonable barrier to trade and that Mexican products were treated less favourably. More specifically, Mexico argued that the US ban was contrary to Articles III,³⁵ XI³⁶ and XIII³⁷ of the GATT 1947. USA argued that their trade limitations were justified under the Article XX b), g) and d) GATT. The GATT Panel³⁸ decided that the exception to the Article XX³⁹ had to be interpreted narrowly in order not to breach multilateral trade rules.⁴⁰ In *Tuna I*, the GATT Panel developed so called process/product distinction

³⁴ *United States- Restrictions on Imports of Tuna*, GATT BISD, Report of the Panel, DS21/R-39S/155, (adopted Sep. 3, 1991), [hereinafter *Tuna I* GATT Panel Report].

³⁵ GATT Art. III represents a national treatment principle. WTO members must not accord discriminatory treatment to imported like products.

³⁶ Art. XI of GATT prohibits quantitative restrictions adopted by the WTO members. These restrictions can have form of quotas- limitations in number or value of imported goods or they can have form of licences or other measures.

³⁷ In general, under GATT Art. XIII, prohibitions, or restrictions on imports of any product from a Party may be applied only in such a way as to cover all countries.

³⁸ This case took place before the creation of WTO.

³⁹ Exceptions in which members of the WTO may be exempted from GATT principles and rules.

⁴⁰ *Tuna I* GATT Panel Report, *op. cit.*, ¶ 6. 3.

according to which when members distinguish between products on the basis of their method of production, they do not conform with GATT rules. Therefore, the process-based measures are illegal and not covered by the Article III GATT (they are not internal measures subject to Article III, they cannot be justified under the Article XX exceptions and as a result violate Article XI. The Panel held that Article XX GATT covers exclusively trade measures that safeguard life or health of humans, animals or plants within the jurisdiction of the importing country.⁴¹ The ruling took, therefore, a pro-trade approach over environmental protection. From GATT's point of view, there was an illegitimate extraterritorial application of national legislation and the creation of unfair trade barriers.⁴² The PPMs were perceived as extraterritorial as they conflicted with the sovereignty of producing Member State to control the activities happening in its own territory.⁴³ It was also claimed that the PPMs could represent eco-imperialism by imposing values to other Members.⁴⁴ Further, the threat to liberalization process of multilateral trading system was feared. The Panel stated that the GATT could “no longer serve as a multilateral framework for trade among contracting parties”.⁴⁵ This decision was perceived by public as hostile to other than trade values and heavily criticised by academia. It was feared that “this report, and the GATT more generally, could

⁴¹ Tuna I GATT Panel Report, *op. cit.*, ¶ 5.26.

⁴² *Ibid.*, ¶ 7.1 a), ¶ 7.1 b).

⁴³ SIFONIOS, David/ ZIEGLER, Andreas, R., “Tuna- Dolphin Forever? The Development of the PPM Debate Related to Trade and Environment in the WTO”, *The Indian Journal of International Economic Law*, Vol. 12, (2020), p. 115

⁴⁴ BHAGWATI, Jagdish, “Trade and the Environment: The False Conflict?”, in ZAEELKE, Durwood and others (eds), *Trade and the Environment: Law, Economics, and Policy*, Washington D.C. 1993.

⁴⁵ Tuna I GATT Panel Report, *op. cit.*, ¶ 5.27.

threaten the ability of states to take measures for environmental purposes and prevent governmental action to address global environmental issues.”⁴⁶

iii) Earth Island Inst. V. Evans

Even though this decision was never formally adopted by the GATT Council,⁴⁷ it opened up a possibility for negotiations which in the year 1998 resulted in the adoption of various agreements such as La Jolla Agreement of 1992, Declaration of Panama from 1995 and finally the Agreement on the International Dolphin Conservation Program from 1998,⁴⁸ between the states whose fleet operated in the ETP area, including the US and Mexico. The AIDCP provisions however allowed dolphin setting if there were no observed mortalities. As a result of AIDCP, the meaning of “dolphin-safe” label was weakened and tuna embargoes were lifted against the countries that used dolphin setting. This was seen as inadmissible for many animal and environmental NGOs. Therefore, they started proceedings against the Secretary of US Commerce. In 2004 judge Thelton E. Henderson ruled that tuna sold in the US could be labelled as “dolphin-safe” only if that tuna was not harvested via dolphin setting.⁴⁹ As a result, the use of AIDCP label was

⁴⁶ SIFONIOS, David/ ZIEGLER, Andreas, *op. cit.*, p. 110.

⁴⁷ In the GATT system, in order to adopt a decision, it was necessary that both parties of the dispute agreed with it. Nor Mexico nor USA decided to agree with this decision. This was partially due to the fact that none of the two countries intended to risk a political firestorm on the eve of the approval of the North American Free Trade Agreement by the US Congress. *See e.g.*, FRENCH, Hilary, *Vanishing Borders: Protecting the Planet in the Age of Globalization*, New York 2000, p. 120.

⁴⁸ Hereinafter the AIDCP.

⁴⁹ *Earth Island Inst. V. Evans*, No. C 03-0007, 2004, U.S. Dist. Lexis 15729, 34. Env'tl. L. Reo. 20069, 26 Int'l Trade Rep. (BNA) 1993 (N.D. Cal. 2004).

not allowed in the US. This development sparked another reaction of Mexico, which will be analysed next.⁵⁰

b) Position of Mexico in the US- Tuna II (Mexico) case

The tuna saga continued in the year 2008. In the centre of the attention of this case was voluntary “dolphin-safe” label on tuna products ensuring the customers that tuna was caught without harming the dolphins.⁵¹ Articles at issue belonged to the TBT agreement,⁵² more specifically Article 2, para. 1 that sets an obligation of non-discrimination: “Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country”. And Article 2, para. 2 requires that technical regulations⁵³

⁵⁰ After the Tuna-Dolphin I, there was another case in the year 1994. Here the European Union in the name of the Netherlands and Dutch Antilles challenged the tuna embargo. It demanded the inconsistency of embargoes with the Art. II and XI para. 1 of GATT. The decision agreed with the conclusions drawn in 1991. The ruling was not adopted.

⁵¹ US-dolphin-safe labelling provisions were following: *United States Code*, Title 16, Section 1385 Dolphin Protection Consumer Information Act. *Code of Federal Regulations*, Title 50, Section 216.91 (“Dolphin-safe labelling standards”) and Section 216.92 (“Dolphin-safe requirements for tuna harvested in the ETP (Eastern Tropical Ocean) by large purse seine vessels”). The ruling in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007).

⁵² Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreements Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S, 120. Art. 2.2. [Hereinafter TBT Agreement].

⁵³ According to the Art. 1 of Annex 1 to the TBT Agreement: Technical regulation is a “[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.”

cannot “be more trade-restrictive than necessary to fulfil a legitimate objective, taking into account the risk of non-fulfilment would create” and afterwards it lists non-exhaustive list of such legitimate interest. Among them is “the protection of human health or safety, animal or plant life or health, or the environment.”

According to Mexico, tuna imported to the US could not proceed from typical method of catching used by Mexican fishers as they followed their traditional catching methods including setting on dolphins. Mexico argued that the US violated Article 2, para. 1 of TBT agreement⁵⁴ because their tuna was not eligible for the label even when during their fishing no dolphin was injured. Mexico stated that US had “found a new way to prevent Mexican tuna from competing in US market.”⁵⁵ In this way this label limited trade opportunities for Mexican tuna fishers in the United States. Basically, according to the measures, different geographical areas were subject to different procedures.⁵⁶ For tuna fishing within the ETP zone, measure imposed strict limitations: they had to show the certification that their fishing method is not using purse seine nets as well as certification that no dolphins were killed or injured. For tuna fished outside of the ETP zone, US permitted to use the “dolphin safe” label on the basis of declaration of vessel’s captain that dolphins have not been injured or killed. Further, Mexico received evidence showing that dolphins are indeed injured and killed in the third countries despite the declarations of the captains.⁵⁷ This means that US

⁵⁴ Tuna II (Mexico) Panel Report, *op. cit.*, ¶ 4.5.

⁵⁵ Tuna II (Mexico) Panel Report, *op. cit.*, ¶ 4.1.

⁵⁶ *Ibid.*, ¶ 4.4.

⁵⁷ *Ibid.*, ¶ 4.127.

treated two different geographic areas in two different ways, requiring more stringent conditions for ETP from where Mexican tuna proceeded. This was according to Mexico a violation of the national treatment principle. In another words, the issue was that the US measure created a risk that tuna imported to US from non-ETP zone was being sold in US even though there could potentially be risk of harm to dolphins, whereas that wasn't the case for the Mexican tuna. Thus, dangerous Mexican tuna had no access to the label meanwhile potentially dangerous tuna from other zone might get access to the label.

Next issue according to Mexico was that the label fell under the definition of a “technical regulation” and violated Article 2, para. 2 of the TBT Agreement.⁵⁸ This would mean that the US measures were mandatory because they limited producers, retailers and consumers “to a single choice for labelling tuna products as dolphin safe. There is [was] no available option for US consumers to buy tuna products that have been produced from tuna caught in accordance with the international AIDCP standard for the protection of dolphins and [was] labelled as dolphin safe under that standard.”⁵⁹ As a result, “Mexican tuna products that qualified as dolphin safe under the AIDCP [were] not allowed to be labelled as dolphin safe in the US market.”⁶⁰ Mexico therefore wanted an alternative dolphin-safe labelling option to be allowed in the US which did not allow the use of AIDCP “dolphin-safe” label.

⁵⁸ *Ibid.*, ¶ 4.342, 4.279, 4.274.

⁵⁹ *Ibid.*, ¶ 4.272.

⁶⁰ *Ibid.*, ¶ 4.213.

c) Position of USA in the US- Tuna II (Mexico) case

The US argued that the labelling was not discriminatory because it was not based on the origin of tuna or tuna products and, therefore, it could not give less favourable treatment to Mexican tuna products.⁶¹ This means that the eligibility for the label did not depend on the origin of products. Consequently, the US regulation did not alter the “conditions of competition to the detriment of Mexican tuna or tuna products. The US provisions provide that any tuna products- regardless of origin- may use the dolphin-safe label if they meet the criteria for label.”⁶² Also, US stated that their labelling provisions had minimal impact on trade. “As a voluntary labelling scheme, the US provisions do not require tuna or tuna products exported to, or sold in, the United States to be dolphin-safe or to be labelled dolphin-safe. And nothing in the US provisions prohibits tuna products that are not dolphin-safe and that are not labelled as such from being exported to, or sold in, the United States.”⁶³

With regards to claims concerning technical regulation claims, according to the US, the label was voluntary, it was not structured as a mandatory compliance condition for the entrance of the products,⁶⁴ therefore it was complying with the definition of standards.⁶⁵ The US

⁶¹ *Ibid.*, ¶ 4.77.

⁶² *Ibid.*, ¶ 4.78.

⁶³ *Ibid.*, ¶ 4.100.

⁶⁴ *Ibid.*, ¶ 4.84.

⁶⁵ There is an important difference between technical regulation and a standard. “While conformity with standards is voluntary, technical regulations are by nature mandatory. They have different implications for international trade. If an imported product does not fulfil the requirements of a technical regulation, it will not be allowed to be put on sale. In case of standards, non-complying imported products will be allowed on the market, but then their market share may be affected if consumers’

sustained that the objective of the label was only to provide consumers with information that no dolphins were hurt, and in this way provide them with accurate information. Second objective was to protect the dolphin population.⁶⁶

As to the alternative measure proposed by Mexico, US held that the AIDCP provisions could not fulfil their objectives. While AIDCP represents an important advancement in dolphin protection, “the US provisions further contribute to protecting dolphins by ensuring the US market is not used to encourage fishing fleets to set on dolphins to catch tuna, which is a fishing technique that, in the United States’ view, adversely affects dolphins.”⁶⁷ AIDCP provisions require the fishing fleet to obtain certification stating that no dolphins were killed or seriously hurt in the course of tuna fishing.⁶⁸ These standards however allow dolphin setting and up to 5.000 dolphins to be killed in these nets annually. Therefore, these measures do not eliminate harmful practice consisting in setting nets on dolphins. They only try to minimize dolphin mortality when using the nets. Moreover, they do not address other negative consequences on dolphin setting.⁶⁹

d) Panel’s decision in the US-Tuna II (Mexico) case

prefer products that meet local standards such as quality or color standards for textiles and clothing.” WTO, “Technical Information on Technical barriers to trade”, https://www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm.

⁶⁶ Tuna II (Mexico) Panel Report, *op. cit.*, ¶ 4.88.

⁶⁷ *Ibid.*, ¶ 7.567.

⁶⁸ *Ibid.*, ¶ 7.496-7.499.

⁶⁹ *Ibid.*, ¶ 4.107.

Panel agreed with Mexico, stating that the “dolphin-safe” label had some mandatory attributes, making it therefore a technical regulation.⁷⁰ With regards to the Article 2, para. 1 of the TBT Agreement, Panel decided that the “dolphin-safe” label did not constitute “less favourable treatment” towards Mexican tuna products. This was because all states fishing in the ETP zone were equally affected by the labelling scheme and there was no particular disadvantage stemming only for Mexico. Moreover, countries fishing in this zone responded to the US provision in different ways. US fishing fleets for instance, stop using setting on dolphins.⁷¹ Mexico however continued with this practice. It was a decision of Mexican fleet not to accommodate itself to the labelling conditions. In conclusion, Panel concluded that the US provisions did not violate Article 2, para. 1 of the TBT agreement as the label did not distinguish between tuna products on the basis of the country of origin.⁷²

Next, the Panel analysed Article 2 para. 2 of the TBT Agreement. This Article states that the technical regulation, must pursue a legitimate objective and must not be more trade restrictive than necessary to meet the objective. Two objectives were asserted by the US. First was ensuring that the public was informed whether tuna products have been obtained in a way that negatively affects dolphins.⁷³ Second objective was to contribute “to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a

⁷⁰ *Ibid.*, ¶ 7.620.

⁷¹ *Ibid.*, ¶ 7.327.

⁷² *Ibid.*, ¶ 7.374.

⁷³ *Ibid.*, ¶ 7.394-7.399.

manner that adversely affects dolphins.”⁷⁴ Panel agreed that these are indeed the objectives pursued by the US⁷⁵ and that they were legitimate since they fall to “the prevention of deceptive practices”⁷⁶ and “protection of animals or plant life and health”⁷⁷ which are stated as one of the legitimate objectives of technical regulations of the Article 2, para. 2 of the TBT agreement. Panel stated that “[s]imilarly, the protection of dolphins may be understood as intended to protect animal life or health or the environment. In this respect, a measure that aims at the protection of animal life or health need not, in our view, be directed exclusively to endangered or depleted species or populations, to be legitimate. Article 2, para. 2 refers to “animal life or health” in general terms and does not require that such protection be tied to a broader conservation objective. We, therefore, read these terms as allowing Members to pursue policies that aim at also protecting individual animals or species whose sustainability as a group is not threatened.”⁷⁸ This is a very important statement as it articulates that not only environmental issues such as protection of endangered species but also protection of individual animal interests is under the auspices of WTO. Consequently, this “can be interpreted as stating that regulation of concerns relating to animals in agriculture, experimentation and entertainment can be legitimate objectives under the TBT and other agreements. This is so since group of animals, other than those threatened as species, can be proper subjects of member state

⁷⁴ *Ibid.*, ¶ 7.394.

⁷⁵ *Ibid.*, ¶ 7.425.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, ¶ 7.437.

⁷⁸ Tuna II (Mexico) Panel Report, *op. cit.*, ¶ 7.747.

regulations. Further, the statement goes further to say that protecting individual animals from harm can also be a legitimate subject of regulation. So, this at least appears to be a signal that regulation of animal issues in a sense much more general than protection of the environment or endangered species is a legitimate objective of member states under the WTO umbrella.”⁷⁹

Having stated that the US measures were understood as pursuing legitimate objectives in the sense of the Article 2, para. 2 of the TBT agreements, the Panel proceeded to the question whether the provisions were more trade restrictive than necessary in order to achieve the objectives. Panel decided that they were indeed inconsistent with this section of the Article 2, para. 2 of the TBT Agreement. The question was whether Mexico could propose an alternative measure that would be less restrictive and reasonably available and that would be able to achieve both of the legitimate objectives. Mexico proposed the use of AIDCP labelling together with the US “safe-dolphin” label. Ultimately, Panel agreed with Mexico by stating that this option “would be at least as apt to contribute to the objective of insuring that consumers are not misled about whether tuna has been caught in a manner that adversely affects dolphins. Both the existing US measures and the alternative suggested by Mexico may reduce to some extent, but do not eliminate, the possibilities of the US consumers being misled.”⁸⁰ The biggest pitfall of the US labelling was the fact that it required stricter conditions for achieving the label for tuna caught in the ETP zone than tuna caught

⁷⁹ KELCH, Thomas, G., “The WTO Tuna Labeling Decision and Animal Law”, *Journal of Animal and Natural Resource*, Vol. 8, (2012), p. 132.

⁸⁰ *Ibid.*, ¶ 7.577.

outside of this zone. Tuna fishing fleet outside of the ETP area did not need to obtain independent certification that no dolphins were killed or injured. Captain's declaration that "no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna was harvested"⁸¹ was enough. These declarations were however unverifiable. "[It] is unclear to us why the requirement that no dolphin be killed or seriously injured in the sets in which tuna was caught would apply in respect of tuna caught by methods other than setting on dolphins in the ETP but not outside the ETP, for access to the official label."⁸² Therefore, both of the objectives could be achieved by allowing alternative dolphin label in the US market. As a result, Mexico was allowed to use AIDCP "dolphin-safe" labelling provisions and export their tuna products under these labels to the US even though they could still use the method of setting on dolphins.

Panel's decision could be seen as both negative and positive for animal protectionists. Mexico was allowed to use AIDCP labelling provisions and export their tuna products with this label to the US even though they could still use the method of setting on dolphins which according to the US is dangerous for dolphins. However, the positive message of this decision was that regulations that protect individual animals can be consistent with the WTO rules even though these animals are not endangered species. This was a crucial advancement for animal protection in international law.

⁸¹ *Ibid.* ¶ 4.127, ¶ 7.560.

⁸² *Ibid.* ¶ 7.560.

e) Appellate Body's decision in the US-Tuna II (Mexico) case

Both parties to the dispute were dissatisfied with the Panel's Report. The US challenged the finding according to which their dolphin-safe label was a technical regulation,⁸³ a finding according to which that their measures were more trade restrictive than necessary,⁸⁴ and a finding according to which AIDCP certification is international standard in the sense of the Article 2, para. 4 of the TBT agreement.⁸⁵ Mexico claimed that findings appealed by the US should be upheld,⁸⁶ that the dispute should be decided on the basis of the GATT as well.⁸⁷

The Appellate Body's report from 2012 held that the US labelling system was a technical regulation, that dolphin safe label was inconsistent with the Article 2.1 of the TBT Agreement and consistent with the Article 2, para. 2 of the TBT Agreement and that the dispute would be decided on the basis of the TBT Agreement.

As we described above, the Panel decided that Mexican tuna products did not receive less favourable treatment and therefore the US measure did not violate Article 2, para. 1 of the TBT Agreement. The Appellate body however, found that the "treatment no less favourable" depends on "whether the contested measure modifies the conditions of

⁸³ Appellate Body Report, *United States- Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, (adopted May 16, 2012), ¶ 11, [hereinafter Tuna II (Mexico) Appellate Body Report].

⁸⁴ *Ibid.*, ¶ 19.

⁸⁵ *Ibid.*, ¶ 30.

⁸⁶ *Ibid.*, ¶ 46, 56, 72.

⁸⁷ *Ibid.*, ¶ 108.

competition to the detriment of imported products.”⁸⁸ The negative impacts perceived by Mexican tuna products is an effect of the measure itself.⁸⁹ This is because the US consumers usually prefer products with a “dolphin-safe” label. As a result, conditions of competition were affected to the detriment of Mexico.⁹⁰ Moreover, the difference in labelling conditions for ETP and non-ETP zones did not stem “exclusively from a legitimate regulatory distinction.”⁹¹ The US measure was discriminatory in the meaning of the Article 2, para. 1 because it was not even-handed thereby, creating arbitrary and unjustified discrimination between potentially dangerous tuna caught in ETP zone and tuna proceeding from non-ETP zones. Basically, tuna caught by Mexican fleet was, for the most part, excluded from accessing the label.⁹² Appellate body ruled that “US measure fully addresses the adverse effects on dolphins resulting from setting on dolphins in the ETP, whereas it does not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP.”⁹³ In these circumstances, we are not persuaded that the United States has demonstrated that the measure is even-handed in the relevant respects, even accepting that the fishing technique of setting on dolphins is particularly harmful to dolphins.”⁹⁴

⁸⁸ *Ibid.*, ¶ 221.

⁸⁹ *Ibid.*, ¶ 239.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*, ¶ 299.

⁹² *Ibid.*, ¶ 199.

⁹³ *Ibid.*, ¶ 251.

⁹⁴ *Ibid.*, ¶ 296.

This signifies that the US trade restriction in favour of animal protection passed muster and it was the particular parameters of the measure that were problematic. Basically, the US did not adopt a regulation that would be strong enough. The Appellate Body did not require elimination of the legislation. On the contrary, the US was able to modify the “dolphin-safe” label and strengthen the dolphin protection outside of the ETP areas. This decision proves that “the Appellate body also focused on dolphin welfare as opposed to species survival. Perhaps more significantly, the WTO challenge improved the Dolphin Safe label and provided better protections for dolphins by widening the scope of the measure and imposing dolphin safeguards in other oceans. These new requirements may actually further restrict trade in protecting dolphins but are likely WTO- compliant.”⁹⁵ In conclusion, US measures can differentiate, in labelling conditions, between tuna caught with dolphin netting and tuna caught by other fishing methods. What is important is that there are no arbitrary differences in achieving the label for ETP and non-ETP areas. Therefore, creating different conditions for tuna harvested with different methods is not inconsistent with the WTO principles. This represents an important advancement for animal welfare interests. “It gives a preliminary imprimatur to laws regulating animal production through production methods.”⁹⁶

On the other hand, the Appellate Body reversed Panels’ finding regarding the fitness of alternative measures in form of the AIDCP standards. “We have concluded that the Panel erred in finding that it

⁹⁵ KALININA, Maria/ LURIÉ, Andrew, “Protection Animals in International Trade”, *American University International Law Review*, Vol. 30, No. 3, (2015), p. 443.

⁹⁶ *Ibid.*, p. 444.

has been demonstrated that the US measure is more trade restrictive than necessary within the meaning of Article 2, para. 2 of the *TBT Agreement*.⁹⁷ While it is true that outside of the ETP zone there are no differences among the US labelling and the AIDPC provisions, within the ETP zone, the AIDCP is less stringent than the US scheme so the objectives would not be achieved in the same degree.⁹⁸ Therefore, US measures did not violate Article 2, para. 2 of the *TBT Agreement* meaning that they were legitimate and no more restrictive than necessary.

We would like to stress out that the Appellate Body upheld the Panel's interpretation of "animal life or health" as a legitimate objective for trade restrictions within the Article 2, para. 2 *TBT*. This is an affirmation that WTO Members have a right to establish various degrees of welfare protection for different animal species. Further, this means that the "protection of animal health or life" is not limited only to endangered species but it encompasses individual animals as well.

With regards to the issue of extraterritoriality, which was the central issue in the *Tuna-Dolphin II case*, the Appellate Body has not examined it at all. "Thus, while this measure would have been qualified as extraterritorial under the reasoning of the US - Tuna I and II GATT Panels, the WTO Appellate Body seemed to consider the measure as "territorial" in the US Tuna II (Mexico) report."⁹⁹ The strict prohibition of PPM measures with extraterritorial effects has been modified by a

⁹⁷ Tuna II (Mexico) Appellate Body Report, *op. cit.*, ¶ 333.

⁹⁸ *Ibid.*, ¶ 329.

⁹⁹ SIFONIOS, David/ ZIEGLER, Andreas, *op. cit.*, p. 126.

more pliant method focusing on the “even-handedness” of the measures and on whether the different treatments given to different fishing methods were “calibrated” to the different perils to dolphins in different parts of the ocean.¹⁰⁰ Thusly, a process-based measure has been confirmed as legal under the GATT as well as TBT Agreements.

After the circulation of the report, US incorporated changes in its labelling system in order to comply with Appellate Body’s findings. Mexico initiated compliance proceedings in which it was found that the measures were still violating WTO rules. US, therefore, amended their legislation for the second time which once again led Mexico to attack them as discriminatory. Here, however, the Appellate Body ruled that measures were in accordance with the WTO agreements. All the changes made by US were connected with the areas outside of ETP, in order to ensure higher dolphin protection in all zones where tuna is being fished. Nothing was changed with regards to the ETP regime, which means that Mexican fishers need two certifications in order to be eligible for “dolphin-safe” label. This reflects the fact, that according to the ruling the dolphin protection was legitimate, but it was not strong enough. As we will see, similar conclusion was reached in *US-Seal regime case*. *US-Tuna II (Mexico)* could, therefore, be regarded a significantly influential for the seal case ruling.

f) The importance of the Appellate Body’s decision

¹⁰⁰ *Ibid.*, p. 127.

Appellate Body's report represents a positive development for animal welfare protection under the WTO as so called "green barriers"¹⁰¹ were given possibility to be allowed under the TBT agreement. This dispute indicates that the WTO is not as hostile to animal protection as is often thought.¹⁰² The Report sends a reinforcing message to WTO members wishing to restrict trade to protect animal welfare. It became apparent that in the clashes between economic and animal interests, the latter ones are becoming to be legitimate restrictions to trade, creating important precedents for the future disputes. Moreover, even though this case was concerned with wildlife, its rationale may be applied to practices that are harmful to other animals such as farm or laboratory animals. "As a result, addressing specific animal production methods on a worldwide basis without violating WTO principles may be easier."¹⁰³ The final decision thusly represents a remarkable development in the incorporation of environmental interests within the WTO law and in the broader context concerning the trade and environmental values.¹⁰⁴

2) SHRIMP/TURTLE CASE

a) Context of the Shrimp/Turtle case

Present case¹⁰⁵ is related to the *US Animal Act 1973 on Endangered Species* that listed all turtles occurring in US territorial waters as threatened and

¹⁰¹ DUNOFF, Jeffrey, L., "Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect?", *Washington and Lee Law Review*, Vol. 49, No. 4, (1992), p. 1408.

¹⁰² KALININA, Maria, *op. cit.*, p. 443.

¹⁰³ *Ibid.*, p. 444.

¹⁰⁴ SIFONIOS, David/ ZIEGLER, Andreas, *op. cit.*, p. 123.

¹⁰⁵ *United States- Import Prohibition of Certain Shrimp and Shrimp Products*, Panel Report, WT/DS58/R, 15 May 1998 (*US-Shrimp*). *United States- Import Prohibition of Certain*

endangered species and banned their capture¹⁰⁶ in US territorial waters, as well as on the high seas.

Afterwards, research programmes were conducted showing that process of shrimp capture carried out by shrimp trawlers is a substantial source causing mortality of sea turtles. The United States National Marine Fisheries Service, in order to decrease the mortality of turtles, has developed a special device for shrimp extraction (so called TED devices) that allowed larger items to be evicted from the collection nets. TED devices eliminate 97% of marine accidental marine tortoises and camouflage nets. TEDs have been required for harvesting boats in the United States since 1990 in demarcated protected turtle zones.

In 1989, the United States enacted *Section 609* of Public Law 101-162 which provided a ban on the importation of shrimp caught using techniques capable of harming sea turtles. The ban did not apply to countries that were able to demonstrate that they had an appropriate national program to protect turtles, and the number of individuals accidentally killed is comparable to that of the United States; or to countries in whose waters the protected species concerned did not live. In 1991 and 1993 the US issued supplementary regulations containing the details necessary for Acts application, such as how to assess the acceptability of other countries' protection policies and certification criteria for importers of shrimp products into the US. Pursuant to these

Shrimp and Shrimp Products, Appellate Body Report, WT/DS58/AB/R, 12 Oct. 1998 (US-*Shrimp AB*).

¹⁰⁶ Targeted, incidental and unwanted.

regulations, the ban was applied only to countries in Caribbean and Atlantic region.

In the mid-1990s, a group of environmentalists in the United States won a federal lawsuit requiring the government to enforce legislation globally.¹⁰⁷ As a result, the US proceeded to embargo shrimp imports from all non-compliant nations as of May 1, 1996. Nine states have adopted programs that met the US standards and obtained certificates that allow the import of shrimp into US territory. An embargo was imposed on imports of shrimp caught on other vessels.

b) Position of India, Pakistan, Malaysia and Thailand in the Shrimp/Turtle case

Five months later, India, Pakistan, Malaysia and Thailand, states that had not taken measures in line with the above requirements and were unable to export shrimp, filed complaints before the Dispute Panel asserting that the US violated Articles I (1),¹⁰⁸ XI (1) and XIII (1) GATT. As a result, these violations created “a nullification and impairment of benefits” conceded under GATT.¹⁰⁹ Moreover, they challenged US’ claim according to which their measures are protected by Article XX GATT. Violation of the Articles I (1) consisted in the fact that the US was restricting imports from non-certified countries, while the same products from certified countries could be freely imported into the

¹⁰⁷ *Earth Island Inst. v. Christopher*, 20 C.I.T. 1221, 942 F. Supp. 597 (Ct. Int’l Trade 1996).

¹⁰⁸ Art. I GATT represents the “Most Favorite Nation” treatment according to which members of the WTO have to provide any privileges, concessions or immunities granted to one country, to all other WTO members.

¹⁰⁹ United States- Import Prohibition of Certain Shrimp and Shrimp Products: First Written Submission of Thailand (May 20, 1997) WT/DS 58, p. 22. [hereinafter First Submission of Thailand].

US.¹¹⁰ “This differentiated treatment is based solely on the method of harvest and the conservation policies of the government under whose jurisdiction the shrimp is harvested.”¹¹¹ The claimants stated that the nature of the product is the same, having the same physical features, end-uses and tariff classifications, plus they are perfectly substitutable.¹¹²

The different conditions for like products coming from certified and non-certified countries also violated Article XIII (1) as “wild shrimp harvested by use of TEDs are forbidden entry into the United States if harvested by a national of a non-certified country, while shrimp harvested by use of TEDs by a national of a certified country are permitted entry into the United States.”¹¹³ Next, the inconsistency with Article I (1) and XIII (1) also lies in the fact that “initially affected countries were given a phase-in period of three years, while newly affected nations generally received only a four month notice (...) to adopt a programme complying with the US requirements.”¹¹⁴ This means that initially affected countries could implement the use of TEDs without serious interruption in their shrimp trade to the US.¹¹⁵ “Products from these countries have therefore been given an “advantage, favour, privilege or immunity” over like products

¹¹⁰ *United States- Import Prohibition of Certain Shrimp and Shrimp Products*, Panel Report, WT/DS58/R, (adopted May 15, 1998), ¶ 7.18. [hereinafter the Shrimp-Turtle Panel Report].

¹¹¹ *Ibid.*

¹¹² *Ibid.*, ¶ 7.20.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*, ¶ 7.19.

¹¹⁵ *Ibid.*

originating in the territories of other Members (...).¹¹⁶ The result is that the US had implemented the provision in a way that unfairly discriminated against certain countries.

The challengers claimed that the US measures were inconsistent with Article XI GATT, which generally prohibits quantitative restrictions on imports and exports. The embargo on shrimps was “a prohibition or restriction” on shrimp and shrimp products importation and conditioning the import by the obligation to install TEDs on the vessels is an “unreasonable restriction” on trade.¹¹⁷ Furthermore, they challenged the contention according to which the embargo was covered by the exceptions b) and g) of the Article XX GATT. They reasoned that the Article XX b) represents measures “necessary to protect human, animal or plant life or health”, however this Article does not allow *expressly* the members to adopt measures in relation to animals that are located within the jurisdiction of *another* contracting party. Therefore, Article XX cannot permit such measures. Because the GATT text is silent on the extraterritoriality of environmental protectionist measures, it should be interpreted according to Articles 1.2, 2.1 and 2.7 of the Charter of the United Nations. These Articles establish the principle of sovereignty and non-interference. As a result, United States did not have the right to force national conservation policies on other member countries. US could not adopt trade restrictions based on their own environmental principles to fishing

¹¹⁶ *Ibid.*

¹¹⁷ United States- Import Prohibition of Certain Shrimp and Shrimp Products: First Written Submission of Pakistan (May 20, 1997) WT/DS 58, *supra* note 99, p 4.

carried out outside of their territory.¹¹⁸ “On the classical principles of the Pacific fur seal arbitration, this is an argument which should have prevailed, and easily so, as it had done in earlier decisions.”¹¹⁹ With regards to Article g), they stated that it covers only physical resources that are located within the jurisdiction of the member that adopted the measures.¹²⁰ They argued that the term “exhaustible natural resources” in Article XX (g) GATT as including only “finite resources such as minerals, rather than biological or renewable resources.”¹²¹ If “all natural resources were considered to be “exhaustible”, the term “exhaustible” would be rendered superfluous.”¹²² Moreover, the claimants contended that *Section 609* obstructed commerce in an industry worth \$ 2.5 billion annually.¹²³

c) Position of the USA in the Shrimp/Turtle case

United States responded by arguing that *Section 609* was justified within GATT Article XX, letter b) and g) which allowed exceptions to GATT principles “necessary to protect human, animal, or plant life or health (or) related to conservation of exhaustible natural resources”. The US officials argued that the objective of the *Section 609* is to “protect and conserve the life and health of sea turtles”¹²⁴ and that the shrimp

¹¹⁸ The Shrimp-Turtle Panel Report, *op. cit.*, ¶ 7.24.

¹¹⁹ SANDS, Phillippe, “Turtles and Torturers: The Transformation of International Law”, *New York University Journal of International Law and Politics*, Vol. 33, No. 2, (2001), p. 531.

¹²⁰ First Submission of Thailand, *op. cit.*, *supra* note 94, pp. 13-15

¹²¹ Shrimp-Turtle Panel Report, *op. cit.*, ¶ 3.237.

¹²² *Ibid.*

¹²³ *Ibid.*, ¶ 3.118, ¶ 3.120, ¶ 3.121.

¹²⁴ *Ibid.*, ¶ 7.48.

production operations constituted the depletion of an “exhaustible national resource”.¹²⁵ With regards to extraterritorial claims, the US contested that Articles XX (b) and (g) “contain no jurisdictional limitations, nor limitations on the location of the animals or natural resources to be protected and conserved and that, under general principles of international law relating to sovereignty, States have the right to regulate imports under their jurisdiction.”¹²⁶

d) Panel’s decision in the Shrimp/Turtle case

In May 1998, the Panel ruled that *Section 609* was inconsistent with Article XX of the GATT and, therefore, constituted an illegal import restriction. The ban, according to the Panel created an unjustifiable and arbitrary discrimination between countries where the same conditions exist, and therefore does not correspond to the chapeau of the Article.¹²⁷ The reason for this finding could be that if countries were allowed to take similar measures, world trade would be subject to undesirable destabilization. Due to the inconsistency of the contested measure with the chapeau of Article XX, the Panel did not further address its relationship to paragraphs (b) and (g). Therefore, the Panel, with its “chapeau-down” approach did not decide whether the sea turtles protected by the Section 609 are “exhaustible natural resources” for purposes of Article XX(g).

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*, ¶ 7.24.

¹²⁷ *Ibid.*, ¶ 7.62.

Many analysts expected this result, as the GATT court ruled against a similar restriction in the United States on tuna imports analysed above. However, United States appealed this decision. Five months later, the WTO Appellate Body partially reversed the original panel decision.

e) Appellate Body's decision in the Shrimp/Turtle case

The essential difference with Panel's decision is that Appellate Body rejected the approach of examining the compliance of the US measures with the introductory paragraph of Article XX before first examining their admissibility in the light of paragraphs (b) and (g), as it would be consistent with the logic and structure of the Article. Thus, the Appellate body conducted two-tiered analysis, first revising whether US ban was consistent with the paragraphs (b) and (g), and only afterwards looking into its compliance with the chapeau of the Article XX. Appellate body decided that US measure could be justified under the letter (g) of Article XX, however the analysis of its compliance with the chapeau did not pass the test as it was found discriminatory.

In order for the measure to be justified under Article XX (g), it must be a measure "relating to" the conservation of exhaustible natural resources. A measure is considered "related to the conservation of natural resources" if it has a "substantial relationship" with such conservation without this being a merely incidental or fortuitous objective.

Here, the petitioners argued that the term “exhaustible natural resources” refers to resources with a limited lifespan¹²⁸ and it cannot be applied to living creatures such as turtles. The Appellate Body rejected this interpretation, stating that science has shown that living species are endangered under extinction in particular due to human behaviour. The Appellate Body stated that “living resources” can have a “limited lifetime”.¹²⁹ Although Article XX of the GATT was formulated more than 50 years ago and was not amended during the Uruguay Round, its provisions must be interpreted in the light of the international community's current care for the protection and preservation of the environment, as set out in the preamble to the WTO Agreement and other documents that emphasize the issue of sustainable development.¹³⁰ According to the Appellate Body, under the provisions of the Preamble to the WTO Agreement, the meaning of the term “natural resources” in Article XX (g) is not a “static” term, but rather an “evolutionary” one. The Appellate Body also noted that in the context of modern international conventions and declarations, we often encounter reference to natural resources, which include both living and mineral resources.¹³¹ Appellate Body reached this decision after having studied United Nations Convention on the Law of the Sea, CBD,¹³²

¹²⁸ For example, minerals.

¹²⁹ Appellate Body Report, *United States- Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, (adopted October 12, 1998), ¶ 128. [hereinafter *Shrimp-Turtle Appellate Body Report*].

¹³⁰ *Ibid.*, ¶ 129.

¹³¹ *Ibid.*, ¶ 130.

¹³² Convention on Biological Diversity of The United Nations Environment Program adopted 1992 in Rio de Janeiro.

CITES,¹³³ Agenda 21¹³⁴ and their definitions of “natural resources”. Thus, Appellate Body stated that the measure in question could be provisionally justified by paragraph (g). Protected turtle species were an “exhaustible natural resource” within the meaning of paragraph (g), and section 609 of US law was a measure that aim to protect those resources. Hence, US “had a legal interest in the protection of the shared but endangered natural resource represented in the declining population of the sea turtles.”¹³⁵

After deciding that the measure complies with the conditions established in the paragraph (g) of Article XX GATT, Appellate Body proceeded to examine its conformity with the conditions stated in the preamble of the Article XX. The preamble prescribes, as we already analysed in the previous chapter, that in order to justify the measure within the Article XX, this measure cannot be applied in a way that would constitute an arbitrary or unjustifiable discrimination between the countries or a disguised restriction on international trade. The conditions in the preamble refer expressly to the manner in which the measure is *applied* rather than to its specific content. The lack of flexibility of the measure (the fact that the measure does not take into account the different situations that may exist in the exporting countries) could constitute a case of unjustifiable or arbitrary discrimination.

¹³³ Convention for International Trade of Endangered Species of Wild Fauna and Flora adopted 1973 in Washington.

¹³⁴ Agenda 21, United Nations Conference on Environment and Development, adopted 1992 in Rio de Janeiro.

¹³⁵ SANDS, Phillippe, *op. cit.*, p. 531.

The Appellate Body agreed with the Panel that the United States had unjustifiably discriminated between exporting countries in its application of the sea turtle law, which was contrary to the chapeau of Article XX as developing countries did not have the technical capacity or sufficient resources to use TED and the US did not take it into account in their measure.¹³⁶ That is why the measure was not flexible- it did not take into account the specific situation of exporters.¹³⁷ The rest of the conditions of Article XX were met and so the Appellate Body found that Section 609 was included in the GATT Article XX exemptions.

Consequently, Appellate Body's decision found that, although the US measure was taken to protect and preserve the environment and acted under Article XX (g) of the GATT 1994, the manner in which the GATT was applied constituted unjustified and unjustifiable discrimination against WTO members, contrary to the provisions of the introductory part. Article XX of the GATT.¹³⁸

¹³⁶ Shrimp-Turtle Appellate Body Report, *op. cit.*, ¶ 177.

¹³⁷ The United States announced in November 1998 that it would revise Section 609 to comply with the Appellate Body's recommendations regarding non-discrimination. In order to comply with the recommendations of the Panel and the Appellate Body, the United States revised its measure and made access to its market conditional on the adoption of a program comparable in effectiveness (and not essentially the same. That is, countries do not have the TED but they can use other nets or another type of capture that has effects comparable to TED) to that of the United States. In US - Shrimp (Art. 21.5), the Appellate Body considered that this allowed a sufficient degree of flexibility in the application of the measure to avoid "arbitrary or unjustifiable discrimination". It also offered to provide technical assistance to developing countries willing to use TEDs.

¹³⁸ Shrimp-Turtle Appellate Body Report, *op. cit.* ¶ 186.

WTO, in its publication *10 Things the WTO Can Do*,¹³⁹ explained that this decision did not mean that measures protecting environment are *ipso facto* contrary to the WTO trade rules. Nor it means that the WTO is favouring trade rather than the environment. It simply means that when a measure discriminates against products from other countries, then the measure violates the trade rules. “If it were equally tough (or equally lenient) on goods from all sources, it would be legal.” Hence, the WTO allows its members to protect for example endangered species, provided that they do it justly, without benefiting their own industries.

f) The importance of the Appellate Body’s decision

Present decision is a turning point in the history of the WTO Dispute Settlement System. Trade restrictions based on the protection of certain animals were approved as legitimate justifications for the first time in the WTO and GATT history. For the first time it was decided that a unilateral national measure with extraterritorial effects can be upheld on environmental grounds. Thusly, Member States may, in certain circumstances¹⁴⁰ use trade restrictive measures to protect the global natural resource and thus introduce measures with extra-jurisdictional application. Robert Zoellick, US Trade Representative said that this decision “shows that the WTO as an institution recognizes the legitimate environmental concerns of its Members.”¹⁴¹ Further, this case

¹³⁹ WTO, “10 Things the WTO Can Do”, https://www.wto.org/english/thewto_e/whatis_e/10things_e/10things00_e.htm.

¹⁴⁰ In this case the conservation of an exhaustible natural resource.

¹⁴¹ ZOELLICK, Robert, “US Wins WTO Case in Sea-Turtle Conservation”, https://ustr.gov/archive/Document_Library/Press_Releases/2001/October/US_Wins_WTO_Case_on_Sea_Turtle_Conservation.html.

clarified the criteria necessary for the application of the GATT's General Exemptions.

Appellate' Body conclusion can be regarded as quite bold. Its result is that, as Sands puts it, "a legal interest now exists where previously there had been none, under general international law and within the WTO context."¹⁴² This decision seems to go hand in hand with the prevailing sentiments and tendencies in the field of international and domestic policies with regards to animal welfare and protection of environment. Therefore, its adoption could also be assessed as logical and natural reaction, particularly in the circumstances in which environmental problems and animal welfare questions become more predominant and as a result, they interfere with increased frequency, with the world trade rules.

3) WHALING IN ANTARCTIC CASE

a) Context of Whaling in Antarctic case

The Antarctic legal regime is as unique as the continent itself. This international regime was created in the year 1959 by twelve states via the adoption of The Antarctic Treaty.¹⁴³ It was a result of the previous successful collaboration of scientists during the International Year of

¹⁴² SANDS, Phillipe, *op. cit.*, p. 531.

¹⁴³ The Antarctic Treaty. Washington, 1 Dec. 1959, Registration no. 5778. This treaty became a fundamental pillar of the Antarctic legal regime. The process of creating a comprehensive Antarctic Treaty System was launched, which also focuses on the protection of marine living resources. However, the ATS does not address the issue of whaling. Contracting States have decided not to regulate whaling to the extent that it is regulated by the International Whaling Commission.

Geophysics on polar and upper atmosphere research.¹⁴⁴ The Antarctic Treaty limited the territorial claims of those states which exercised them before the treaty's adoption. However, states have only undertaken not to pursue territorial claims against Antarctica for the duration of the *Antarctic Treaty*. We talk therefore about “freezing” of territorial claims of different States.

Article 2 of the Protocol on Environmental Protection to the Antarctic Treaty¹⁴⁵ designates Antarctic environment and its dependent and associated ecosystems as a “natural reserve devoted to peace and science”. Antarctica can be used only for peaceful purposes¹⁴⁶ and principles of scientific liberty¹⁴⁷ and international cooperation in scientific investigation apply.¹⁴⁸

Concerning the whaling in Antarctic, Antarctic Treaty does not regulate this matter. It is the International Convention for the Regulation of Whaling¹⁴⁹ that entered into force in 1948 that focuses on this area. The ICRW is also a founding document of the International Whaling Commission.¹⁵⁰

b) Legal regime of whale hunting

¹⁴⁴ It took place between 1957-1958.

¹⁴⁵ Protocol on Environmental Protection to the Antarctic Treaty. Madrid, 4 October 1991, Registration no, 5778 (entered into force 14. Jan. 1998).

¹⁴⁶ *Ibid.* Preamble.

¹⁴⁷ *Ibid.* Art. 2.

¹⁴⁸ *Ibid.* Art. 3.

¹⁴⁹ Hereinafter the ICRW.

¹⁵⁰ Hereinafter the IWC.

The IWC adopted a global moratorium on commercial whale hunting.¹⁵¹ The only states still hunting for commercial purposes are Norway and Iceland.¹⁵² However, Article 8.1 of The ICRW allows Parties to kill, capture and process whales for *scientific* research. Permits for such hunting are granted by individual *governments*, which are also responsible for setting and regulating catch limits for this purpose. Regulation of scientific whaling is, therefore, not within the remit of the IWC. Nonetheless, Contracting Governments shall promptly notify the IWC of the granting of all such permits. The IWC then comments on these submitted scientific programs in a resolution. Criteria for assessing the need for and suitability of individual scientific research programs include for example, feasibility of research without the use of deadly research methods, substantial contribution to better management of whale populations, number, age and sex of whales needed to carry out research, the need for research in terms of the need for research data for further research, the likelihood of obtaining reliable answers to research questions, etc. However, the IWC's resolutions on submitted scientific programs are not legally binding and contracting governments need not follow the IWC's views in this regard.

c) Japan and whale hunting

Until 2019 Japan was bound by the ban on commercial hunting¹⁵³ and therefore made use of the provisions of Article 8.1. ICRW, which places

¹⁵¹ IWC, 34th Annual Meeting, Agenda item 6, July 1982, Brighton.

¹⁵² These countries have set their own limits for whale fishing. However, they must provide information on their catches and related scientific data to the IWC. Also, both countries operate whaling in their exclusive economic zones.

¹⁵³ In 2019 Japan left the IWC.

whaling for scientific purposes outside the remit of the IWC and it has launched large-scale scientific research programs such as JARPA II.¹⁵⁴ It was an indefinite research program with aim to catch about 950 individuals a year within the Whale Reserve. Following unsuccessful efforts by the IWC to discourage Japan from continuing the JARPA II scientific program or at least to limit it to research methods that do not require the killing of cetaceans, especially in the Southern Ocean Whale Reserve, this situation resulted in a lawsuit between Australia¹⁵⁵ and Japan in 2010 (with New Zealand's intervention) before the International Court of Justice.¹⁵⁶

d) Australia's position towards Japanese "scientific" whale hunting

Australia has argued that while Japan allegedly stopped commercial whaling, it essentially replaced it with scientific whaling, which was introduced immediately after the moratorium on commercial whaling. Austria therefore claimed that the JARPA II program was not a whaling program for the purposes of scientific research within the meaning of Art. VIII of the Convention. Moreover, Australia claimed that Japan

¹⁵⁴ Japanese Whale Research Program under Special Permit in the Antarctic.

¹⁵⁵ Australia administers the *Australian Antarctic Territory* (AAT), which is one of Australia's external territories under Australian law but is officially recognized internationally only by Norway, France, United Kingdom and New Zealand. Australia argues that its sovereignty is based on the effective occupation of the coast three permanent bases, in accordance with the principles of international law. Antarctic waters belonging to this area have become part of the dispute between Japan and Australia. In 1999, Australia established The Australian Whale Sanctuary (AWS) to protect whales and dolphins in Australian waters from hunting, governed by the Environmental Protection and Biodiversity Conservation Act. As Japan is one of several states that did not explicitly recognize Australia's territorial claims in Antarctica, the emergence of the AWS did not affect its whaling activities in these waters under its JARPA program.

¹⁵⁶ Hereinafter, the ICJ.

did not prove sufficiently the importance of the program for scientific purposes, meaning that it could not be justified under Article 8.1 ICRW. Also, all three species fished by Japan belonged to Appendix 1 of CITES which requires the existence of exceptional circumstances to allow trade in such species and the introduction of a special certificate, that the specimens will not be used preferentially for commercial purposes. With regards to the obligations imposed on Japan by the CBD, according to Australia, hunting under JARPA II violated Article 3 of the CBD, which requires States to ensure that activities under their jurisdiction or supervision do not cause damage to the environment of other States or territories beyond their national jurisdiction; further infringed Article 5 of the CBD, which requires it to cooperate with other Parties, directly or through competent international organizations, on matters of mutual interest in the conservation and sustainable use of biodiversity; and also violated Article 10 (b) of the CBD, which provides that each Party shall take measures regarding the use of biological resources that minimize or avoid adverse impacts on biodiversity.

As a result, Australia asked the International Court of Justice to confirm that Japan has breached its obligations under international law by implementing the JARPA II program in the Southern Ocean Whale Reserve. In addition, Australia has requested that the ICJ order Japan to suspend the implementation of JARPA II, revoke all authorizations allowing activities under dispute, and provide assurances that it will refrain from any further activities under JARPA II or a similar program until the program will not be brought into line with its international obligations.

e) The ICJ's decision in Whaling in Antarctic case

The ICJ ruled on this matter in 2014.¹⁵⁷ First of all, it stated that it could not decide on the compliance of the scientific whaling itself with international law. It could only assess whether JARPA II complied with Article VIII of the ICRW. Thus, the ICJ could verify whether Japan's research program was justified under the ICRW. The court stated that "However, whether the killing, taking and treating of whales pursuant to a requested special permit is for purposes of scientific research cannot depend simply on that State's perception."¹⁵⁸ ICJ also did not define criteria for the research whaling. Next, ICJ stated that in order to gain new scientific data, it is allowed to kill whales, however Japan did not consider sufficiently other research methods that would not require whaling. Another issue was that Japan did not even start to analyse its findings from previous research programs before starting new JARPA programme; findings from first six years of JARPA II programme were not satisfactory, there was no collaboration made with other institutions and the research lacked transparency. This suggested that the real reason behind the whaling was not science but rather capture for commercial purposes. ICJ therefore decided that the exemptions for whaling granted for JARPA II did not meet the requirements of Art. VIII of ICRW, and that whaling in a whale

¹⁵⁷ *Whaling in Antarctic (Australia v. Japan: New Zealand intervening)*, Judgement, I.C.J. Reports, (adopted March 21, 2014).

¹⁵⁸ *Ibid.*, ¶ 61.

sanctuary is generally contrary to international law and must be stopped.¹⁵⁹

f) The importance of the ICJ's decision

We regard that the judgement did not use the potential of this case to its maximum. ICJ left many blank spaces that will very probably lead to new disputes and new attempts for misuse of scientific whaling. The ruling is “noteworthy for its silences, its omissions, its lacunae.”¹⁶⁰ One of the disappointments was that judges did not formulate criteria for scientific whaling, leaving it entirely on respective governments. Many also showed despair as the court did not decide to completely prohibit whaling in the name of science.¹⁶¹ Also, no definition of scientific research was provided. These issues are already materialized as Japan adopted in 2014 program called NEWREP-A¹⁶² and NEWREP-NP.¹⁶³ Finally, in 2019 Japan left IWC in order to resume commercial whaling.

On the other hand, this ruling was at its time undoubtedly a groundbreaking victory for whales. It indicated preferred future development for scientific whaling that includes the need of the authorizing government to take into account the views of the Commission and the

¹⁵⁹ *Ibid.*, ¶ 227.

¹⁶⁰ TAMS, Christian, “Roads Not Taken, Opportunities Missed: Procedural and Jurisdictional Questions Sidestepped in the *Whaling* Judgment”, p. 198, in FITZMAURICE, Malgosia/ TAMADA, Dai, (ed.), *Whaling in the Antarctic: Significance and Implications of the ICJ Judgment*, Leiden 2016.

¹⁶¹ CLAPHMA, Phillip, “Japan whaling following the International Court of Justice Ruling: Brave New World or Business as Usual?”, *Marine Policy*, Vol. 51, (2014), pp. 238-241.

¹⁶² New Scientific Whale Research Program in the Antarctic Ocean.

¹⁶³ New Scientific Whale Research Program in the North Pacific.

Scientific Committee and to prefer non-lethal use methods for obtaining scientific information. The ruling is important as the Court interpreted Article 8 and in this way it might have “created a benchmark for how States may seek to legally challenge the conduct of whaling in international law.”¹⁶⁴ We can therefore understand it as rules of conduct for obtaining permits in the future. The proponents have to now explain in detail how will the obtained data contribute to the amelioration of the whale management schemes and they have to explain the necessity of usage of lethal methods.¹⁶⁵ These are some direct practical effects of the judgement. Through them the court established “high standard of review for special permit whaling”¹⁶⁶ obliging the proponents to have extensive technical and scientific arguments.

Moreover, the importance of this case was described by Judge Trindade in its dissenting opinion according to which “The present case on *Whaling in the Antarctic* has brought to the fore the evolving law on the conservation and sustainable use of living marine resources, which, in turn, has disclosed what I perceive as its contribution to the gradual formation of an *opinio juris* communis in the present domain of contemporary international law. *Opinio juris*, in my conception, becomes a key factor in the formation itself of international law (here, conservation and sustainable use of living marine resources); its incidence is no longer that of only one of the constitutive elements of

¹⁶⁴ SHIBATA, Akiho, “Conclusion: The Judgement, Its Implications and Prospects”, in FITZMAURICE, Malgosia/ TAMADA, Dai, (ed.), *Whaling in the Antarctic: Significance and Implications of the ICJ Judgment*, Leiden 2016, p. 389.

¹⁶⁵ SHIBATA, Akiho, *op. cit.*, p. 406.

¹⁶⁶ *Ibid.*

one of its “formal” sources. The formation of international law in domains of public or common interest, such as that of conservation and sustainable use of living marine resources, is a much wider process than the formulation of its “formal sources”, above all in seeking the legitimacy of norms to govern international life.”¹⁶⁷

4) THE EC- SEAL PRODUCT CASE

Our jurisprudential analysis was started by describing the “Old World” on the example of the *Exploitation or Preservation of Pacific Fur Seals case*. Controversy with seals in the spotlight comes up yet one more time. Now, it will, however, close our study on the “progress and the transformation” of the international legal order. It will reflect gradual inclusion of animal interests in international arena and illustrate important developments in favor of animal wellbeing.

Following questions will be clarified: did the WTO dispute settlement system follow the traditional approach according to which in the absence of a precise rule limiting state’s sovereignty, the tribunal should conclude that no such limitation is possible? Or did it opt for a more progressive attitude, when in the absence of such a rule, the tribunal takes into account interests and concerns of society, overcomes uncertainty and adopts a new position? Did the WTO follow the advances achieved in the previous cases analyzed in this subchapter? Let us proceed now to the analysis of this case in order to find the answers.

¹⁶⁷ *Whaling in Antarctic (Australia v. Japan: New Zealand intervening)*, Separate Opinion of Judge Cançado Trindade, I.C.J. Repors, (adopted March 21, 2014), ¶ 89.

a) *Progressive regulation of animal interests in the EU law*

The motive for this controversy was the adoption of a *Regulation No. 1007/2009 on Trade in Seal Products*¹⁶⁸ and its *Implementing Regulation No. 737/2010*.¹⁶⁹ The primary aim of these instruments was the protection of public morals of EU citizens with respect to cruel seal hunting. Therefore, the general ban of importation and marketing of seal products within the EU was adopted. This was the first case where the Article XX (a) of GATT 1994- *restriction of trade necessary for protection of public morals*- was used in relation to animal protection. The final Report of WTO's Appellate Body is considered as a landmark decision, materializing the development of society and decision bodies with regards to animal welfare issues.

The Regulations banning importation and marketing in seal products was not adopted out of the blue. European Union is leader in animal welfare laws. It had been especially concerned with the way seals are killed for decades even though seal hunting is predominant outside of the EU- especially in Arctic areas, in Canada, Iceland, Greenland, Namibia, Norway, Russia. Within the EU, seal killing takes place in Sweden, Finland and UK.¹⁷⁰ From the 1950ties, concerns regarding

¹⁶⁸ Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, *OJ L 286*, 31.10.2009, [hereinafter Regulation (EC) 1007/2009].

¹⁶⁹ Commission Regulation (EU) No 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products, *OJ L 2016*, 17.8.2010.

¹⁷⁰ European Food Safety Authority, "Opinion of the Scientific Panel on Animal Health and Welfare on a request from the Commission on the animal welfare aspects of the killing and skinning of seals", *The EFSA Journal* (2007), 610, p. 14.

unethical production practices of seal products started to emerge thanks to the awareness campaigns of animal welfare groups such as The Sea Shepard Conservation Society,¹⁷¹ International Fund for Animal Welfare,¹⁷² The Humane Society of United States,¹⁷³ The Seal Protection Action Group,¹⁷⁴ Franz Weber Foundation¹⁷⁵ and others. From this period onwards, animal protection organizations broadened the concepts of animal welfare to include not only companion animals, but also wildlife, farm animals, animals used in laboratories and others.¹⁷⁶

On the EU level, first reaction towards seal welfare happened in the year 1983 through the *Council Directive 83/129 on the prohibition of importation of skins of certain seals pups and products derived therefrom*.¹⁷⁷ This was a direct reaction to shrinking population of certain seal families as a result of commercial hunting.¹⁷⁸ Moreover, as noted in the Directive, some Member States had already adopted measures to restrict or ban the importation and marketing of harp and hooded pup seal skins.

¹⁷¹ See more at: SEASHEPARD, “Standing fast on the front lines of marine conservation since 1977”, <https://www.seashepherdglobal.org/who-we-are/history/>.

¹⁷² See e.g., IFAW, “Our history”, <https://www.ifaw.org/eu/about/history>.

¹⁷³ See e.g., HUMANSOCIETY, “Sea Lions & Seals”, <https://www.humanesociety.org/animals/sea-lions-seals>.

¹⁷⁴ See e.g., SEALACTION, “History of SPAG”, <https://www.sealaction.org/about>.

¹⁷⁵ See e.g., FFW, “Protection of Seals”, <https://www.ffw.ch/en/story/protection-of-seals/>.

¹⁷⁶ PHELPS, Norman, *The Longest Struggle: Animal Advocacy from Pythagoras to PETA*, New York 2007, p. 192.

¹⁷⁷ Council Directive 83/129/EEC of 28 March 1983 concerning the importation into Member States of skins of certain seal pups and products derived therefrom, *OJ L 91*, 9.04.1983.

¹⁷⁸ Harp seals *Pagophilus groenlandicus* and Hooded seals *Cystophora cristata*.

According to the Directive, the Member States had to adopt or maintain all necessary measures to ensure that the products listed in the Annex are not commercially imported into their territories.

Another essential document taken by the EU was the *Directive 92/43* from 1992 *on the conservation of natural habitats and of wild fauna and flora*.¹⁷⁹ Its aim is to promote the maintenance of biodiversity and restoration of natural habitats and species of Community interests,¹⁸⁰ among them also seals. Directive prescribes that Member States had to prohibit the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of species included in the Annex II.¹⁸¹

Seal welfare was tackled not only on the EU level. Many Member States were also proactive in promoting seal protection and setting the standards for their hunting. For example, *The Convention for the Conservation of Antarctic Seals*¹⁸² from 1972 gathers different countries, among them also many European, such as Germany, Italy, Poland, France, United Kingdom, Czech Republic. The members of the Convention agreed to ban the hunt of specific families of seals¹⁸³ in order to preserve them. In the same year United States banned the

¹⁷⁹ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, *OJ L 206*, 22.7.1992.

¹⁸⁰ *Ibid.*, Recital.

¹⁸¹ *Ibid.*, Article 15.

¹⁸² This convention forms part of Antarctic Treaty System.

¹⁸³ Southern elephant seal (*Mirounga leonina*), Leopard seal (*Hydrurga leptonyx*), Weddell seal (*Leptonychotes weddelli*), Crabeater seal (*Lobodon carcinophagus*), Ross seal (*Ommatophoca rossi*), Southern fur seals (*Arctocephalus australis*).

importation of all seal products. A step that motivated many other countries to adopt stricter rules.

Another treaty for the protection of seals worth mentioning is *The Agreement on the Conservation of Seals in the Wadden Sea* from 1990 between Germany, Denmark and Holland. Its goal is the enhancement of the cooperation between the Member States in the conservation of the seals living in the Wadden Sea.

In the following years the media started to publish more and more documents, photographs and videos capturing the inhumane commercial killing of seals, which led to the public outcry. It is the cuteness of these animals, their innocence and similarity with puppies that softens the emotions of people, and which led to strong public opposition towards seal hunt. European Union started to receive a big number of letters from NGO's, animal activists and general public, demanding the ban of these practices. European Parliament adopted a Declaration, that requested the Commission to draft a Regulation to ban the importation, exportation and selling of seal products. Among the reasons for this ban the Parliament mentioned the decrease in the seals population of 2/3 in comparison with the 1950ties and 1960ties,¹⁸⁴ the fact that 42% of the slaughtered seals examined by the experts may have been skinned whilst still conscious and that commercial sealers receive less than 5% of their income from sealing. Moreover, other states have already adopted strict bans in this area, such as USA, Mexico, Croatia, Belgium, Luxemburg or

¹⁸⁴ Declaration of European Parliament P6_TA (2006)0369 of 26 September 2006 on banning seal products in the European Union, *OJ C 306*, E/194, 15.12.2006.

Italy that took the seal welfare in their hands. Afterwards, the Council of Europe adopted a *Recommendation 1776*¹⁸⁵ on seal hunting highlighting the public morality debate in Europe¹⁸⁶ and inviting Member States practicing seal hunt to ban cruel sea killing methods and furthermore to prohibit hakapiks, guns and bludgeons.¹⁸⁷

Following the Declarations, the Panel on Animal Health and Welfare adopted a scientific opinion¹⁸⁸ as requested by the Commission. According to the report, more than 750, 000 seals were killed in commercial hunts each year.¹⁸⁹ A strong evidence suggested that effecting seal killing was not always guaranteed. “When seals are hit or shot, but are not dead, they may have to be hit or shot again or may they have to be moved or skinned whilst conscious, resulting in avoidable pain, distress, fear and other forms of suffering.”¹⁹⁰ It was also concluded that there have been practices when seals were conscious before being skinned or before being bled out. “Some methods of killing seals are inhuman *e.g.*, trapping seals underwater until they die and should not be used.”¹⁹¹ The effectiveness of the human hunting largely depends on the capabilities of individual hunters and also on the external circumstances such as weather and unpredictable movements of the animals. With regards to the control

¹⁸⁵ Council of Europe, Recommendation 1776 (2006) of Parliamentary Assembly of the Council of Europe of 17 November 2006 on Seal Hunting.

¹⁸⁶ *Ibid.*, Art. 9.

¹⁸⁷ *Ibid.*, Art. 13.1.2.

¹⁸⁸ European Food Safety Authority, *op. cit.*

¹⁸⁹ *Ibid.*, p. 3.

¹⁹⁰ *Ibid.*, p. 4.

¹⁹¹ *Ibid.*

system of human seal killing, the report concluded that it is almost impossible to secure it in the practice. This study played an important role in the future controversy as its findings were used as arguments by the EU as well as by the Panel and the Appellate Body.

Furthermore, the Commission requested an independent study called *Assessment of the potential impact of a ban of products derived from seal species*, created by the COWI consulting group. Within this study a public consultation took place- more than 73.000 people were asked about their opinion on seal killing. For the majority (87,4%) the hunt of adult seals was absolutely not acceptable. The public also disagreed with the hunting methods and with the justifications for commercial hunting. The data from this survey were also crucial as a reflection of public support for the ban.

As a consequence of all the above-mentioned facts- from growing number of states adopting seal welfare measures, pressure from NGO's to findings in the reports, a *Regulation 1007/2009 on Trade in Seal Products* was adopted, in order to eliminate the fragmentation of the EU internal market and to provide a harmonised rules while taking into account animal welfare considerations.¹⁹² The Regulation prohibited the importation and marketing of seal products unless they belong to one of the three exceptions:

- the IC exception (indigenous exception)
- the MRM exception (marine management exception)

¹⁹² EC Seal Regime case, Recite 10.

- the travelers' exception

The IC exception provided that “the placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence.”¹⁹³ The aim of the exception was the acknowledgment that Inuit hunt is an expression of their culture and identity as established in the United Nations Declarations on the Rights of Indigenous People. The MRM exception allowed the placement of seal products on EU market when they “result from by-products of hunting that is regulated by national law and conducted for the sole purpose of the sustainable management of marine resources.”¹⁹⁴ The last exception allowed the import of seal products for travellers if they have it for personal use only.

Such a strong ban (even though with exceptions) was justified by the difficulties with the control of compliance with animal welfare requirements: “given the conditions in which seal hunt occurs, consistent verification and control of hunters’ compliance with animal welfare requirements is not feasible in practice or, at least, is very difficult to achieve in an effective way.”¹⁹⁵ The regulation also acknowledged that „seals are sentient beings that can experience pain, distress fear and other forms of suffering”¹⁹⁶ and that “the hunting of

¹⁹³ *Ibid.*, Art. 3, para. 1.

¹⁹⁴ *Ibid.*, Art. 2 (b).

¹⁹⁵ *Ibid.*, Recital 11.

¹⁹⁶ *Ibid.*, Recital 1.

seals has led to expressions of serious concerns by members of the public and governments sensitive to animal welfare considerations.”¹⁹⁷ The *Implementing Regulation 737/2010* established further clarifications concerning the regime of exceptions and of various notions.

To conclude, above-mentioned regulations introduced a strong ban prohibiting placement of seal products on the EU market, which means that these products could not be placed on the market internally nor could they be imported. Among the seal products we can mention the skins, blubbers, their meat, fur used in fashion industry, or even pills with omega-3 seal oil.¹⁹⁸ Regulations were adopted after thorough examination of public concerns regarding inhuman seal hunting and after analysis of scientific evidence on the methods and processes of the hunts. Although several states adopted seal welfare laws, a harmonised regime was necessary in order to react to a public demand for seal welfare. The Regime included three exceptions, with IC exception being the most controversial one, as it permitted the seal hunt by the Inuit and other indigenous communities. The problem was that the EU did not establish any requirements for the Inuit community regarding their hunting methods and maintenance of seal welfare. This was seen as a contrary to the objectives of the Regime. Simply put, EU permitted the indigenous communities to continue with their traditional hunt and even to export their products to EU without addressing their

¹⁹⁷ *Ibid.*, Recital 4.

¹⁹⁸ Regulation 1007/2009 bans placing on the market „all seal products“ in the Art. 2, para. 2.

inhuman killing and skinning methods. Meanwhile, the commercial hunts were absolutely prohibited by the Regulations, restricting the trade in name of protection of morals sentiments against inhumane seal killing.

As a result, two countries suffering the most from EU actions- Canada and Norway, filed a complaint with the WTO, arguing that this ban was a technical regulation violating various TBT Articles¹⁹⁹ and stating that it was contrary to the principle of most favourite nation, principle of national treatment and violating the restrictions concerning quantitative limitations, all three of them regulated within the GATT.

b) Position of EU in the EC- Seal Product case

As we already know, European Union justified its seal regime using the general exception of public morals (Article XX(a) of GATT) stating that its objective is “to address the moral concerns of the EU public with

¹⁹⁹ Canada argued that the Seal Regime constituted a technical regulation in the virtue of Art. 1 of TBT. Moreover, it stated the Regime violated Art. 2.1, 2.2, 5.1.2 and 5.2.1 of TBT. According to the Art. 2.1, the WTO members should ensure with regards to the technical provisions that the imported goods have no less favourable treatment than that accorded to like products of national origin and like products originating in any other country. Art. 2.2 says that technical provisions should not create unnecessary obstacles in international trade. Art. 5.1.2 establishes that WTO members have an obligation to ensure that, in cases where a positive assurance of conformity with technical regulations is needed, governmental bodies cannot adopt assessment procedures that would create unnecessary trade obstacles. According to the Art. 5,2,1 those assessment procedures have to be undertaken and completed as expeditiously as possible and, in a no less favourable order for products originating in the territories of other Members than for like domestic products.

regard to the welfare of seals.”²⁰⁰ Moreover, EU asserted that “contributing to the welfare of seals by reducing the number of seals killed in an inhumane way can be regarded as being simultaneously a legitimate objective on its own and one of the instruments to achieve the first, broader and overarching, objective of addressing public moral concerns on seal welfare.”²⁰¹ To support its claim of protecting public morals, EU emphasized that “moral concern with regard to the protection of animals is regarded as a value of a high importance in the European Union, which is now expressly enshrined in its constitutional treaties.”²⁰² By this ban the EU wanted to avoid the partaking in the inhuman seal killing throughout the purchase of products derived from seals. The evidence of EU showed that its regime served to reach above-mentioned aims through protection of its citizens from morally repugnant seal products. In this way hundreds of thousands of seals were spared from an inhumane killing.²⁰³

To use the argument of public morals defence was a very courageous tactic. Article XX(a) of GATT was used only in two previous WTO cases²⁰⁴ not connected to the animal welfare issues. However, EU built its case on a well-constructed strategy. It was backed by the letters

²⁰⁰ Panel Report, *European Communities- Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 7. 274, WT/DS400/R, WT/DS401/R (adopted Nov. 25, 2013), [hereinafter EC Seal Products Panel Report].

²⁰¹ *Ibid.*, ¶ 7. 367

²⁰² *Ibid.*, ¶ 7.625.

²⁰³ *Ibid.*, ¶ 7. 434- 7.435.

²⁰⁴ *United States-Measures Affecting the Cross- Border Supply of Gambling and Betting Services*, WT/ DS258/AB/R (adopted Dec. 10, 2003); *China- Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audio-visual Entertainment Products*, WT/DS363/AB/R (adopted Jan. 19, 2010).

received from EU citizenry and animal welfare organizations demanding action on EU level as a result of higher media coverage of this issue. The public questionnaires also confirmed a vast support of the ban and the pressure from multiple NGO's was growing. Moreover, several Member States²⁰⁵ have already adopted limitations or bans in seal imports and marketing.

The elements, non-existent in the previous seal case, were crucial for advocating in the name of seals. Media, NGO's, International Organizations and public opinion showed their ability of exercising power for sake of animal wellbeing.

c) Position of Canada and Norway in the EC- Seal Product Case

The complainants argued that the EU Seal Regime could not be justified under the general exception of public morals. According to Canada public "concerns" cited by the European Union do not rise to the level of public morals, and the idea that the EU Seal Regime addressed public moral concerns rests on a false premise that the commercial seal hunt is inherently inhumane.²⁰⁶ Canada also questioned "the seriousness of the harm that might be expected to arise to public morals in the absence of the EU Seal Regime."²⁰⁷ In addition, Canada stated that the EU Seal

²⁰⁵ Croatia (in 2006- ban of the import of seal pelt), Italy (in 2005-adoption of a temporary ban on seal products), Germany (in 2006- Germany eliminated itself from commercial seal market), Austria (in 2007- ban of the sale of seal skin), Italy, Belgium (in 2007- complete ban on seal trade), the Netherlands (in 2007- complete ban of seal trade). Outside of EU: Mexico (in 2006- ban of trade in marine mammals and primate). After the adoption of EU Seal Regulations, in 2011, custom union of Russia, Kazakhstan and Belarus also banned the seal trade.

²⁰⁶ EC Seal Products Panel Report, *op. cit.*, ¶ 7. 627.

²⁰⁷ *Ibid.*, ¶ 7. 628.

Regime represented the most trade-restrictive measure even though less-restrictive measures such as certifications or labelling were available.²⁰⁸ The complainants questioned the coherence of the ban as well, as the slaughterhouses for farm animals and hunts of other wild animals were permitted in the EU.²⁰⁹ Petitioners therefore questioned the inconsistency of the IC exception. (How can Inuit hunts be morally acceptable for the EU citizens if they use other inhuman practices?).

d) Panel's decision in the EC- Seal Product case

In order to determine whether the seal ban could be justified by the general exception within the Article XX of GATT, the two-tier analysis had to be carried out. First of all, it was necessary to determine whether the EU Seal Regime fell under one of the exceptions of the Article XX, in this case, letter a- protection of public morals. Next, it was necessary to determine whether the measure satisfied the prescriptions in the chapeau of the Article XX. That is to say, the measure cannot be arbitrary, discriminative or represent a hidden commercial restriction.

(i) A measure necessary for public morals

The first step was therefore, to determine whether the seal ban was necessary for the protection of societal preferences, according to the Article XX (a). The condition according to which the trade restrictive measure has to be *necessary for public morals* is known as the necessity criterion. This criterion counts with a process of confronting different

²⁰⁸ *Ibid.*, ¶ 7. 468.

²⁰⁹ *EC- Measures Prohibiting the Importation and Marketing of Seal Products*: First Written Submission of Canada (Nov. 9, 2012) WT/DS 400, paras. 146-162.

factors, especially the contribution that the restrictive measure has for the achievement of its objectives, the importance of the values restricted by the measure, and the level of restriction of the commerce as a result of the measure. Moreover, the measure has to be compared with possible alternatives that are reasonably reachable, that are less trade restrictive and that contribute to the achievement of the objective.

The Panel concluded that the Seal Regime fell under the Article XX (a) of GATT, which was an unprecedented decision.²¹⁰ It was a landmark moment for the animal welfare movement. For the first time in the WTO history, the decision body decided that the exception of public morals can be used to justify trade-restrictive measures. The Panel concluded that other alternatives such as certifications of labelling would not reach the ban's objective- the protection of public moral, reduction of the number of killed seals and decrease of demand in seal products. This is because the alternative measures were not reasonably available "taking into account the risks that non-fulfilment of the European Union's objective would create."²¹¹

Moreover, Panel's opinion concerning the inhumane nature of seal hunt confirmed the EU stand. In the Panel's opinion, seal hunting was inherently inhuman for various motives. First, there is a significant difference between terrestrial wildlife hunt or slaughterhouses and seal hunt. Seal hunts took place in freezing temperatures with ocean waves and winds, with volatility of ice conditions which have impact of the

²¹⁰ EC Seal Products Panel Report, *op. cit.*, ¶ 7.639.

²¹¹ *Ibid.*, ¶ 7.3.3.3.5.

effective performance of the hunts.²¹² Consequently, hunters were experiencing difficulties with stunning the targeted animals accurately, not causing instantaneous death. This led to unnecessary suffering of the animals. Moreover, commercial motives for hunting led to increasing quantities of hunts which were conducted in a limited period of time, and which might additionally contribute to subjecting seals to the animal welfare risks as hunters did not dedicate enough time to each kill.²¹³ In order to protect EU citizens from products derived from such hunts and to protect their public morals, it was necessary to adopt the EU Seal Regime. By this argumentation the Panel rejected alleged incoherence of the Regime based on the premise that the EU allows exploitation of other animals. It is up to each WTO Member State to determine what is morally significant to its society and what is ethically not acceptable.²¹⁴

(ii) The chapeau of the Article XX

However, the analysis of the Article XX of GATT was not yet finished, as it was necessary to determine the compliance of the measure with the chapeau of the Article XX. To justify trade-restrictive measure with regards to the Article XX, the measure cannot be applied in the form that constitutes an arbitrary discrimination between the countries with similar conditions, it cannot create an unjustifiable discrimination

²¹² *Ibid.*, ¶ 7.187.

²¹³ *Ibid.*, ¶ 7.245.

²¹⁴ *Ibid.*, ¶ 7.389.

between those countries, and it cannot establish a hidden commercial restriction.

Therefore, the claims focused on the Seal Regime's exceptions, especially the discriminative consequences of the IC's exception on Canada and Norway in comparison with Greenland. The result of the inconsistency with chapeau of the Article XX of GATT was the violation of the principle of the *most favourite nation*. This was because the Inuit can be found mostly in Greenland, meanwhile in Norway and Canada their numbers are very small. It looked like the IC exception was designed especially for Greenland. "Greenland's majority Inuit population places more than half of the seal skins caught into the commercial market through Great Greenland, its vertically integrated seal hunting processing and seal product manufacturing system. In other countries where Inuit hunters place some of their seal products into the economy, they do so through the existing seal processing infrastructure. The numbers of Inuit hunters are generally too small to allow for separate processing industry in other countries, so that Inuit community outside of Greenland will have a difficult time taking advantage of the IC exception."²¹⁵ "In Greenland, where 90 per cent of the population are Inuit, half of the skins are consumed locally, and the other half are traded in and exported from Greenland."²¹⁶ In sum, the claim was that the IC exception violated the Article I, paragraph 1 of GATT as the advantages given to products under the IC exception

²¹⁵ COOK, Heather, "The EU's Seal Products Ban Tests the WTO's Public Moral exception", *Journal of Transportation Law, Logistics and Policy*, Vol. 81, No. 4, (2014), p. 321.

²¹⁶ EC Seal Products Panel Report, *op. cit.*, ¶ 7.285.

should have been given to all other products from WTO's Member States. The EU replied that the fact that in Canada or Norway live smaller Inuit population cannot be regarded as discriminative.²¹⁷ Panel agreed with the complainants and decided that the Seal Regime gave advantages to Greenland and threatened the competitive potential of Norway and Canada.²¹⁸

To conclude, the Panel decided that the Seal Ban could be justified under the Article XX (a) of GATT, which was an unorthodox decision, by which the Panel showed its flexibility and readiness to overcome narrow textualism. The ban was considered therefore as “genuine, nonpretextual desire to protect animals from cruelty.”²¹⁹ The fact that the WTO opened itself to trade restrictions based upon “noninstrumental rationales (expressions of intrinsic moral or spiritual beliefs)”²²⁰ was a big step forward. In this way the WTO respects pluralism and allows Member States to excuse their trade restrictions through justifications rooted in noninstrumental reasons.²²¹ However, the Panel disapproved with the IC and MRM exceptions for being discriminative and arbitrary, violating the chapeau of the Article XX of GATT.

²¹⁷ *Ibid.*, ¶ 7.591.

²¹⁸ *Ibid.* ¶ 7.651.

²¹⁹ HOWSE, Robert/LANGILLE, Joanna, “Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values”, *The Yale Journal of International Law*, Vol 37, No. 2 (2012), p. 393.

²²⁰ *Ibid.*, p. 367.

²²¹ *Ibid.*

e) Appellate Body's decision in the EC- Seal Product case

Panel's report was appealed by both complainants as well as by European Union. The Appellate Body agreed with the Panel's finding regarding the justification of the ban through public morals exception.²²² The Appellate Body allowed EU to restrict the trade in order to address citizen's moral opprobrium against inhuman seal hunting. In this way, the WTO abandoned narrow interpretations and accepted that the protection of animal welfare was not a "pretext for protectionism or an arbitrary response to a passing outburst of public sentiment."²²³

First it examined whether it was possible to determine that protection of public morals was indeed the primary objective of the Regulations, in the sense of the Article XX (a) of GATT. Appellate body confirmed Panel's finding that the primary aim was the protection of public interest in relation to seal welfare and conditions of inhumane hunts.²²⁴ The exceptions were considered as intents to mitigate negative effects of the ban on indigenous communities hunting seals traditionally. According to the EU, Regulations materialized a moral stand according to which citizens should not contribute to animal suffering without justifiable reason. The IC exception reflected according to EU this justifiable reason, as the objective here was to preserve the traditional cultural Inuit identity. Nevertheless, it was found that the IC exception and MRM

²²² Appellate Body Report, *European Communities- Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 6.1.b.i, WT/DS400/AB/R, (adopted Jun.16.2014), [hereinafter EC Seal Products Appellate Body Report].

²²³ HOWSE, Robert/LANGILLE, Joanna, *op. cit.*, p. 373.

²²⁴ EC Seal Products Appellate Body report, *op. cit.*, ¶ 5.1.6.7.

exception were arbitrary and unjustifiably discriminatory.²²⁵ This was because the Inuit exception allowed seal trade even though animal welfare standards for Inuit hunt were not set. In this way, the exception belittled the effectiveness of the ban. The Inuit could continue with their inhumane killing and seal skinning and EU was not concerned with the influence of these actions on public morals. The exception was therefore susceptible of misuse. In essence, the decision meant that “banning trade in seal products without exceptions would make a greater contribution to protecting EU public morals as to seal welfare and be consistent with the EU’s WTO obligations”²²⁶ and “[e]ssentially, the Appellate Body determined that the measure *did not go far enough* in achieving its objectives.”²²⁷

Appellate Body also examined whether Regulations contributed to decrease in demand in seal products and the number of inhumane hunts. Canada argued that decrease in demand does not have to necessarily lead to lowering the number of killed seals.²²⁸ Appellate Body concluded that by decreasing the demand the number of seals killed will probably drop.²²⁹

With regards to alternative measures, Appellate Body agreed with Panel that less restrictive measure that would achieve the same objectives as

²²⁵ *Ibid.*, ¶ 6.1.d.ii.

²²⁶ LURIÉ, Andrew/KALININA, Maria, “Protecting Animals in International Trade: A Study of the Recent Success at the WTO and in Free Trade Agreements”, *American University International Law Review*, Vol, 30, Issue 3, (2015), p. 449.

²²⁷ *Ibid.*, p. 450.

²²⁸ EC Seal Products Appellate Body report, *op. cit.*, ¶ 2.18.

²²⁹ *Ibid.*, ¶ 5.243.

EU Seal Regime was not at a disposal. Therefore, the ban was necessary to protect public morals of EU citizens.²³⁰

In order to comply with Appellate Body's decision, EU altered the Seal Regime through adoption of a *Regulation 1775/2015 which modifies the Regulation 1007/2009*.²³¹ First, the EU abandoned MRM exception²³² and clarified two other ones. Concerning the IC exception, the hunt has to be carried out in “for the subsistence and development, providing food and income to support the life and sustainable livelihood of the community, preserving and continuing the traditional existence of the community.”²³³ Hunts conducted by Inuit and other indigenous communities have to be carried out “with due regard to animal welfare in a manner which reduces pain, distress, fear or other forms of suffering experienced by the animals hunted to the extent possible, while taking into consideration the way of life of the Inuit and other indigenous communities and the subsistence purpose of the hunt.”²³⁴ This means that the IC exception applies only to “hunts that contribute to the subsistence of those communities.”²³⁵ Products complying with the exception have to be accompanied with the document issued by the

²³⁰ *Ibid.*, ¶ 5.279.

²³¹ Regulation (EU) 2015/1775 of the European Parliament and of the Council of 6 October 2015 amending Regulation (EC), No 1007/2009 on trade in seal products and repealing Commission Regulation (EU) No 737/2010, *OJ L 262*, 7.10.2015, [hereinafter Regulation (EU) 2015/1775].

²³² The MRM exception was abandoned as the differences between commercial hunts and hunts carried out for the sustainable management of marine resources is not sufficient to justify the exception.

²³³ Regulation (EU) 2015/1775, *op. cit.*, Recital 2.

²³⁴ *Ibid.*, Recital 3.

²³⁵ *Ibid.*

attesting bodies authorized by the EU.²³⁶ The traveller's exception was also clarified. The import of seal products is allowed if it is of "occasional nature and consists exclusively of goods for the personal use of travellers or their families."²³⁷ The nature and quantities cannot indicate their import for commercial reasons.²³⁸

f) The importance of the Appellate Body's decision in the EC-Seal Product case

The Appellate Body decision to uphold that Article XX (a) of GATT can be used to protect public morals in relation to animal welfare issues is unprecedented. Its importance for animal welfare is yet to be seen. Before this decision, the natural option for states protecting animals or environment through trade-restrictive measures would be Article XX (b) or (g) of GATT. That is to say, to demonstrate that the measures are necessary to protect human, animal or plant life or health or that the measures are relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.²³⁹ "After the WTO recognized that animal welfare is an ethical concern for all and that the protection of public moral concerns regarding animal welfare is a legitimate objective that can justify trade restrictions, countries have

²³⁶ Only three attesting bodies count with the EU's Commission approval: Greenland Department of Fisheries, Hunting and Agriculture received the condition of attesting body in 2013, Second one was the Department of Environment- Government of Nunavut (2015) and Government of Northwest territories of Canada (2015).

²³⁷ Regulation (EU) 2015/1775, *op. cit.*, Art. 3, para. 2.

²³⁸ *Ibid.*

²³⁹ As used in the famous cases: *United States- Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS58/AB/R, (adopted Nov. 6, 1998); *United States- Measures Concerning the Importation, Marketing and Sale of Tuna Products*, WT/DS381/AB/R, (adopted Jun 13, 2012).

a broader basis upon which to legislate.”²⁴⁰ *The EC- Seal Products Case* provides “countries with solid footing to restrict trade to protect animals in the future.”²⁴¹ It also gives “animal advocates good reason to believe that the WTO will continue to recognize that seeking to improve animal welfare, whether to protect animal life or health or to safeguard public morals, is a legitimate objective that justifies restricting trade.”²⁴² As will be shown in the Chapter no. V, public interests include many aspects of animal welfare, from farm animals to wildlife. It will be proved that animal welfare is a common concern of humankind, global public interest and global public good, therefore the use of public morals as a general exception under the WTO will be, we assume, used more often in the future.

Essentially, the WTO confirmed that animal welfare is a legitimate value that deserves protection and that it can be protected through general GATT exception. To adjudicate that international trade can be restricted because of the protection of public morals with regards to animal wellbeing was a landmark moment that opened up wider possibilities for animal protection.²⁴³ Even though great number of legal scholars doubted that public morals could be used to protect seals from

²⁴⁰ LURIÉ, Andrew/KALININA, Maria, *op. cit.*, p. 451.

²⁴¹ *Ibid.*

²⁴² *Ibid.*, p. 451.

²⁴³ Understandably, many voices have been concerned with such a development, seeing it as a danger to a free market access. Critics worry that this decision will allow Member States to adopt protectionist regulations hidden under the public moral's exception. They argue that almost anything can be understood as public morals and that this can lead us to insincere claims for trade limitation in the name of morals. However, the two-tier test sets a very strict procedure to achieve the protection of Art. XX (a) of GATT making sure that only sincere demands for public moral protection pass the test.

inhumane killing²⁴⁴ (or criticized it, after the Report's adoption), WTO took into consideration needs of the society and adopted a bold position. The recognition of inhumane nature of seal hunting, the acknowledgment that seals are sentient beings deserving protection and the openness towards public opinion are manifestations of a non-conformist approach of the WTO and its gradual receptiveness to animal welfare protection. The use of public morals exception in the *EC Seal Regime case* suggests, that animals deserve to be spared from suffering even to the detriment of trade. It is a confirmation that animal welfare is a value that has an important place on international level and that it is morally significant. It also reflects transformations of international landscape: issues of animal protection are being regulated on international level; they are not anymore under a massive dominance of domestic administration. "The verdict in the seal product case, by interpreting the need to protect public morals broadly, shifts the balance significantly away from the goal of promoting free trade and avoiding any step that could lead to "a flood of protectionist abuses" and towards allowing member states to decide how best to promote the values most important to them, as long as they do so in a manner that does not discriminate between producers, domestic of foreign."²⁴⁵

²⁴⁴ For example: FITZGERALD, Peter, "Morality May Not be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law", *Journal of International Wildlife & Policy*, Vol. 14, (2011); BHAGWATI, Jagdish/ SRINIVASAN, TN, "Trade and the Environment: Does Environmental Diversity Destruct the Case for Freed Trade", *Discussion Paper Series* No. 718, (1995); HENNING, Martin, "The EU Seal Product Ban- Why Ineffective Animal Welfare Protection Cannot Justify Trade Restrictions under European and International Trade Law", *Arctic Review on Law and Politics*, Vol. 6, No. 1, (2015).

²⁴⁵ SINGER, Peter, *One World Now: The Ethics of Globalization*, New Haven & London 2016, p. 89.

Moreover, the case shows us that the citizenry demands are able to change the level of animal protection and that states and international organizations react to the voices of the people. We see the influence of NGO's, their importance as a protector of interests of civil society and the significance of scientific data regarding the assessment of animal suffering and animal management. All of this means that the WTO did not interpret its principles in a "clinical isolation"²⁴⁶ but opted for a broad analysis of the facts and *amici curiae* of NGO's.²⁴⁷

In conclusion, the arguments of *contra bonos mores* used by US in 1893 were resuscitated in the 21st century, when the society and decision-making bodies are prepared for its comprehension and application. As a result, we see that "animal welfare is a longstanding, independent, bona fide rationale for legislation"²⁴⁸ and that its regulation on international level reflects the place that animal protection occupies in the society. And to answer our main question from the beginning of this section: The Appellate Body was indeed able to escape a narrow interpretation and to open up to a more flexible approach. It took into account interests and concerns of the citizenry, overcame the uncertainty and adopted a new, courageous position.

²⁴⁶ SANDS, Phillippe, *op. cit.*, p. 550.

²⁴⁷ In the case *United States- Import Prohibition of Certain Shrimp and shrimp products*, WT/DS58/AB/R, (adopted Nov. 6, 1998), the Appellate Body decided that Panels have discretion to decide whether or not to accept amicus curiae. Before, amicus curiae could not be accepted in the WTO proceedings.

²⁴⁸ HOWSE, Robert/ LANGILLE, Joanna, *op. cit.*, p. 393.

C) PARTIAL CONCLUSIONS: PROGRESSIVE
INCORPORATION OF ANIMAL WELFARE INTERESTS IN
INTERNATIONAL JURISPRUDENCE

From our analysis we can see the progress that has been made on international level towards animal protection. While in the past, the idea of animal welfare as a reason for trade restriction was unthinkable, in the present it represents a valid claim. Animal welfare is receiving an increasing comprehension. Environmental but also animal issues are getting more urgent, and they often clash with trade rules. International fora are however opening towards protection of animal issues even at the expense of economic gains. This shift is a result of pressure coming from public, NGOs, international organizations and scientific knowledge in favour of higher animal wellbeing. One of the important precursors for change is perhaps the objective of sustainable development that has been included in the Preamble of the Marrakesh Agreement. Appellate body sees this concept as “colourful, texture and shading” when interpreting the WTO law. The concept of sustainable development therefore might have positively influenced the rulings concerning trade and environment. International judges are becoming aware that animal welfare is an intrinsic value within the international community. A value that can be legitimately protected and preserved. This would be something unheard of just a few decades ago.

Described rulings are, therefore, examples of optimism for the future: protection is granted not only to endangered species but also to welfare of individual animals; states can adopt extraterritorial measures with aim to protect animals; global tendencies towards animal welfare protection

are being formulated. Animal protection is becoming “a matter of weight in the context of international trade (which) both reflects and adds to a nascent consensus that a global conception of justice must include some notion of justice regarding animals, and that this idea can no longer be dismissed out of hand as eccentric or trivial.”²⁴⁹

At the end we can conclude that our jurisprudential analyses confirmed that there is a change in the public international law. And that this change is significant. International law is distancing itself from a “minimalist vision”²⁵⁰ which “encourages national and international courts to err on the side of caution in the absence of rules which clearly express limits to state actions.”²⁵¹ Indeed, throughout its development international law demonstrated its ability to flexibly react to the needs of people, organizations and states and its capability to adjust itself to the changing circumstances in the world. Animal interests are no exception. They are gradually becoming part of international law as more decisions are adjudicating in their favour. This fact is fundamental and will serve as a one of the justifications for construction of international animal law as general international regime.

²⁴⁹ SYKES, Katie, “Globalization and the Animal Turn: How International Trade Law Contributes to Global Norms of Animal Protection”, *Transnational Environmental Law*, Vol. 5, No. 1, (2016), p. 75.

²⁵⁰ SANDS, Phillippe, *op. cit.*, p. 548.

²⁵¹ *Ibid.*

PART II

THE CONSTRUCTION OF INTERNATIONAL ANIMAL LAW

After first three chapters we have acquired necessary understanding of the evolution of human-animal relations. Also, we have learnt about the paradigm shift permitting higher international protection of animal welfare. We have seen that international law reacts to new challenges and that increasing number of novel questions have been included into its scope. As the world changes, international law changes alongside. This ability allows new concerns and interest to penetrate international arena and receive protection. This has been illustrated on the examples of international jurisprudence. All of this suggests that the international law is ready to encompass animal welfare protection due to its flexibility to react to shifts in the society, to new challenges and to overall progress.

Once we understand that animal welfare can form part of international law, we can start building theoretical pillars of international animal law. This will be the main focus of the second part. Our hypothesis will be that animal welfare is a universal value and a common concern of humankind that reflects interests and concerns of a global community in its entirety. It is a matter of a public interest as its protection and enforcement has intergenerational dimension. It is protected by public interest norms. However, the current state of regulations relative to animals is not sufficiently advanced. Because of the on-growing concern for animal protection, it is, therefore, necessary to develop and

International animal law...

complement the emerging international regime of international animal law.

Before we delve into the theory of international regimes in the chapters no. V and VI, we will look into the existing international regulation of animal welfare. This is important, because first we need to establish the baseline. We need to see what has been created so far with regards to animal welfare so we can move forward. In the chapter no. IV, we will see that there is a lack of hard law concerning animal welfare, but there is a growing body of soft law that wants to ameliorate welfare of animals from an international perspective. Our findings will accentuate the need for a better international protection of animal welfare, but for this to happen we need to construct a well justified theoretical basis of this emerging international regime.

CHAPTER IV

PROGRESSIVE INCORPORATION OF ANIMAL WELFARE INTERESTS IN PUBLIC INTERNATIONAL LAW

In the fourth chapter we will take a closer look into existing international regulation concerning non-human animals. Throughout the analysis we will see that despite the need, animal welfare does not have any unified and effective international legal protection. Advancements are mainly regional, parochial, without any unified strategy. There is currently a gap in the international legal protection of animal welfare¹ even though “welfare of individual animals (whether wild or domesticated) is emerging as a significant and pervasive concern of the international community (...).”² Nonetheless, the analysis will show that there are important advances in soft law, regional arrangements and NGO’s agendas. These developments could be seen as precursors for change on hard law level.

In this chapter we will analyze hard law as well as soft law instruments that regulate questions relative to animals. Simple criterion to distinguish hard law from soft law is that the first one encompasses legally binding norms, and the latter covers legally non-binding norms.³ On the international level, hard law is materialized in form of

¹ WHITE, Steven, “Into the Void: International Law and the Protection of Animal Welfare”, *Global Policy*, Vol., No. 4, (2013), p. 391.

² BOWMAN, Michael/ DAVIES, Peter/ REDGWELL, Catherine, *Lyster’s International Wildlife Law*, Second Edition, Cambridge 2011, p. 698.

³ SCHAFFER, Gregory, POLLACK, Mark, A., “Hard vs. Soft Law: Alternatives, Complements and Antagonist in International Governance”, *Minnesota Law Review*, vol. 94, (2010), p. 712.

international treaties while soft law in form of declarations, codes of conduct, conventions, guidelines or recommendations. Our analysis will show that a universal treaty fully dedicated to welfare of individual animals has not yet been adopted. Thusly, animal welfare advancements are currently being developed mainly through soft law tools. However, some hard law treaties protecting the conservation of entire species do contain sporadic mentions of animal welfare. Those are, nonetheless, incoherent, and insufficient.

The objective of this chapter is, therefore, to identify, map and analyze international legal regulations protecting animals, especially the animal welfare. We will highlight their shortfalls as well as their positive features. This is essential in order to comprehend present-day arrangement and systematization of the topic. With this information, we will be aware of the gaps that exist in the international animal welfare regulations. Further, this will help us to grasp the need for an overreaching approach and international policy framework.

A) ANIMAL CONSERVATION SPECIES AGREEMENTS

In order to understand current position of animals in international law we simply cannot omit two important conservational treaties: The *Convention for International Trade of Endangered Species of Wild Fauna and Flora*⁴ and the *International Convention for the Regulation of Whaling*.⁵ They

⁴ Convention for International Trade of Endangered Species of Wild Fauna and Flora, United Nations, adopted 1973 in Washington. Hereinafter CITES.

⁵ International Convention for the Regulation of Whaling, adopted 1946 in Washington. Hereinafter ICRW.

may serve as a fountain of inspiration for animal welfare advancements. Important questions will be asked: what can international animal law learn from international environmental law?

Even though there are important differences between conservationist and welfarist approach, it is beneficial to understand the successes and the failures of environmental treaties. Now, what are the main differences between welfarist and conservationist approaches? Simply put, animal welfare focuses on the wellbeing of individual animals. “It relates to the living and dying conditions of animals as they are kept, traded, and killed by humans, based on the assumption that humans are, in principle, morally entitled to do all this with animals.”⁶ Animal welfare encompasses three different aspects. “[T]he animal’s basic health and functioning; its affective state; and its natural living.”⁷ On the other hand, the conservationist center of interest is on wider environmental problems, species or eco-system protection. “The purpose of conservation is to preserve species with the aim of preventing extinction, whereas animal welfare measures prioritize the protection of individual animals regardless of conservation status.”⁸ Can these two different perspectives influence each other and learn from each other? Could they co-exist in one treaty? Ultimately, we believe that there are lessons to be taken from conservational treaties that could

⁶ PETERS, Anne, “Global Animal Law: What It Is and Why We Need It”. *Transnational Environmental Law*, Vol. 5, No. 1, (2016), p. 11.

⁷ *Ibid.*

⁸ NYILAS, Francesca, “CITES and Animal Welfare: The Legal Void for Individual Animal Protection”, *Global Journal of Animal Law*, Vol. 9, (2021), p. 3.

enrich the development of international animal law and that it is important to understand them in order to construct new legal regime.

1) CONVENTION FOR INTERNATIONAL TRADE OF ENDANGERED SPECIES OF WILD FAUNA AND FLORA-CITES

a) Species extinction in context

Species extinction is a natural phenomenon of life's development on our planet. Nevertheless, in the last centuries the species extinction was significantly accelerated.⁹ Evolution is not anymore, the main reason for species disappearance. Human actions have progressively replaced it as a driving force for the eradication of plants and animals. Animal trophy hunting, inconsiderate fishing, trade with live animals or with their body parts, destructions of natural habitats are changing the landscape in such a drastic way, that coordinated global action for the protection of endangered animal and plant species was adopted. "Globally, trade in protected fauna and flora is one of the four lucrative areas, alongside drugs, arms and waste trafficking. Owing a rare animal or plant has unfortunately become in the last decades more than fashionable. As a result, the illegal trade in animals associated with the uncontrolled removal of animal and plant species from their natural habitats (...) is the second most important cause of loss of animal and plant species on our planet."¹⁰

⁹ BARNOSKY, Anthony, at all, "Has the Earth's sixth mass extinction already arrived?", *Nature*, Vol. 471, (2011), p. 51.

¹⁰ SOUKUP, Miroslav, "Ekologická kriminalistika v České Republice", *Policiista*, No. 6, Annex I. (2002). Own translation.

b) *The approach of CITES*

Treaty that regulates these issues is called *Convention for International Trade of Endangered Species of Wild Fauna and Flora*. It was adopted in 1973 in Washington within the United Nations fora. It is considered as one of the most important instruments for the protection of nature.¹¹ CITES is a treaty with aim to regulate the world trade with endangered species under the common control of all states in order to achieve their protection from complete extinction resulting from unscrupulous trade. The pretext for the regulation is the need to avoid ecological aggravation of fauna and flora.¹² The treaty encompasses more than 180 states.¹³ The universality of CITES reflects global concern for the protection of endangered species. It also materializes global nature of the issues- the fact that animal protection needs to be regulated from an international perspective.

CITES protects more than 800 animal species and 30000 plants. Endangered species are divided in three annexes (I, II, III). The trade regime with endangered species differentiates depending on the inclusion of the animal/plant to the specific appendix. The strictest regime is applied to appendix I. So, for an animal to be protected under

¹¹ McOMBER, Elisabeth, “Problems in Enforcement of the Convention on International Trade in Endangered Species”, *Brooklyn Journal of International Law*, Vol. 27, No. 2, (2002), p. 674.

¹² Fauna and flora are described in CITES’ preamble as an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come. CITES, *op. cit.*, Preamble (1), (2).

¹³ CITES, “List of Parties to the Convention”, <https://cites.org/eng/disc/parties/index.php>.

CITES, they need to belong to an endangered species listed in one of the appendixes. “The decision of which animals are listed, and in which Appendix, is of vital importance to ultimate species survival as well as the treatment of individual animals.”¹⁴ CITES is therefore an example of an environmental approach that protects species, not individual animals. This is one of the most striking differences with animal law.

c) The system of protection of CITES

i) “Sustainable” use approach

CITES does not prohibit trade with endangered species altogether but it rather sets clear rules that have to be followed in order to trade. The treaty follows “sustainable use” logic according to which trade brings important economic and other benefits that create “substantial contribution to the global economy and human well-being.”¹⁵ The main argument is that there is no reason why not to permit the trade with species that are not directly endangered with extinction. Also, according to this position, if trade is banned, animals are hunted and raised illegally and breeders and traders are irrelevant whether the animals are directly endangered with extinction or not.¹⁶ Therefore, it is necessary to differentiate between species that are directly endangered or not and

¹⁴ WAGMAN, Bruce, A./ LIEBMAN, Matthew, *A Worldview of Animal Law*, Durham 2011, p. 289.

¹⁵ CITES, “CITES Trade: A Snapshot” <https://www.cites.org/sites/default/files/common/docs/CITES-trade-snapshot-eng.pdf>.

¹⁶ On the other hand, the protectionist principle requires total ban of trade with endangered species. Trading in endangered species, according to this approach, develops a market in which killing of protected animals generates income which is an encouragement for poachers.

whether they need the protection at all. In this way the treaty follows three-tiered system “that regulates trade in endangered species at different levels of stringency depending on the appendix in which a particular species is listed.”¹⁷ “This underlines the fact that the convention does not one-sidedly favor an unlimited conservation approach, nor does it neglect trade interests outright.”¹⁸

ii) Trade permits

Animals and plants forming part of CITES are protected through the Parties to the Convention. Organs of CITES’ members issue permits for trade; without them the trade is considered illegal and can be sanctioned. Appendix I is the strictest. It requires “issuance of an export permit by the exporting country after a finding by that country’s scientific authority that such export will not be detrimental to survival of the species, and issuance of an import permit by the country into which the specimen is imported after a determination by the scientific authority of the importing state that the import will “be for purposes which are not detrimental to the survival of the species” and a determination by the management authority that “the specimen is not to be used for primarily commercial purposes.”¹⁹ Species that are not directly endangered by the extinction but could become directly

¹⁷ KELCH, Thomas, “CITES, Globalization, and the Future of Animal Law”, in ABATE, Randall (ed.), *What can Animal Law learn from Environmental Law*, Washington 2015, p. 274.

¹⁸ FUCHS, Cristine, “Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)- Conservation Efforts Undermine the Legality Principle”, *German Law Journal*, Vol. 9, No. 11, (2008), p. 1567.

¹⁹ *Ibid.*, p. 274.

endangered if they are not protected, are included in the appendix II. Keeping those animals and trading with them is permitted also for commercial purposes but under very strict conditions. Appendix III is the most flexible with regards to the level of protection. It is created by specimens that are protected by a party to the treaty that requires trade cooperation of other Parties to protect these animals/plants. This means that these specimens are protected only in the countries that have acceded to their inclusion in the Annex III. Here, also, export permits have to be issued stating that the specimen “was not obtained in contravention of the laws of the exporting country, and that any living specimen is prepared and shipped in a way that minimizes risk of injury.”²⁰

iii) Sanction mechanism

With regards to the sanction mechanism, CITES determines that states are obliged to take appropriate measures in order to prevent violation of CITES’ articles. For example, a financial sanction or confiscation of specimens. Therefore, Parties themselves have to develop more precise sanction rules.

Organizational structure of CITES is explained in the articles XI-XVII. Two main organs are the Conference of Parties and the Secretariat. The Conference of Parties takes place at least once per two years where the Parties discuss the implementation of the treaty as well as they decide on the amendments to the appendixes. Secretariat is responsible for the adoption of scientific studies; it periodically publishes

²⁰ *Ibid.*, p. 278.

recommendations for the adoption of the aims of the treaty. It also cooperates with different NGOs such as WWF,²¹ UNEP²² or INTERPOL.²³ There are also committees²⁴ created by the Conference of Parties. Standing Committee meets in between the conferences, and it controls the administration of the Secretariat. Committee has six members that represent different world regions. The Committee on Trade in Wild Fauna and Flora are scientific organs created by the experts in field. Their role is to help decide which species should be granted the protection status. They also give recommendations to the Secretariat regarding the trade regulation.

iv) Implementation of the CITES on the EU level

On the EU level, the regulation that implements CITES is the *Implementation of the Council n. 338/97*.²⁵ The main organ for the application of the CITES is the Commission. There is also a Scientific Review Group- an expert organ that helps Commission with its tasks. It gathers three-four times in Brussels, it is composed of scientific

²¹ World Wildlife Fund, founded 1961, Morges. *See e.g.*, CITES, “CITES, WWF and TRAFFIC release new guide to identify smuggled ivory”, https://cites.org/eng/CITES_WWF_TRAFFIC_Ivory_Identification_Guide_1108_2020.

²² United Nations Environment Program, founded 1972, Nairobi. *See* CITES, “Relationship between CITES and UNEP”, <https://cites.org/eng/node/2423>.

²³ The International Criminal Police Organization, founded 1923, Vienna. *See e.g.*: CITES, “Wildlife trafficking: organized crime hit hard by joint INTERPOL-WCO global enforcement operation”, https://cites.org/eng/news/wildlife-trafficking-organized-crime-hit-hard-by-joint-interpol-wco-global-enforcement-operation_10072019.

²⁴ Committee for Animals, Committee for Plants, etc.

²⁵ Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, *OJ L 61*, 3.3.1997.

representatives from member states, and it is chaired by the representative of European Commission. It focuses on scientific issues related to the application of the Regulation and it assesses whether trade has a detrimental effect on the conservation of species.²⁶ The Enforcement Group is another organ on EU level. The members are representatives of all the member states. Their role is to assure the correct application of the regulation with regards to actions of custom officers, environmental inspectorates, police, etc. It is also chaired by the of Commission. This group meets on average twice a year in Brussels. Its main task is to monitor law enforcement policies and practices in the Member States and to make recommendations to improve enforcement in the area of wildlife trade. It facilitates the exchange of information, experience and expertise in areas related to the control of wildlife trade. Further it shares intelligence information and creates and maintains databases. On the level of Member States, CITES and *Regulation n. 338/97* require creation of one or more executive organs able to issue permits in the name of the party and scientific organs.²⁷

d) CITES as an inspiration for international animal law

CITES can give us many important lessons. There are several elements that can serve as an inspiration for future treaty on animal welfare such

²⁶ Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulation trade therein, *OJ L 61*, 3.3.1997, Art. 4, para. 1, letter a); art. 4, para. 2, letter a); art. 4, para. 6; art. 17, para. 2, letter a).

²⁷ Council Regulation (EC) No 338/97, *op. cit.*, Art. 14, para. 3.

as its universality and the cooperation with other treaties, organizations, and NGOs.

i) Universality

One of the most important strengths of CITES is its ability to unite significant number of states. This success of the Convention motivates not only environmentalist but also general public to protect disappearing species as a result of international trade. Checklist of CITES is another respected feature. There, you can find all the species protected by the Convention and the information regarding their inclusion in the concrete appendix. The number of protected species is maybe the most important achievement. More than 5600 animals and 30000 plant varieties are included in the Convention. The enrollment of many new species²⁸ into the appendixes during 2013 Conference of the Parties has been described as “roaring success”.²⁹ Moreover, “the foundational sustainability principle of CITES, which fashions trade restrictions for species in need of protection, while permitting regulated trade in species that can be sustainably exploited, is itself a success.”³⁰

ii) Processes

CITES’ processes are another great feature of the Convention. “The CITES permit process, which requires that a number of steps be taken

²⁸ Five kind of sharks, the Ecuadorian Machalilla frog, several kinds of turtles, rosewood and ebony trees, etc.

²⁹ McLENDON, Russell, “5 Big Breakthroughs at CITES 2013”, <https://alizu2.blogspot.com/2013/03/5-big-breakthroughs-for-endangered.html>.

³⁰ KELCH, Thomas, *op. cit.*, p. 281.

before issuance, including analyzing detriment to species sustainability and health and welfare consideration, has been praised as a success story.”³¹ Also, Convention’s ability of inter-convention cooperation can be regarded as very positive. Collaboration is actually one of the CITES’ goals through which the delivery of its Strategic Vision could be delivered.³² Special mention deserves the collaboration between CITES and CBD.³³ A *Memorandum of Cooperation* between those two conventions was adopted in order to develop joint work plans. This was a result of the need for strengthened action towards protection of biodiversity related questions. In the CITES’ *Strategic Vision for 2008-2020*, its vision statement focuses on the conservation of biodiversity and on the contribution to “its sustainable use by ensuring that no species of wild fauna or flora becomes or remains subject to unsustainable exploitation through international trade, thereby contributing to the significant reduction of the rate of biodiversity loss (...).”³⁴

CITES also cooperates with many different NGOs and international organizations. One of the main characteristics of the Convention “lies in its cooperation with other organizations.”³⁵ Different stakeholders can attend the CITES meetings or can be regarded status of observers. Also, NGOs of the Parties to the Convention closely cooperate

³¹ *Ibid.*

³² CITES, “CITES Strategic Vision: 2021-2030“, https://cites.org/sites/default/files/document/E-Res-18-03_0.pdf.

³³ Convention on Biological Diversity of The United Nations Environment Program adopted 1992 in Rio de Janeiro.

³⁴ CITES, “CITES Strategic Vision: 2008-2020“, https://cites.org/sites/default/files/document/E-Res-16-03-R17_0.pdf.

³⁵ FUCHS, Cristine, *op. cit.*, p. 1573.

between each other which increases joint efforts to protect and monitor the illegal trade. Moreover, CITES cooperates with the OIE, International Whaling Commission of Migratory Species of Wild Animals, with the International Union for Conservation of Nature and Natural Resources, with INTERPOL, etc. From the above it is clear that “CITES’ work is based on linkages between different international bodies as well as those at the national and international level.”³⁶

On the other hand, the weakness of any international treaty is the need to reach the consensus. As effective regulation requires as many states as possible to be Parties, negotiations will end at a level that is acceptable to as many of them as possible. However, this will usually result in a lower level of protection than would be desirable.

e) Limitations of CITES

Despite positive aspects of CITES, there are also shortcomings that are, however, typical for international regulation, such as insufficient implementation and compliance and problematic monitoring system.

i) Insufficient implementation

One of the biggest shortcomings of the Convention is its insufficient implementation, which is a crucial problem as without proper implementation, the Convention cannot achieve its objectives. CITES is binding on the Parties but is generally not self-executing which means that the Convention cannot be fully implemented until the Parties have

³⁶ *Ibid.*, p. 1574.

not adopted domestic legislation for that reason.³⁷ Another issue is that many Parties fail to fulfill their reporting obligations.³⁸ There is also lack of authority on international level that would enforce CITES' articles. One of the areas that are not implemented is the establishment of scientific bodies or their inadequate staffing.³⁹ States also breach CITES with regards to reporting obligations and adoption of national legislation. As of July 2018, less than half of the Parties had not implemented the minimum requirements such as the punishment of illegal trade, seizure of specimens illegally trafficked or held, establishment of scientific bodies.⁴⁰ Also, many developing countries have difficulties of economic and staff character to supervise the wildlife trade, or their cultural background does not see it as a priority.

ii) Problematic monitoring system

Another weakness is the problematic monitoring system which in many cases was unsuccessful to halt illegal trade. For example, in spite of being enrolled in the Appendix I, the population of rhinos is drastically decreasing. The number of Black Rhinos shrieked from 65, 000 to 2600 from 1970 to 1998; Sumatran Rhino reduced from 1000 in 1990s

³⁷ CITES, "National Laws for Implementing the Convention", <https://cites.org/legislation>.

³⁸ BINIAZ, Susan, "Remarks About the CITES Compliance Regime", p. 93, in BEYERLIN, Ulrich et al, *Ensuring Compliance with Multilateral Environmental Agreements: Academic Analysis and Views from Practice*, Leiden 2006.

³⁹ This is the problem especially in developing countries.

⁴⁰ European Union: *Commission Staff Working Document: Report from the Commission to the Council and the European Parliament; Progress report on the implementation of the EU Action Plan against Wildlife Trafficking*, 28 October 2018, COM(2018) 711 final.

to 400 in 2000, etc.⁴¹ Similar situation applies to the population of elephants in central Africa that reduced 64% from 2005 to 2015.⁴² Moreover, CITES fails to protect certain endangered species such as various corals and shark species. The fact that the upgrade of polar bears from Appendix II to the strictest level of protection failed is another disappointment.⁴³ Finally, CITES does not count with a dispute settlement process and body that would adjudicate on the clashes between the Parties.

f) Conclusions: what can international animal law learn from CITES?

Despite CITES' shortcomings, the Convention represents an important advancement for the protection of fauna and flora. "The CITES regime and the attention it has brought to issues of trade in endangered species have altered consumer behavior, causing a move away from purchasing products of endangered animals."⁴⁴ There is a lot that animal law could learn from CITES. According to Kelch, "CITES constitutes a talisman directing attention to the global nature of issues relating to the treatment of animals, and is a beacon lighting the way for animal lawyers to appreciate that animal abuse and protection cannot be adequately

⁴¹ HUTTON, Jon/ DICKSON, Barnabas, *Endangered Species Threatened Convention*, London 2000, p. 91.

⁴² Agence France- Presse "African elephants numbers plummet during worst decline in 25 years", <https://www.theguardian.com/environment/2016/sep/26/african-elephant-numbers-plummet-during-worst-decline-in-25-years>.

⁴³ In 2013, the United States tried to uplist the polar bear to Appendix I. Unfortunately, the proposal failed to be adopted. Since then the United States did not present another proposal for higher protection of polar bears. See *e.g.*, SULLHEIM, Nicolas, "CITES and the Polar Bear", <http://polarconnection.org/cites-and-the-polar-bear/>.

⁴⁴ KELCH, Thomas, *op. cit.*, p. 282.

addressed locally or even nationally, but these issues must be addressed on a global basis.”⁴⁵ CITES, therefore, acknowledges that threats to animals and plants are global, that they need a unified action and that it is no longer possible to tackle the problem on national or even regional basis. Animal law also needs a global solution to global issues. International treaty would be an ideal tool to increase animal welfare globally. However, the difference between environmental law and animal law is the fact, that the first one is focused on entire species meanwhile the latter is protecting certain categories such as animals used for food, aquatic animals, animals used in laboratories, etc.⁴⁶ This “can cause something of a local or parochial focus.”⁴⁷ Myriad of national legislations on animal welfare are definitely a positive occurrence, but it does not solve the problem. As we know, animal issues are globalized. For example, once a particular country adopts a legislation against animal testing, the corporations can move their activities to another country. The same applies to animal agriculture. “Indeed, animal use and abuse are being “outsourced”; animal experimentation is heading east, and animal agriculture is moving south.”⁴⁸ That is why animal law also needs proper global answers to current reality. Moreover, CITES also represents global fora where countries with very different opinions agree on unified position. It is a “firm foundation on which international agreements on this issue can be reached.”⁴⁹ Animal law lacks such a platform. OIE is the only international organization that is

⁴⁵ *Ibid.*, p. 285.

⁴⁶ *Ibid.*, p. 284.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, p. 285.

⁴⁹ *Ibid.*

officially solving animal welfare related issues from a global perspective, but it is focused on a specific category of animals, and it only creates a soft law legislation.

As we will see in the next subchapter, there have been attempts to adopt international treaties for animal welfare, but unfortunately, they have not yet succeeded. At the moment we reckon that there is not enough political will to adopt animal welfare treaty. On the other hand, we believe that it is only the matter of time until these issues become so unbearable that countries will move towards this possibility. More soft law legislations we have; more animal welfare and animal rights NGOs exist; more national and regional laws are being issued; sooner it will be possible to progress to animal welfare treaty.

Another feature of CITES that could be applied to animal law, according to Kelch, is the cooperation of the Convention with other bodies and organizations. With contrast to CITES, animal protection lacks this level of joint efforts, NGOs are focused mainly on national or regional issues and there is not enough global cooperation. “Cooperation is the toll that can bridge cultural borders and lead us toward a common global language and strategy with which to attack animal protection and rights issues.”⁵⁰

Further, Kelch argues that animal law could benefit from gathering information regarding animal issues as same as it is done in the CITES. This reporting obligations would lead to an objective overview

⁵⁰ KELCH, Thomas, *op. cit.*, p. 288.

concerning animal welfare and rights problematics. Animal law would be enriched by the common global standards for animal welfare. “fashioning mechanisms for uniform reporting of information on the use and abuse of animals and developing a global language of animal advocacy that resonates across cultures- all of these could be the results of efforts to bring animal issues to global consciousness through treaties or other international agreements like CITES. This standardization could, for example, directly impact the present “outsourcing” of animal use and abuse.”⁵¹

2) INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING- ICRW

a) History of whaling regulation

The history of whaling regulation is linked to the development of harpoon whaling in the mid-19th century, which led to the endangerment of almost all whale species. The first international conventions were signed in the nineteen thirties - *The Convention for the Regulation of Whaling* was signed in 1931, but it was not sufficient and was replaced in 1937 by *The International Agreement for the Regulation of Whaling*, and finally, in 1946, *the International Convention for the Regulation of Whaling*.⁵² The Convention entered into force in 1948 and it is the founding document of the International Whaling Commission.⁵³ The Commission promotes and organizes research in relation to whales or

⁵¹ *Ibid.*, p. 290.

⁵² Hereinafter the ICRW.

⁵³ Hereinafter the IWC.

their hunting, collects and analyses statistical information on the current status of whales and examines the information on conservation and enhancement methods.

b) ICRW: The transformation of whaling regulation

This Convention shows “how an agreement drafted for one purpose, promoting the whaling industry, can be adapted over time to serve another objective, in this case protecting and preserving whales.”⁵⁴ During the early days of the Commission, the Parties agreed on use of whales for economic purposes. The IWC focused primarily on the protection of the interests of the main whaling states instead of the protection of the whales. Economic incentives prevailed over environmental ones. Actually, the system incentivised states to whale in big proportions and there were no limits to how much they could hunt. “The new institution and its rules both legitimized whaling and quickened the pace of devastation, resulting in the disappearance of remaining whale stocks more rapidly than ever before.”⁵⁵ But over time, with the increasing public awareness, growing number of the NGOs and the inclusion of non-whaling countries into the Convention, the focus of the Commission shifted towards a protectionist approach.⁵⁶

⁵⁴ FITZGERALD, Peter, L., “Exploitation, Conservation, or Preservation? The International Convention for the Regulation of Whaling and Conflicts over Science, Culture, and Morality”, p. 128, in FITZGERALD, Peter, L., *International Issues in Animal Law*, Durham 2012.

⁵⁵ CARLARNE, Cinnamon, “Saving Recent Developments and the Future of International Whaling: Whales in the New Millennium: International Institutions, Recent Developments and the Future of International Whaling Policies”, *Virginia Environmental Law Journal*, Vol. 24, No. 1, (2005), p. 6.

⁵⁶ *Ibid.*

Moreover, during the 1980s, traditional whaling powers such as New Zealand, Australia and United Kingdom entered the Convention which was an important achievement as they banned whaling in their territorial waters. Following the Stockholm Conference in 1982, the Commission has imposed zero quotas on industrial whaling since 1986. There are exceptions permitting the whaling, however they are limited. Some Caribbean Island states, Indonesia, the Philippines, Norway, Russian Federation, Iceland, and Greenland have been awarded these exceptions. In the latter two, for example, the exemptions apply to the hunting carried out by indigenous peoples for whom whaling serves as a source of livelihood. Another achievement is the creation of two whale reserves. One is in the Indian Ocean and the other in the Southern Arctic Circle, together covering about one-third of the world's area.

The evolution of the IWC shows that “the whale has become a symbol of the ability to achieve international cooperation, illustrating that despite the difficulties involved, it is possible for states with divergent interests and perspectives to compromise.”⁵⁷ Nonetheless, the characteristic feature of this treaty is that it focuses, as same as CITES, on the welfare of entire specimens not on the individual animals. “Thus, it is clear that while the environmental perspective of the importance of wildlife as part of ecosystems is well accepted, the conditions of life and

⁵⁷ *Ibid.*, p. 48.

death of individual animals at the hands of humans around the world are not yet a focus of legal drafting.”⁵⁸

This is a clear indication that the welfare of individual animals is not sufficiently reflected in international law. The incorporation of welfare provisions that would grant effective protection to animals with regards to their individual suffering is needed. In this way, we could see the fusion of conservationist and welfarist approach.

B) ANIMAL WELFARE REGULATIONS

As we already learnt, there is no international hard law concerning animal welfare.⁵⁹ However, soft law advancements do exist. These recent developments consider the seriousness of the problem and represent important first step towards effective regulation of animal welfare issues. The most important organization addressing animal welfare is the World Organization for Animal Health that issued a set of recommendations on land and aquatic farm animals. We will analyze their content and assess their impact. Also, proposals on animal welfare regulations will be presented and examined.

1) WORLD ORGANIZATION FOR ANIMAL HEALTH: THE OIE STANDARDS

⁵⁸ FAVRE, David, S., “An International Treaty for Animal Welfare”, *Animal Law*, Vol. 18, No. 2, (2012), p. 246.

⁵⁹ Not counting EU regulations and directives on animal welfare that will be presented in the chapter no. VII.

World Organization for Animal Health⁶⁰ is an intergovernmental organization created in 1924 as a global response to animal disease (rinderpest) threatening the agricultural production, with the aim to bring “transparency in the worldwide animal health situation, based on incontestable scientific diagnostic methods and scientific knowledge.”⁶¹ Since the beginning, the OIE has adopted an anthropocentric position. The protection of human interests (economy and human health) not animal wellbeing *per se* was for a long time in the focus of this organization. Animal welfare has not been its concern until the beginnings of 2000s, when the OIE’s strategic plan for 2001-2005 was adopted, prioritizing animal welfare in its agenda. Until then, animal welfare was simply not recognized as a priority by the OIE. With growing concern of OIE’s members and public regarding animal welfare issues, the *OIE Animal Welfare Working Group* was created, and its first recommendations were published in 2003. In 2004, the Global Conference on Animal Welfare organized by OIE was convened for the first time.⁶² In the same year, the OIE’s Guiding Principles on Animal Welfare were added to the *Terrestrial Health Code*.⁶³ The *Terrestrial Health Code* is a set of recommendations for the amelioration of animal health and veterinary public health globally and from the 2000s it is also

⁶⁰ Office International des Epizooties. In 2003 the organization adopted the name of the World Organization for Animal Health, but it kept its original acronym- the OIE. Hereinafter the OIE.

⁶¹ VALLAT, Bernard, “Foreword”, p. 10, in *Proceedings of the Global Conference on Animal Welfare: An OIE Initiative*, Luxembourg 2004.

⁶² At the conference, the OIE animal welfare strategic initiative was discussed as well as global animal welfare challenges, application of science to animal welfare, practical application, etc.

⁶³ It was first adopted in 1968 and since then it has had many revisions. It’s 2021 version is its 29th Edition. OIE, *Terrestrial Animal Health Code*, Vol. 29, Paris, 2021.

dedicated to improving animal welfare. We emphasize that the *Terrestrial Health Code* has not been adopted in a hard law mode; therefore, it is not binding upon the states. It is a soft law with recommendatory nature.

a) Guiding principles of the Terrestrial Animal Health Code: basic facts

The guiding principles are considered “as the philosophical foundations of all OIE work on animal welfare.”⁶⁴ They form an inherent part of the chapter 7 of the *Terrestrial Animal Health Code*. According to these principles there is for example, a critical relationship between animal health and animal welfare; the internationally recognized “Five Freedoms”⁶⁵ provide valuable guidance in animal welfare; the internationally recognized “Three Rs” provide valuable guidance for the use of animals in science.⁶⁶

The recognition of the connection between animal health and animal welfare means that the OIE’s goal now includes amelioration of animal welfare, animal health and veterinary public health globally. Thus, according to the OIE, there are various foundations for animal welfare-

⁶⁴ FITZGERALD, Peter, *International Issues in Animal Law*, Durham 2012, p. 173.

⁶⁵ Freedom from hunger and thirst, discomfort; pain, injury, and disease, fear and distress; and replacement of the use of animals in scientific studies. The author of Five freedoms is Professor Roger Brambell. The report was created as a result of an investigation commissioned by the UK government as a response to the popular book named *Animal Machines*, written by Ruth Harrison. The Brambell Report had a significant influence, first in the UK (creation of Farm Animal Welfare Advisory Committee), later on internationally (OIE’s guidance principles). *See* more in chapter VII, C), 1) b), (i).

⁶⁶ Reduction in number of animals, refinement of experimental methods and replacement of animals with non-animal techniques. First described by RUSSELL, William/ BURCH, Rex in their study “Principles of Humane Experimental Technique” from 1959.

not only moral, religious or philosophical, but also scientific ones. “Disregard for animal welfare often leads to poor animal health-increased susceptibility of animal populations to disease and injury and poor quality or contaminated animal-based food products-with resulting economic losses, (...) Animal welfare is thus intrinsically related to other government concerns’ such as public health, food safety and long-term economic development.”⁶⁷

We can see that the OIE sees animal welfare through the lens of animal and human health and economic interests. The OIE does not consider animal welfare important because of the inherent value of non-human animals but rather as a means to higher food and health safety and economic development. The importance to keep animals safe and healthy is necessary *in order to* protect public health and to safeguard governmental interests.

But chapter 7 of the Code consists of much more than just guidance principles. It is fully dedicated to animal welfare, and it lays out the recommendations concerning six areas- transport of animals by land, by sea and by air, slaughter of animals for human consumption, killing of animals for disease control purposes and the control of stray dog populations.⁶⁸ The recommendations are science-based⁶⁹ and they represent the only international standards on animal welfare for animals.

⁶⁷ VAPNEK, Jessica/ CHAPMAN, Megan, “Legislative and regulatory options for animal welfare”, *FAO Legislative Study*, No. 104, (2010), p. 13.

⁶⁸ OIE, “The OIE’s Objectives and Achievements In Animal Welfare”, <https://www.oie.int/international-standard-setting/specialists-commissions-groups/working-groups-reports/list-of-working-groups/working-group-on-animal-welfare/>.

⁶⁹ Terrestrial Animal Health Code, Art. 7.1.3.

They state that “the use of animals carries with it an ethical responsibility to ensure the welfare of such animals to the greatest extent practicable,”⁷⁰ a statement that underpins the moral obligations we owe to non-human animals. Except this proclamation, the recommendations follow the anthropocentric vocabulary such as “the use of animals in agriculture, education and research, and for companionship, recreation and entertainment, makes a major contribution to the wellbeing of people”⁷¹ subjecting in this way animals to the needs of humans.

b) Guiding principles of the Terrestrial Animal Health Code: limitations

i) The vagueness

First, we can point to its vagueness. For example, the *Terrestrial Code* says “[a]nimals in transit shall be provided with *adequate space*”,⁷² “[v]essels should have *adequate ventilation* (...)”,⁷³ “[t]he feeding and watering system should be designed to permit *adequate access* to feed and water *appropriate to* the species, size and weight of the animal..., “[t]he owners and managers of the animals are responsible for: (...) the presence of an *adequate number* of animal handlers during loading and unloading;”⁷⁴ “[t]ransport companies (...) are responsible for (...) ensuring that *properly trained staff* are available

⁷⁰ *Ibid.*, Art. 7.1.2., para. 6.

⁷¹ *Ibid.*, Art. 7.1.2., para. 5.

⁷² *Ibid.*, Art. 1.4.1.1., para 2.

⁷³ *Ibid.*, 7.2.5., para. 4. e.

⁷⁴ *Ibid.*, 7.3.3., para. 1. d.

for loading/unloading of animals;⁷⁵ “(...) ensuring *adequate competency* of the driver in matters of animal welfare for the species being transported (...)”,⁷⁶ “[m]anagers of facilities at the start and at the end of the journey and at resting points are responsible for: (...) ensuring *proper rest times and minimal delay during stops*”⁷⁷ or “[p]ersons carrying out stunning should be *properly trained and competent*”,⁷⁸ “[b]irds should have sufficient space so that all can lie down at the same time without being on top of each other”,⁷⁹ “the amount of time animals spend on a journey should be kept *to the minimum*.”⁸⁰

The examples show us that the language is obviously very pliable, allowing various interpretations which can lead to different standards and unequal conditions for animals. “Vague guidelines which use terms such as *adequate space* or *proper handling* are impossible to implement because one person’s interpretation of proper handling will be different from somebody else’s.”⁸¹ There are no exact directions regarding for example, the maximum amount of time an animal can spend travelling. To state that animals should be kept on journey for the minimum amount of time is a nebulous proclamation which can mean different things for different stakeholders. This is especially problematic in the

⁷⁵ *Ibid.*, 7.3.3., para. 4. b.

⁷⁶ *Ibid.*, 7.3.3., para. 4. c.

⁷⁷ *Ibid.*, 7.3.3., para. 5. h.

⁷⁸ *Ibid.*, 7.5.7., para. 1.

⁷⁹ *Ibid.*, 7.5.2., para. 2.

⁸⁰ *Ibid.*, 7.3.1.

⁸¹ GRANDIN, Temple, “Foreword: Strategies to Improve Farm Animal Welfare and Reduce Long Distance Transport of Livestock Going to Slaughter.” p. 12, in APPLEBY, Michael at all, *Long distance Transport and welfare of farm animals*, Oxfordshire 2008.

case of long-distance journeys by land or sea. The recommendations are therefore prone to generalization and the welfare standards are conceived in a broad way.

ii) Animals in transit and their final destination

The use of elastic language is not the only concern. Another issue is that the Terrestrial Code misses some of the problematic areas. As Otter, O'Sullivan and Ross pointed out, the recommendations “only cover animals in transit and do not address their needs at their final destination (...).”⁸² Animals that travel by sea, for example to the Middle East are likely to be treated less favorably at destination ports than at ports of origin. “In developing countries receiving livestock from Western countries, the infrastructure in the port of disembarkation is unlikely to be as well organized as in the ports of origin. Offloading ramps, inspections and truck suitability and availability are all likely to be of lower quality than in Western countries.”⁸³ Consumers from these destinations require fresh meat, therefore the slaughter takes place in the importing country, where the levels of animal welfare are not supervised by the exporting country. “Members of animal activist groups and investigative journalists have reported on conditions in Middle Eastern ports, which supposedly show animal abuse and mistreatment. Scientific investigations on the prevalence of such alleged

⁸² OTTER, CALEY/ O'SULLIVAN, Siobhan/ Ross, Sandy, “Laying the Foundations for an International Animal Protection Regime”, *Journal of Animal Ethics*, Vol. 2, No. 1, (2012), p. 56.

⁸³ PHILLIPS, C.J.C., “The Welfare of Livestock During Sea Transport”, p. 152, in APPLEBY, Michael at all, *Long distance Transport and welfare of farm animals*, Oxfordshire 2008.

abuses would be worthwhile to identify the scale of the problems.”⁸⁴ A report by European Commission showed that there are serious issues during cattle and sheep sea transport from EU to the Middle East. For example, fitness records that should be made at exit ports do not reflect real number of unfit animals or the reports are not made at all; personal responsible for livestock inspections lack the expertise; exporters pressure vets at exit ports to approve shipments if they decide to halt the vessel from loading; there is very little or non-existent communication between the EU Member States and importing countries regarding the condition of transported animals once they reach the exit ports; there is general lack of transparency. Moreover, there is an unresolved question concerning the legal responsibility for welfare of animals while they are at sea.

iii) Different views upon animal welfare

Also, the organization is very diverse given the large number of members. Different countries have different views upon animal welfare. “For example, in the case of ritual slaughter, the OIE standards do not prescribe pre-stunning of the animal concerned. Yet such pre-stunning is a prerequisite for the humane slaughter of the animal. The scientific literature on this is compelling. For example, a sheep can remain conscious for up to 20 seconds after its throat is cut. Accordingly, one should be wary of claims by industry bodies that their practices comply with standards prescribed by the OIE.”⁸⁵ It can be therefore summarized that “the OIE’s recommendations are extremely limited,

⁸⁴ *Ibid.*

⁸⁵ McEWEN, Graeme, *Animal Law: Principles and Frontiers*, Victoria 2011, p. 10.

especially in comparison with the harms the animals suffer by being used in the ways the code regulates, they do not challenge in any real way the exploitation animals suffer. Indeed, the limitations are basically aimed at safeguarding human health and economic goals.”⁸⁶

iv) Lack of legal binding force

Next issue is that the OIE’s standards are only advisory, they are not legally binding on its members, therefore the countries are not obliged to implement them. They are only the recommendations, and the member states can apply them fully, partially or ignore them all together. It is not possible to enforce their implementation and application.

The Terrestrial Code has many shortcomings. The whole spirit of the code reflects an “orthodox approach to animal welfare law (...)”⁸⁷ where the wellbeing of animals is expressed through the angle of humans; where the use of animals is considered as necessary and enriching for humans and economy; where animal welfare cannot supersede human needs and interests. However, by stressing out the problematic areas of the Terrestrial Code, we do not want, by any means to proclaim that the work of OIE in the area of animal welfare is futile or unnecessary. By including animal welfare into its agenda, the OIE stimulated the development of welfare standards and inspired countries to apply them into practice. “[T]he concept of approaching animal

⁸⁶ HORTA, Oscar, “Expanding Global Justice: The Case for the International Protection of Animals”, *Global Policy Journal*, Vol. 4, No. 4, (2013), p. 2.

⁸⁷ TULLOCH, Gail/ WHITE, Steven, “A Global Approach to Animal Law and Ethics”, *Australian Animal Protection Law Journal*, Vol. 6., No. 29, (2011), p. 48.

welfare change management on a global rather than on a national or regional basis, represents a significant concept shift.”⁸⁸ As a result, the OIE guidelines “are the only global, science-based standards agreed by the trading nations of the world.”⁸⁹ Spreading awareness regarding animal welfare is crucial, especially in the initial stage of construction of international animal protection standards. Even though the recommendations are not binding, their existence and acceptance has important political and moral significance. The organization positions itself as a leader in animal welfare development and it indeed is a crucial organization in that area. However, we agree with McEwen according to which “the OIE is intergovernmental organization responsible for improving animal health rather than animal welfare, worldwide”⁹⁰ given its approach towards animal welfare and important defects in its strategy. The OIE’s leadership in improving animal health was recognized also by the WTO’s SPS⁹¹ agreement that identified the OIE as a “source of international standards for *animal health* (emphasis added).”⁹²

c) Guiding principles of the Terrestrial Animal Health Code: conclusions

⁸⁸ PETRINI, Antonio/ WILSON, D, “Philosophy, Policy and Procedures of the World Organization for Animal Health for the Development of Standards”, *Revue Scientifique et Technique*, Vol. 24, No. 2, (2005), p. 669.

⁸⁹ World Organization for Animal Health, “Animal Welfare”, <http://www.oie.int/en/animal-welfare/animal-welfare-at-a-glance/>.

⁹⁰ McEWEN, Graeme, *op. cit.*, p. 9.

⁹¹ World Trade Organization’s Sanitary and Phytosanitary Agreement.

⁹² VAPNEK, Jessica/ CHAPMAN, Megan, *op. cit.*, p. 13.

All in all, current Terrestrial Code and OIE's initiative in animal welfare is a clear indication that animal welfare is indeed a global issue that needs global and unified legal regulation. The OIE can be characterized as an organization promoting a positive change in animal treatment and although its standards are comprised within the anthropocentric view of human-animal relationships, the change has to start somewhere. Every advance towards higher animal welfare is a desired evolution.

The OIE has a space for improvement and further development of its standards. It could address for example, welfare of higher number of animals (animals used in entertainment, animals in research, conservational concerns) as well as it could enhance already existing recommendations, change its vague language and make the standards legally binding on the OIE's member states. With creation of special committees, it could provide expert recommendations to its member states and to international NGO's, governmental and inter-governmental institutions, it could formulate basic factors of animal well-being that would be adopted on national level, etc. However, if the OIE's role in animal welfare grows, we can identify important issues such as the fact, that the organization is closely connected to governments and industry stakeholders and the fact that the OIE "identifies trade, not animal protection, as its central objective."⁹³ Therefore, it is questionable whether this organization is the best one for becoming the undisputed leader in international animal protection. Whose interests would be really in the focus? Would be OIE willing to guarantee that the welfare of animals, not the economic gains prevail in

⁹³ OTTER, CALEY/ O'SULLIVAN, Siobhan/ Ross, Sandy, *op. cit.*, p. 68.

its agenda? For now, these structural changes are not feasible, as for their implementation is necessary sufficient political interest and willingness to compromise economic activities for the sake of animals.

To conclude, we greet the inclusion of animal welfare into OIE's program. It is a very important catalysator for the change on a global level as it demonstrates that the legal action towards higher animal welfare has to be global. Current OIE's non-binding recommendations despite their substantial shortcomings are contributing to higher animal welfare and can play an important role in the future if they undergo important reforms. Nevertheless, we believe that with the growing public concerns regarding animal wellbeing, the reform (at least partial) will be eventually adopted.

2) PROPOSALS ON ANIMAL WELFARE REGULATION

Here, we will have a look at various proposals such as *Universal Declaration on Animal Welfare* and *United Nations Convention on Animal Health and Protection* that have not yet been adopted, nevertheless they achieved considerable attention and support. They reflect the societal and academic interests in global regulation of animal protection, welfare, or rights.

a) Universal Declaration on Animal Welfare: UDAW

*Universal Declaration on Animal Welfare*⁹⁴ is an important advancement for higher animal protection. For the time being it is a proposed inter-

⁹⁴ Hereinafter UDAW.

governmental agreement that recognizes animal sentience, prevents cruelty, aims at reducing animal suffering and promotes animal welfare standards. Its interim objective is to be adopted by the United Nations as a declaration which would strengthen the possibility of its further transformation into a binding treaty.

i) Process of UDAW's preparation

The declaration was created by the World Society for the Protection of Animals,⁹⁵ which changed its name to World Animal Protection.⁹⁶ It is the “largest federation of animal welfare organizations in the world with over 850 member societies in more than 150 different countries”⁹⁷ with 15 offices around the world and with 400 000 individual supporters. It even has the consultative status within the UN⁹⁸ as the only animal welfare organization and an observer status at the Council of Europe.

WAP's aim is to gather sufficient support in order to persuade the United Nations Economic and Social Council to adopt the declaration. “If that happens, the Declaration would provide a legal basis for recognizing the importance of animal welfare among the persuasive principles of “soft” international law.”⁹⁹ UDAW's goal is, therefore, to

⁹⁵ Hereinafter WSPA.

⁹⁶ Hereinafter WAP.

⁹⁷ SZUCS, E, “Make the science knowledge available and used”, in ALAND, A/MADEC, F. *Sustainable animal production: The challenges and potential developments for professional farming*, Vegeningen 2009, p. 434.

⁹⁸ United Nations.

⁹⁹ FITZGERALD, Peter, *op. cit.*, p. 163.

“secure international legal recognition for the principles of animal welfare and have the United Nations officially create a Convention on Animal Welfare.”¹⁰⁰ The main point of the Universal Declaration is to grant animals the status of sentient beings, able to perceive pain and suffering and also to perceive animal protection issues as part of the social development of the nations of the world. It is the largest global initiative of its kind to date, and it represents a significant attempt in eliminating animal cruelty and suffering.

The foundation text of the Declaration was adopted at the Manila conference in 2003 which was attended by 21 governmental delegations.¹⁰¹ Inter-governmental steering committee was created in 2005 and Costa Rica, Czech Republic, India, Kenya and Republic of Philippines decided to expressly support the project. “They lead a group of governments whose officials have stated support in the following years,¹⁰² including Australia, Cambodia, Fiji, Latvia, Lithuania, New Zealand, Poland, Slovenia, Tanzania, and the UK.” Also, more than two million individuals supported the initiative thru online campaign “Animals Matter to Me”¹⁰³ and approximately three hundred NGO’s around the world backed the declaration. UDAW was also endorsed by the Islamic Conference on Animal Welfare in 2008 and the Council of

¹⁰⁰ SMITH, Ethan/ DAUNCEY, Guy, *Building an Ark: 101 Solutions to Animal Suffering*, Gabriola Island 2007, p. 253.

¹⁰¹ Australia, Bangladesh, Cambodia, China, Czech Republic, Egypt, Germany, India, Indonesia, Israel, Italy, Netherlands, New Zealand, Singapore, Switzerland, Spain, Philippines, Thailand and the United Kingdom. The European Council, United States and Saipan also attended the conference as observers.

¹⁰² Approximately 43 governments stated their support for the Declarations.

¹⁰³ The goal is to garner 10 million signatures.

European Union called on its members to “support, in principle, the UDAW initiative in the relevant international fora.”¹⁰⁴

The Declaration definitely brought a lot of attention towards animal welfare issues. The amount of support is unprecedented that once again reflects the need for a global solution to a global problem. Although the Declaration has not been yet adopted by UN General Assembly, it has triggered international advancements and its adoption can also represent a first step towards creation of a *hard law* agreement on animal welfare on a global level¹⁰⁵ as “protecting animals from suffering is a universal issue that, like other universal issues, is a legitimate subject of international agreement.”¹⁰⁶

ii) UDAW's structure

The Declaration is very brief, it consists of a preamble and seven articles which lay down its principles. The preamble affirms that animals are sentient creatures and that their welfare is worthy of consideration by the Member States; it also states that humans are cohabiting this planet with other species and forms of life in an interdependent ecosystem. The text continues with recognizing the valuable guidance of five

¹⁰⁴ Council of the European Union, “Council Conclusions on a Universal Declaration on Animal Welfare”, Press Release 6430/09, (2009).

¹⁰⁵ BRELS, Sabine, “The Evolution of International Animal Law: From Wildlife Conservation to Animal Welfare” p. 375, in RABATE, Randal, S. (ed.), *What can Animal Law Learn from Environmental Law*, Washington DC 2015.

¹⁰⁶ DRAEGER Amy, “More than Property: An Argument for Adoption of the Universal Declaration on Animal Welfare”, *Drake Journal of Agricultural Law*, Vol. 12, No., 277, (2007), p. 297.

freedoms for animal welfare. The Declaration also highlights that good animal welfare has important positive impacts on human health and the environment, food security, hunger and poverty reduction, social development, ... It specifically mentions the FAO's integration into its poverty alleviation, disaster relief and livestock development programs. Further, the UDAW considers that the animal welfare needs a collective action with incorporation of all the stakeholders and affected Parties.

Afterwards, seven articles lay down the UDAW's principles. First article states that animals are sentient beings, and their welfare should be respected. Second and third article include meanings of what is animal welfare and the meaning of the word sentience. Article no. IV calls on the Members States to prevent cruelty to animals and to reduce their suffering. It says that the Declaration provides a foundation for improvement of national welfare legislation; for introduction of animal welfare legislation in countries where it does not currently exist; for encouraging business which use animals to prioritize their welfare; for unifying humanitarian, development and animal welfare agendas nationally and internationally and for inspiring positive change in public attitudes towards animal welfare. According to the fifth article, standards, policies, and legislation concerning animal welfare shall be further adopted on the basis of the Declaration (including farm animals, draught animals, wildlife animals, companion animals, animals used in research). Basically, the Declaration should serve as a basis for future policies and legislations regarding treatment and management of all animals. The Declaration acknowledges cultural, economic, and social

differences between the Parties¹⁰⁷, nevertheless it concludes that each state should treat animal in a human manner in accordance with the Declaration.

iii) Characteristics of UDAW

The language of the Declaration is very vague, it is written in a simple way and it reflects “the philosophy of animal welfare.”¹⁰⁸ It embodies “ideas rather than setting precise standards of animal welfare and imposing obligations on signatories to ensure that these standards are met.”¹⁰⁹ UDAW could nevertheless work as a guideline with criterions on animal welfare and in this way help the states to adopt new legislations, to assist NGO’s in their advancement in animal welfare issues, it could also provide an exemplar for other stakeholders and for public in general on *how* and *why* to protect animal welfare. UDAW indeed “creates an internationally recognized norm upon which legislators may rely in developing animal welfare law (...). More important, the UDAW establishes a universal standard upon which the public may rely when the image of a sow, hen or dairy calf awakens in us the need to change human history.”¹¹⁰ It could be perceived as a starting point for governments, producers, NGO’s, and public, helping them understand the importance of animal welfare. It summarizes important grounds as of why animals deserve to be treated with respect

¹⁰⁷ Art. number 6 of UDAW, version 2011.

¹⁰⁸ GIBSON, Miah, “The Universal Declaration of Animal Welfare”, *Deakin Law Review*, Vol. 16, No. 2, (2011), p. 547.

¹⁰⁹ *Ibid.*, 547.

¹¹⁰ DRAEGER, Amy, *op. cit.*, p. 302.

and why do they matter to us and the environment. In this way, it could impact the way we look on animals and how we should treat them. Its significance is especially in the persuasive power of its wording regarding the “why” we should treat animal in a human way. Therefore, the main objective of the Declaration is to change the mindset of all the stakeholders involved, from the governments to the consumers. UDAW could be notably helpful for developing countries, that do not have effective animal welfare legislation in place. This is because there are incredible disparities between countries and their animal welfare laws. UDAW could inspire these countries to make first steps towards the most basic animal welfare legislations. Its impact on developed countries we regard as less important, as the majority of those states already recognize animals as sentient beings.

We would like to pay attention to the fact that the Declaration specifically mentions five areas that are directly connected to animals-human health, social development, poverty and hunger reduction, disaster relief and environmental sustainability. This means, that the way we treat animals influences many other areas of life. Current Covid-19 situation is the illustration on how closely interconnected these topics are. Shortcomings in animal care and maintenance of their health can and do lead to serious human diseases. Or in the case of social development, “through the protection of animals in a society, we can evidence an essential part of it, the behaviour and attitudes towards animals is a clear reflection of society and its culture (...) Domestic violence, juvenile crime, bullying among other, are issues to be tackled in social development. Improvement in social development can be reached by teaching and socializing of compassion towards animals, a

clear example of social improvement (...).”¹¹¹ Declaration then continues on with the poverty and hunger reduction which are closely connected to efficient food productivity that would also respect the needs of animals and treat them humanly. Most importantly, UDAW also mentions the environment. Negative impacts of intense animal agriculture are already a common knowledge: from air, water, soil pollution, deforestation, loss of biodiversity, to climate crisis, among others. Current farming model is not environmentally sustainable and its need serious reformations. The fact, that the UDAW explicitly declares the connection between animals and other important areas of life is of a paramount importance: the way we treat animals has significant impacts on multiple spheres of our existence. We simply cannot disregard the interests of animals; therefore, we need to reconsider our current predominant anthropocentric society and start including in it more care for the other species.

To conclude, instruments such as UDAW are definitely a positive occurrence despite its generality and vagueness. It once again reflects the need of international community for higher animal protection. UDAW is the materialization of concerns and interest of public, different stakeholders, NGO’s and states. Its adoption would therefore be a formal acknowledgment of the importance of animal welfare on a

¹¹¹ BRITO, NAVAS/ Verónica, “The Universal Declaration of Animal Welfare: The Potential as a Non-binding Proposal to Contribute as an International Framework for Animal Welfare”, Thesis, <https://repositorio.usfq.edu.ec/bitstream/23000/3820/1/112431.pdf>, p. 34.

global level. In the future, UDAW could lead to the adoption of the binding convention on animal welfare.¹¹²

b) United Nations Convention on Animal Health and Protection

In the 2018 a framework convention on the protection of all animals has been drafted. However, it has not been yet adopted by the UN. It was created by Global Animal Law Organization that unities experts in the field. The aim of this Convention is to protect animals, their welfare and their health.

It encompasses five categories of animals: animals raised for food, laboratory animals, pet animals, wild animals and sport animals. This makes it a truly holistic attempt to regulate the welfare of all the animals, not focused only on the individual categories. The Convention has four parts- the Preamble, Objectives, Principles and Implementation.

The preamble acknowledges that animal interests and needs have to be considered in every field of human activities, it considers the fact that animal questions represent a growing interest of international community; it also acknowledges that human animal health are interdependent and that UN institution on animal health, welfare and protection should be established. UNCAHP' preamble finishes with the *UN World Charter for Nature's* statement according to which "Every form of life is unique, warranting respect regardless of its worth to man, and,

¹¹² If this future possible Convention would have the same version as it has now, it is questionable how it would change the ways we treat and protect animals. It would be necessary to make the articles more specific and in order for them to have serious impact on animal welfare rather than work just as a guideline with no concrete effects.

to accord other organisms such recognition, man must be guided by a moral code of action.”

In the Objectives wide definitions are laid down offering a wide scope of implementation. Next, there are Principles which are the backbone of the Convention. According to them, humans must act responsibly and with care, respecting specific needs of animals under their custody. Also, we have an obligation to help animals in distress. The principles also acknowledge the importance of the OIE’ “Five Freedoms” and “Three Rs” as valuable guidelines. Article three states fundamental principles according to which animals are sentient beings with intrinsic value. With regards to sentience, a precautionary principle should be applied, meaning that in the case of doubt on the sentience of invertebrate animal, no harm should be done to them even though their ability to feel pain has not yet been scientifically proved. The Convention also uses the term of dignity. This means that animals should not be instrumentalized and humiliated. Fourth article is dedicated to the eradication of animal cruelty and development of compassionate animal care. Article 5 is very interesting as it represents four animal interests: interest to live,¹¹³ to be free,¹¹⁴ to be well treated and not to be harmed in any case unless human life is at risk and to be represented.¹¹⁵ Article six is also very inspiring as it calls to research

¹¹³ “Not to be killed unnecessarily when appropriate alternatives exist.”

¹¹⁴ “Not to be confined or contained unnecessarily when appropriate alternatives exist.”

¹¹⁵ “Given the incapacity to defend themselves, non-human animals have an interest to be represented, when human beings or corporations are transgressing the fundamental animals’ interests described in this Convention. This interest of representation in criminal, administrative and civil procedures should be clearly

alternatives that would end animal exploitation.¹¹⁶ Next part titled Implementation is important as it represents progress compared to other proposals that are usually very vague. Here, the Convention proposes the strategy to implement its articles which would be very helpful in order to make in effective.¹¹⁷ Convention also highlights the need for international cooperation between the Parties and the importance of promoting Convention' principles through public awareness and education.

Article eleven establishes a Secretariat that would issue reports and coordinate different activities as well as arrange meetings of the Conference of the Parties. This Conference would review the implementation of the Convention and adopt new protocols, amendments and annexes.

This Convention represents another step forward in adopting a hard law treaty dedicated to animal questions. It is more developed than UDAW, its articles are more specific, and they represent a more wholesome umbrella treaty. We especially appreciate the implementation articles as they would make the Convention more impactful. Also, we recognize the importance of inclusion of animal

established at a national level, entitling state authorities and precisely described elements of civil society to plead for the fundamental interests of animals.”

¹¹⁶ “For the greater interests of both animals and human beings, every national government should therefore promote current alternatives to the use of animals and develop research on future alternatives to existing animals’ products and exploitation.”

¹¹⁷ For example: “Develop national strategies, plans or programs for animal health, welfare and protection (...)” or “[i]ntegrate, as far as possible and as appropriate, animal health, welfare and protection into relevant sectoral or cross-sectoral plans, programs and policies.”

interests, such the interest not to be killed if appropriate alternatives exist. Although, this could be potentially problematic article with regards to hunting or animal agriculture and many states would most probably object it, further clarification could be adopted. Also, this article could promote the development of laboratory meat, vegan diet, cooperation with developing countries with regards to plant agriculture and overall transformation of meat industry. These changes are global, and they would disturb current economic interests. But now more than ever we are aware that animal and human health are closely interconnected and that in order for the humanity to stay healthy we need to regulate strongly the meat industry.

This Convention is full of potential as it applies to all animals and all human activities involving animals. It switches the predominant anthropocentric logic according to which animals are just resources for human use. We perceive it as a materialization of the urgent need to see animals as “as a sentient and vulnerable being whose subjectivity matters”¹¹⁸ and as “living, breathing, sentient Others through which human identity is consolidated culturally and maintained legally.”¹¹⁹ We regard this Convention as the best attempt so far, to achieve a universal adoption of regulation on animal welfare.

C) ACTORS AND INSTITUTIONS

¹¹⁸ DECKHA, Maneesha, “Initiating a Non-Antropocentric Jurisprudence: The Rule of Law and Animal Vulnerability Under a Property Paradigm” *Alberta Law Review*, Vol. 50, No. 4, (2013), p. 785.

¹¹⁹ *Ibid.*, p. 784.

Here, we will discuss approaches and strategies towards animal protection of different organizations and institutions that could form part of general international regime of international animal law: Food and Agriculture Organization of the United Nations (FAO), Organization for Economic Cooperation and Development (OECD), Eurogroup for Animals, and NGO's such as Compassion in a World Farming, Human Society International, Mercy for Animals. What is their place in international animal law and how are they helping to develop it?

1) FOOD AND AGRICULTURE ORGANIZATION: FAO

Food and Agriculture Organization¹²⁰ is a specialized agency within the structure of United Nations. The main goal of the organization is to reach food security and access to quality food for all people. It has more than 194 member states. It is obvious that animal welfare is not the main objective of this organization, and that FAO approaches it through the prism of human health and agricultural development. Nevertheless, FAO contributes to dissemination of information and knowledge regarding animal issues. It has been “involved in animal welfare-related activities for many years, contributing to a better understanding of the issues at stake, in relation to productivity, food safety and security, human and animal health, sustainability of animal production, and rural development.”¹²¹ It provides us with a large number of statistical data,

¹²⁰ Hereinafter FAO.

¹²¹ STEVENSON, Peter, “Review of Animal Welfare Legislation in the Beef, Pork, and Poultry Industries”, Prepared under FAO Investment Centre, 2014, p. v, <https://www.animallaw.info/sites/default/files/faostudy.pdf>.

studies, analysis and reports that are important for development of international welfare policies. For example, in its study from 2013, FAO concluded that livestock production contributes more to greenhouse gas emissions than all forms of transport combined. It is responsible for up to 14,5% of man-made emissions.¹²² They calculated that livestock production is responsible for approximately 7.1 billion tons of carbon dioxide (CO₂e) per year. Of this dizzying amount, 45% originates in the cultivation of animal feed (of which 9% is due to the expansion of pastures and fields for the cultivation of feed), 39% in the digestion of animals and 10% in the decomposition of manure.¹²³ The rest falls on the processing and transport of animal products. This study catapulted livestock issues to the awareness of general and technical public. It became clear that climate crisis is a result of myriad of human actions, including those that were not usually connected with environmental problems. Other reports show for example, enormous increase in meat, egg and milk production. For example, thanks to FAO we know that global meat production raised four times in last 50 years; that 80 billion animals are slaughtered for consumption per year or that pig production increased from 24,75 million in 1961 to 120,88 million tons in 2018.¹²⁴ Moreover, “increased production was achieved not by increasing the number of farms producing animal products but, on the contrary, by a major concentration of production on fewer and fewer farms.”¹²⁵ This

¹²² FAO, “Livestock’s long shadow, environmental issues and options”, 2016, p. 17, <https://www.fao.org/3/a0701e/a0701e.pdf>.

¹²³ *Ibid.*

¹²⁴ FAO, “Faostat”, <http://www.fao.org/faostat/en/?#data/>.

¹²⁵ FRASER, David, “Toward a Global Perspective on Farm Animal Welfare”, *Applied Animal Behaviour Science*, Vol. 113, (2008), p. 332.

directly leads to worst conditions for farm animals living in confined spaces, under artificial lights, without enough movement.

FAO is also one of the essential partners of the European Social and Economic Committee and European Commission and the European Safety Authority on issues related to animal welfare.¹²⁶ Also, “[a]n increasing number of FAO member countries have requested FAO to assist with the improvement of their animal welfare legislation and develop related capacities (...)”¹²⁷ Further, FAO created on its website page dedicated to broad range of information dedicated to farm animal welfare. It provides access to national and international information relative to this issue. According to FAO “[a]nimal welfare is a global common good which forms an integral part of a responsible development of livestock sector.”¹²⁸ Moreover, animal welfare is not “a stand-alone topic but (...) topic among many others relevant or related to food safety and security, human and animal health, sustainability, rural development. Animal welfare is a tool that can generate benefits to producers, their animals and citizens at large.”¹²⁹

As we can see from the above, FAO sees farm animals as resources and economic unites used for human needs. Its anthropocentric position reflects current position of international welfare policies. Despite its findings proving that increased meat production is not sustainable, the

¹²⁶ STEVENSON, Peter, *op. cit.*, p. v.

¹²⁷ *Ibid.*

¹²⁸ FAO, “Getaway to Farm Animal Welfare”, <http://www.fao.org/ag/againfo/themes/animal-welfare/aw-abthegat/aw-whaistgate/en/>.

¹²⁹ *Ibid.*

organization does not seem to derail from traditional position towards food production.¹³⁰ In its sustainable development goals relative to transformation of livestock sector¹³¹ we can once again deduce its oblivion towards animal welfare and questions of animal pain, living conditions and overall holistic context of farm animal welfare. This accentuates the need for global institution that would put animal interests on the first place and that would restructure current agricultural models.

2) UNITED NATIONS COMMITTEE ON WORLD FOOD SECURITY

United Nations Committee on World Food Security in their *Proposed draft recommendations on sustainable agricultural development for food security and nutrition including the role of livestock* stated “Improve animal welfare delivering on the five freedoms and related OIE standards and principles, including through capacity building programs, and supporting voluntary actions in the livestock sector to improve animal welfare.”¹³² The fact that animal welfare was mentioned in the UN document is important as it reflects that it is an issue of growing

¹³⁰ In its report “Tackling climate change through livestock” FAO suggest use of best practices (better feeding practices, health management, manure management practices, recycling along supply chains, etc.) to mitigate negative impacts of meat production instead of looking at the primary causes of current climate and environmental crises.

¹³¹ FAO, “World Livestock: Transforming the livestock sector through the Sustainable Development Goals”, Rome 2014, <https://www.fao.org/3/CA1201EN/ca1201en.pdf>.

¹³² HLPE, “Sustainable Agricultural Development for Food Security and Nutrition, including the Role of Livestock?”, Report by the High Level Panel of Experts on Food Security and Nutrition of the Committee on World Food Security, Rome 2016, <https://www.fao.org/3/i5795e/i5795e.pdf>.

significance for the international community. To identify animal welfare as one of the global goals of sustainable agricultural policy is a “massive step forward”¹³³ because it “formally identifies animal welfare as a distinct (rather than subsumed) component of sustainable agricultural and economic development, of food security and of human nutrition.”¹³⁴ It makes from animal welfare a “deliverable objective of UN-driven public policy.”¹³⁵

Recommendations imply that farm animal welfare concerns should be taken seriously by government and that issues relative to unnecessary use of antibiotics and ensuring biosecurity are of a vital importance. UN policy is therefore contributing to a world in which “countries will no longer ask, “should we include animal welfare?” but “how to we deliver better animal welfare?”¹³⁶

3) ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT: OECD

Organization for Economic Co-operation and Development¹³⁷ is an international inter-governmental organization with 35 members with a mission to promote policies that will ameliorate social and economic

¹³³ World Animal Protection, “UN Supports Better Welfare for Farm Animals Worldwide”, <https://www.worldanimalprotection.org/news/un-supports-better-welfare-farm-animals-worldwide>.

¹³⁴ BULLER, Henry/ BLOKHIUS, Harry/ JENSEN, Per/ KEELING, Linda, “Towards Farm Animal Welfare and Sustainability”, *Animals*, Vol. 8, No. 6, (2018), p. 2.

¹³⁵ *Ibid.*

¹³⁶ World Animal Protection, *op. cit.*

¹³⁷ Hereinafter OECD.

well-being of people.¹³⁸ OECD acknowledges the need to protect animals in general and in experimental work,¹³⁹ it promotes the “Three Rs” and it conducts various research relative to animals such as research on global antimicrobial use in the livestock sector. OECD takes into account opinions of civil society therefore different animal welfare NGOs have formed a coalition called the International Council on Animal Protection to push the core animal issues to the center of attention such as to replace or reduce the use of animals in OECD guidelines.¹⁴⁰ The organization supports better animal welfare directly in *OECD-FAO Guidance for Responsible Agricultural Supply Chains*, by stating that “we will support animal welfare in our operations, including by: striving to ensure that the “five freedoms” for animal welfare are implemented (...) ensuring high standards of management (...) for animal production (...) in accordance with or exceeding OIE’s principles.”¹⁴¹ Among its reports belongs for example, *Agricultural Policy Monitoring and Evaluation 2020* providing insights into agricultural policies their monitoring and evaluation.¹⁴² OECD is especially concerned with welfare of laboratory animals which leads to adoption

¹³⁸ OECD, “About”, <http://www.oecd.org/about/>.

¹³⁹ OECD, “Animal Welfare”, <http://www.oecd.org/env/ehs/testing/animal-welfare.htm>.

¹⁴⁰ WorldAnimal, “OECD”, <http://worldanimal.net/53-our-programs/international-policy/544-oecd>.

¹⁴¹ OECD/FAO, *OECD-FAO Guidance for Responsible Agricultural Supply Chains*, Paris 2016, p. 28.

¹⁴² OECD, *Agricultural Policy Monitoring and Evaluation*, Paris 2020.

of programs that reduce number of animals used in testing or that reduce duplicative testing.¹⁴³

The importance to safeguard animal welfare is obvious from OECD policies. So far, the organization has been concerned with laboratory and farm animals but with the pressure of NGOs there is possibility to broaden the scope to other welfare issues. It is therefore important for lobby groups to encourage OECD in adopting more reports which could lead into recommendations and policies. Also, the cooperation of OECD with FAO and OIE is an indication that animal welfare is a multifaced global issue that has to be tackled on international level.

4) NON-GOVERNMENTAL ORGANIZATIONS

Non-governmental organizations of different types, sizes and ideological basis are trying to reduce and eliminate various types of animal suffering: from livestock, laboratory animals, wildlife trafficking to animals in zoos, aquariums and circuses, exotic pet trade, etc. NGOs have a crucial role in efficient policing of animal welfare and rights legislation. They have different approaches to achieve their goals such as, active campaigning with the aim to increase public awareness on particular issues; political lobbying with objective to push political agenda towards animal questions; law enforcement NGOs with main goal to make sure that the policies are being properly applied and

¹⁴³ OECD, “Animal Welfare”, <http://www.oecd.org/env/ehs/testing/animal-welfare.htm>.

enforced¹⁴⁴ or direct animal protection consisting in rescuing animals during disasters, running shelters for stray animals or creating animal sanctuaries. These organizations have a deep insight into the problematics which makes them very suitable for presenting practical as well as ethical suggestions and expertise into the policy-making process. In addition, they also have a powerful impact on the commercial segment, influencing corporations' best practices and developing private standards.¹⁴⁵

For example, Compassion in a World Farming, founded in 1967 has achieved one of the most impactful victories: their political lobbying influenced the EU to recognize animals as sentient beings able to feel the pain and suffering as well as to outlaw the barren battery cages for egg-laying hens, sow stalls and narrow veal crates; they also mobilized more than 1,5 million Europeans to sign a petition *Europeans Citizen Initiative* demanding the end of the “cage age”.¹⁴⁶ Humane Society International, has been leading successful campaigns to protect wildlife from exploitation for more than thirty years. Following their petitions, Japan ceased to sell products from elephant ivory on e-shops and many high-end fashion brands decided to go fur-free, Canada passed

¹⁴⁴ European Commission, “Science for Environment Policy”, https://ec.europa.eu/environment/integration/research/newsalert/pdf/wildlife_law_enforcement_the_vital_role_of_NGOs_56si13_en.pdf.

¹⁴⁵ Tesco's Nature, Carregour's guarantee of origin, Freedom Food standard in UK, etc. See, e.g. MACIEL, Carolina/ BOCK, Bettina, “Modern Politics in Animal Welfare: The Changing Character of Governance of Animal Welfare and the Role of Private Standards”, *International Journal of Sociology and Agriculture and Food*, Vol. 20, No. 2, (2012).

¹⁴⁶ Compassion in World Farming, “About Compassion in World Farming”, <https://www.ciwf.org.uk/about-us/>.

milestone bills, ending the captivity of dolphins, whales and porpoises for entertainment and European Bank for Reconstruction amended its Environmental and Social Policy stating that no funding will be awarded to projects including production of fur, etc.¹⁴⁷ Mercy for Animals, NGO focused on farm animals pushed, through their cooperation with Mexican congress, federal legislation protecting farm animals from being cut open before losing consciousness,...

NGOs have a powerful voice, and they are well equipped to represent animal interests and concerns of general public. Their impact is undeniable, especially with regards to exposing horrific treatment of animals and educating about welfare issues. However, animal welfare development cannot rely exclusively on them. NGOs are only *one of* the stakeholders that form colorful mosaic of actors within the international animal law. Now it is time that others learn from NGOs enthusiasm and in collaborations with them develop animal friendly governance apparatus, preferably on an international level.

In conclusion, this chapter showed us that in the last decades we have been witnessing a growing concern for animal questions. What started as a worry of few pressure groups, moral philosophers, and relatively marginal number of individuals, has transformed into a public debate on state, regional and universal level. It is not anymore just activists, rooting for the change of our relations to non-human animals. It is a paradigm shift of international community. Issues of farm animal welfare, negative impact of intensive farming on climate, species

¹⁴⁷ Human Society International, “Achievements for Animals. 2019 Annual Report”, https://www.hsi.org/wp-content/uploads/2020/04/HSI_AR19_LRz_Single.pdf.

extinction, animal experimentation and use of animals for entertainment, are concerns frequently discussed in press, on Internet, in academic spheres, in parliaments, international fora and plethora of NGO's. These are clear signs that more stakeholders are taking animal welfare into considerations. It also means that international animal law is not only needed but it is already in the process of its formation.

Despite all these advancements, we lack an overreaching agreement on international level, that would regulate animal welfare issues in a unified way. Current international norms concerning animal welfare are circumstantial and insufficient to effectively tackle multifaced animal welfare problematics. "Clearly, the piecemeal offering of international and regional law does not form a coherent and 'thick' body of law. The provisions are fragmented, often qualified, often inconsistent, unenforceable, and moreover unknown to most lawyers, law enforcers and legal scholars alike."¹⁴⁸ There is, therefore, a need for a development of an international model for animal protection. However, this might not be feasible in the near future. One of the reasons is insufficient academic construction of theoretical pillars of international animal law. Without strong justifications for its existence based on the theory of public international law, changes will only be partial and unsatisfactory.

¹⁴⁸ PETERS, Anne, *op. cit.*, p. 15.

CHAPTER V

TOWARDS INTERNATIONAL ANIMAL LAW

“Many believe that we are entering a new geological epoch: the Anthropocene. Humans have now become a force of nature affecting our planet Earth on a geological scale and at a much faster rate than traditional geological speed. We have impacts on all spatial scales, from local to global.”¹

Brown Weiss

One of the most pressing questions within the animal welfare area is how an effective international legal protection of animals could be constructed. In other words, the challenge is how could be animal welfare protected internationally. Our proposal is the creation of a new general international regime of public international law- international animal law. General international regimes protect global public interests such as climate change, loss of biodiversity, protection of basic human rights, protection of peace and security² and are suitable, as we will argue, for the protection of animal welfare as well.

In order to construct international animal law as a general international regime we first need to analyze animal welfare through the analytic tools of such regimes. Those are the concepts of universal values, global public interests, and common concern of humankind. Therefore, the hypothesis that will be defended in this chapter is that animal welfare is a universal value and global public interest of international community that could be materialized through the legal statute of common concern

¹ WEISS, Brown, “Nature and the Law: The Global Commons and the Common Concern of Humankind”, *Pontifical Academy of Sciences*, Extra Series 41, (2014), p. 1.

² CASANOVAS, Oriol/ RODRIGO, Ángel, *Compendido de Derecho Internacional Público*, Tenth Edition, Madrid 2020, p. 348.

of humankind. We will thusly argue that animal welfare belongs to the international arena as its protection and enforcement has global and intergenerational dimension. Present analysis will be, therefore, crucial for the creation of the next chapter, dedicated to international animal law as a general international regime. We will first draw the foundations that will be the backbone of the next chapter.

To build a well justified proposal for new international regime it is truly essential to ask why we need transnational legal apparatus protecting animals. For that reason, we will present relevant factors that globalize animal welfare issues and reasons for creation of an overreaching international policy framework. We will identify ethical, philosophical, sociological, political, and legal reasons for the existence of international animal law.

A) ON THE TERM “INTERNATIONAL”

1) GLOBAL OR INTERNATIONAL ANIMAL LAW

Firstly, we need to clarify the terminology. We propose the construction of international animal law as a general international regime of public international law. Thusly, the most correct notion for a legal system encompassing a supranational regulation on animal issues is, in our opinion, the one of “international” animal law. First, because it is close to the positive law, as opposed to terms such as “global” or “universal” animal law. These notions are not yet backed up by positive law and can be perceived as “romantic” views or ideals that are far from maturing into a structured formal legal system. They represent a legal phenomenon rather than a codified legal system. Therefore, to present

a credible proposal rooted in positive law, we use the term “international” animal law. Second, in this way we can maintain the systematic and structural logic of inclusion of international animal law as a general regime of public international law. We want to stay as realistic as possible and offer a pragmatic proposition for the creation of an international legal system protecting animals. By using the notions “global” or “universal” animal law or animal law of “humankind” we would enter into terminological inconsistencies with the possibility of shadowing the main message of our thesis: the need for animal welfare protection from an international perspective.

Further, as will be explained throughout this chapter, public international law encompasses universal values, global public interests, and goods as well as public interest norms. It is not anymore, a narrowly constructed legal system, as we have already learned in the chapter no. II. It opened itself up to a new set of societal needs, new actors, and new challenges. It swiftly reacts to changes; it deals with the global problems such as climate change or loss of biodiversity. Therefore, it is perfectly suitable to include international animal law as one of its regimes and thusly protect animal welfare internationally.

By using the term international animal law, we highlight first and foremost, the need for animal welfare regulation which is not confined to the area of a purely national law. The reason for an international response to animal issues is that “virtually all aspects of (commodified) human-animal interactions (ranging from food production and distribution, working animals, animal use in research, to breeding and keeping pets) possess a transboundary dimension. Therefore, the

welfare of animals, which is inevitably affected by these interactions, is global issue *per se* calling for a global response.”³ Indeed, globalization has direct effects to animal welfare. The interconnections between different economies⁴ creating a “flat world”⁵ are, together with technological advances, factors contributing to the world as we know it now. A world that does not know the distance, a society where the “local” is getting forgotten, where the consumption is the main drive. The westernization, internationalization, or recapitalization⁶ are changing our economic, social and political terrains. But how exactly is globalization impacting our fellow non-human animals? How are the phenomena of economic and social connectedness promoting animal abuse? How is the globalization deteriorating conditions of farm animals, wildlife and animals used in experiments? Answers to these questions will accentuate the urgent need for a protection of animal welfare from an international angle.

2) GLOBALIZATION AS A NEGATIVE INFLUENCE ON ANIMAL WELFARE

“Today, animals, animal products, and everything else can be trucked, sent by rail, or flown over a long distance in short periods of time. Animals no longer just travel from village to village but from country to

³ PETERS, Anne, “Global Animal Law: What It Is and Why We Need It”, *Transnational Environmental Law*, Vol. 5, No. 1, (2016), p. 16.

⁴ The movement of people, commodities and capital is more and more flexible.

⁵ FRIEDMAN, Thomas, L., *The World Is Flat: A Brief History of the Twenty-First Century*, New York 2005.

⁶ WRENN, COREY LEE, “Resisting the Globalization of Speciesism: Vegan Abolitionism as a Site for Consumer-Based Social Change”, *Political Science*, Vol. 9, No. 3, (2011), p. 9.

country”⁷ and from continent to continent. We live in a big economic marketplace where animals are “controlled in large part, by wealthy multinational corporations that exploit the economic value of animals.”⁸ The “global” aspect of animal issues is reflected in many factors of our globalized world- from long distance transportations (including transport by sea to another continent),⁹ intensive modern factory farming model, which is being introduced to developing countries, transboundary illnesses, experimentation on animals reflecting our never withering thirst for new cosmetic products. There is also growing consumer’s demand for meat and dairy products from foreign countries, wildlife trafficking, pressure from dairy and meat industry on governmental institutions to promote carnivore diet¹⁰ or truly globalized clothing industry that in the name of fashion kills millions of animals.¹¹ We can see that the globalization is bonded together with animal conditions in farming, wildlife, experimentation, and entertainment industries.

Use of animals in modern factory farming is an illustrative example of the interconnectedness between globalization and animals. The quantities of animals used for food are astonishing. More than nine

⁷ KELCH, Thomas, G., *Globalization and Animal Law: Comparative Law, International Law and International Trade*, Alphen aan den Rijn 2017, p. 24.

⁸ *Ibid.*

⁹ One of the longest journeys is the one of sheep- from Australia to the Middle East.

¹⁰ WHAT THE HEALTH, “What the Health - Documentary - 2017 2160p 4K - YouTube”, <https://www.youtube.com/watch?v=LL2cLhOqPsE>.

¹¹ PETA, “Animals used for clothing” <https://www.peta.org/issues/animals-used-for-clothing/>.

billion farm animals were killed last year globally.¹² The increase of animal production is undeniable and bound to grow in the future. As a result, many developing countries are orientating themselves towards animal production to offer competitively priced products to consumers in other parts of the world. For example, Africa and Brazil,¹³ are responsible for producing meat for Europe and Asia.¹⁴ As a result of increasing beef exports especially from Brazil, rampant deforestation of rain forests is taking place. Soy plantations¹⁵ and cattle ranches¹⁶ are

¹² DOWLING, Andrea, “Facts-Farm animals”, <https://www.animalmatters.org/facts/farm/>.

¹³ EU-MERCOSUR trade deal makes it cheaper for farmers in Brazil to export beef.

¹⁴ KELCH, Thomas, “Towards Universal Principles for Global Animal Advocacy”, *Transnational Environmental Law*, Vol. 5, No. 1, (2016), p. 82.

¹⁵ They are used to feed the livestock not only in Brazil, but worldwide. See, e.g., ARIMA, Eugenio/RICHARDS, Peter/ WALKER, Robert/ CALDAS, Marcellus, “Statistical Confirmation of Indirect Land Use Change in the Brazilian Amazon”, *Environmental Research Letters*, Vol. 6, No. 2, (2011); BOUCHER, Doug, ELIAS, PIPA/ LININGER, Katherine/ MAY-TOBIN, Calen/ ROQUEMORE, Sarah/ SAXON, Earl, *The Root of the Problem: What’s Driving Tropical Deforestation Today?*, Cambridge 2011; FEARNESIDE, Philip, “Soybean Cultivation as a Threat to the Environment in Brazil”, *Environmental Conservation*, Vol. 28, No. 1, (2001); LIMA, Mendelson/ SKUTSCH, Margaret/ MEDEIROS COSTA, Gerlane, “Deforestation and the Social Impacts of Soy for Biodiesel: Perspectives of Farmers in the South Brazilian Amazon”, *Ecology and Society*, Vol. 16, No. 4, (2011); Greenpeace USA., “Eating Up the Amazon”, <https://www.greenpeace.org/usa/research/eating-up-the-amazon/>.

¹⁶ See, e.g., NEPSTAD, Daniel/ MCGRATH, David/ STICKLER, Claudia/ ALENCAR, Ane, “Slowing Amazon Deforestation Through Public Policy and Interventions in Beef and Soy Supply Chains”, *Science*, Vol. 344, (2014); KAIMOWITZ, David/ MERTENS, Benoit/ WUNDER, Sven/ PACHECO, Pablo, “Hamburger Connection Fuels Amazon Destruction”, 2004, https://www.cifor.org/publications/pdf_files/media/Amazon.pdf; FEARNESIDE, Philip, “Deforestation in Brazilian Amazonia: history rates, and consequences”, *Conservation Biology*, Vol. 19, No. 3, (2005); NEPSTAD, Daniel/ SOARES-FILHO, Britaldo/ MERRY, Frank/ LIMA, André/ MOUTINHO, Paulo/ CARTER, John/ BORWMAN, Maria, “The End of Deforestation in the Brazilian Amazon”, *Science*, Vol. 326, No. 5958, (2009); BUTLER, Rhet, “62% of Deforested Amazon Land Ends Up as Cattle Pasture”, <https://news.mongabay.com/2011/09/62-of-deforested-amazon-land-ends-up-as-cattle-pasture/>; Amnesty International, “Brazil: Halt Illegal Cattle Farms Fuelling Amazon Rainforest Destruction”, <https://www.amnesty.org/en/latest/news/2019/11/brazil-halt-illegal-cattle-farms-fuelling-amazon-rainforest-destruction/>.

destroying these areas with fast tempo- up to 91% of Amazon destruction is caused by our demand for meat.¹⁷ This process also leads to a loss of biodiversity and to animal extinction. Another implication is that regional advances in farm animal welfare, such as those in the EU, are often not effective as corporations can relocate their business through outsourcing to developing countries and get around stronger welfare rules. Thus, on the first sight straightforward issues have far reaching tentacles strangling our planet and our health.

Another example of globalization' effects on animals is long transportation of agricultural animals, animals transported to zoos or animals used in circuses. Very common example showing long transportation logistic is the importation of live sheep from Australia to Middle East. Even if Australia has relatively good standards of animal welfare, they are not applicable during the transport and in the importing country. The same problems happen with animal experimentation which is headed to Asian countries.

These are some of the reasons why we need to focus on a global approach towards animal welfare. What we can conclude is that “the use of animals throughout the world (is) on an unprecedented scale. Along with this unprecedented use has come unparalleled profit and unparalleled globalized trade in animals.”¹⁸ Therefore, “[p]arochialism and one state strategies will not ultimately be effective in ending animal

¹⁷ Rainforest Foundation US, “Deforestation in Your Kitchen”, <https://rainforestfoundation.org/agriculture-2/>.

¹⁸ KELCH, Thomas, *op. cit.*, p. 83.

abuse. Without an integrated global strategy, increases in animal trade and outsourcing will undoubtedly continue apace.”¹⁹ Throughout this chapter we will provide the readers with more detailed examples of globalized nature of animal welfare, especially when addressing the common concerns of humankind.

3) GLOBALIZATION AS POSITIVE INFLUENCE ON ANIMAL WELFARE

What is “global” is also growing, bottom-up consumer concerns for animals. Animal issues are universal concerns, connected directly to animal suffering, climate change, deforestation, soil and water pollution, water shortage, social inequalities, deterioration of human health, etc. Society is becoming more informed about these topics which leads individuals to change in their eating habits and overall moral standing towards non-human animals.

For instance, with regards to farm animals, we witness change in eating habits. According to the novel studies, one in eight Britons are vegans or vegetarians, there has been a 600% rise of vegans in USA. in the last three years²⁰ and 400% rise of vegans in Portugal in the last decade.²¹ Veganism represents an unstoppable rise, plant- based is the food trend of last years and it is predicted to grow with further strength. Companies

¹⁹ *Ibid.*, p. 83.

²⁰ SMITHERS, Rebecca “Third of Britons Have Stopped or Reduced Eating Meat - Report | Business | The Guardian”, https://www.theguardian.com/business/2018/nov/01/third-of-britons-have-stopped-or-reduced-meat-eating-vegan-vegetarian-report?fbclid=IwAR2mgSLP6Q5MZwUlrihtVgAWwy5c7uje5pC_gtbgIuHc0GrcOETvM

²¹ OBERST, Lindsay “Vegan Statistics: Why the Global Rise in Plant-Based Eating Isn’t a Fad”, <https://foodrevolution.org/blog/vegan-statistics-global/>.

like Nestlé,²² Hellmann’s,²³ McDonalds²⁴ or Tyson Foods²⁵ react to consumers demand for plant-oriented diet, new start-ups producing vegan products are on the rise,²⁶ vegan dishes are served on airplanes,²⁷ etc. These are not just trends; these are paradigm shifts.²⁸ Ergo, there is an “increasing attention to welfare aspects by consumers in their purchasing decisions on products involving or using animals [which] has an impact on both the relevant industries and governments.”²⁹ Consumer preferences influence not only domestic regulation but also decisions on the importation of animal products from other countries.³⁰ Requirements of well-informed consumers affect decisions of

²² POINTING, Charlotte, “World’s Biggest Food Company, Nestlé Is Working on Vegan Products to Keep Up With Competition”, <https://www.livekindly.co/worlds-biggest-food-company-nestle-vegan-products-competition/>.

²³ EDWARDS, Jess, “Hellmann’s Is Launching Vegan Mayonnaise in the UK and Praise Be”, <https://www.cosmopolitan.com/uk/worklife/a23078250/hellmanns-vegan-mayonnaise/>.

²⁴ FOODINGREDIENTSFIRST, “Rise in Veganism Spurs NPD from Big Brands”, <https://www.foodingredientsfirst.com/news/rise-in-veganism-spurs-npd-from-big-brands.html>.

²⁵ NGUYEN, Sophia, “The Rise of Vegan Culture”, 2017, <https://www.harvardmagazine.com/2017/07/the-rise-of-vegan-culture>.

²⁶ We can mention the Impossible Foods, Beyond Meat, Oatly, ...

²⁷ STAROSTINETSKAYA, Anna, “Air New Zealand Adds Impossible Burger to San Francisco Flights Despite Meat-Industry Backlash”, <https://vegnews.com/2018/11/air-new-zealand-adds-impossible-burger-to-san-francisco-flights-despite-meat-industry-backlash>.

²⁸ We face for example the “post-milk generation”, the plant-based butcher shops, the foax fur fashion.

²⁹ PETERS, Anne, *op. cit.*, p. 16.

³⁰ *Ibid.*, p. 17.

corporations but also decision of foreign governments “if they wish to support their trading industries.”³¹

Thus, on one hand we see that animal welfare issues have profound consequences influencing the health of our environment, eco-systems, biodiversity, species extinction and many other areas. These multidimensional global problems can only be solved through a coherent global effort. On the other hand, there is a pervasive public support towards the increase of welfare standards and common worry over animal well-being which create solid moral justifications for the necessity of new regulations.

To conclude, the notion of international animal law accurately reflects complex realities in which animals currently live and at the same time suggests the need for a truly overreaching solution.

B) ANIMAL WELFARE AS A UNIVERSAL VALUE AND GLOBAL PUBLIC INTEREST

The fundamental idea is that animal welfare has been recognized as a universal value and global public interest (or general interest of international community) that deserves to be reflected and protected in the public international law. The most adequate international legal tool for this is the one of the common concern of humankind.

1) ANIMAL WELFARE AS A UNIVERSAL VALUE

³¹ *Ibid.*

a) *In cultures and beliefs*

Universal values are shared by most of the people and states around the world. Consequently, animal welfare can be considered as universal value as it is included in the legal systems of almost every state, and it forms part of most of the belief systems and cultures throughout the globe.³² It is true that in different cultures and religions we can find ambivalent references to animals. Sacred scripts of, especially, Abrahamic religions³³ include, as it is predominantly understood, anthropocentric positions towards animals. However, kindness, mercy, and compassion to all living creatures is apparent and deeply rooted in these traditions.³⁴ On the other hand, dharmic religions, such as Buddhism, Jainism and Hinduism explicitly require proper treatment of animals. They abandoned animal sacrifices because of their karmic

³² *Ibid.*

³³ Judaism, Christianity, and Islam.

³⁴ In the chapter n. I, we offered an analysis of Christian tradition and its relation to animals. With regards to Islam see following examples: “A good deed done to an animal is as meritorious as a good deed done to a human being, while an act of cruelty to an animal is as bad as an act of cruelty to human beings. (Hadith Mishkat, Book 6, Ch. 7, 8:178). Or “[i]t behoves you to treat animals gently.” (Hadith Muslim, 4:2593). “The central Islamic message of love, compassion, humility, submission, and almsgiving (zakat) is applicable not only for humans but also in the broader context of human-animal relations.” CARUANA, Lois, *Different religions, different animal ethics?* p. 11. According to Jewish tradition, all creatures are good in themselves, and animals are part of the community, as we can see on the example of the Noah and the flood. (Genesis 9:9, NRSV). There are also specific duties with regards to animals, such as “that your ox and donkey may have rest” (Exodus 23:12 NRSV) and moral obligations, for example, to help an overloaded donkey, even if its belonging to the enemy (Ecclesiastes 3:19 NRSV) and not to muzzle an ox while it is working (Deuteronomy 25:4). Concerning the religious slaughter- halal and kosher slaughter, we need to understand that in those times they indeed were considered human and reducing the pain. However, currently they clearly do not pass the muster of “human slaughter” as these animals are not stunned before being killed.

beliefs and are mostly vegetarian.³⁵ They are built on the principles of non-violence and non-killing.³⁶ Throughout the complex and diverse cultural landscape, we can find convergence on some essential points: even though different religions and cultures have different positions towards animals, the caring for creation and abstaining from causing the unnecessary suffering is evident. Major religions celebrate the creation and recognize that humans depend on nature. At the same time, they praise the compassion to all living creatures and acknowledge the inherent value of animals and the necessity to keep them away from suffering.

b) On the state level

The universality of animal welfare is also visible in the number of anti-cruelty laws all over the world. For example, torturing animals for sadistic satisfaction is generally seen as *malum in se*, i.e., “naturally evil” or indisputably wrong as a matter of fundamental principles of human civilization.”³⁷ Wide range of countries prohibit animal cruelty and apply the principle of human treatment of animals: European Union³⁸

³⁵ Cyclical re-birth of all living beings in different forms in each life.

³⁶ SZUCS, E./ GEERS, Rony/ JEZIERSKY, Tadeusz/ BROOM, Donald/ SOSSIDOU, Evangelia, “Animal Welfare in Different Human Cultures, Traditions and Religious Faiths”, *Asian-Australasian Journal of Animal Sciences*, Vol. 25, No. 11, (2012), p. 1500.

³⁷ WAGMAN, Bruce/ LIEBMAN, Matthew, *A Worldview of Animal Law*, Durham, North Carolina 2011, p. 141.

³⁸ *See* chapter No. VII, C).

San Marino,³⁹ but also Brazil,⁴⁰ Canada,⁴¹ different US states,⁴² New Zealand,⁴³ Switzerland,⁴⁴ India,⁴⁵ Taiwan,⁴⁶ Israel,⁴⁷ Australia,⁴⁸ and many

³⁹ See e.g. Disposizioni Sul Divieto di Sperimentazione Animale Nella Repubblica di San Marino, legge. No. 108, [online], 3.10.2007, San Marino: “All animal experimentation is in fact a condition of mistreatment, in that the animals are kept in conditions of imprisonment and constraint, are often submitted to procedures that cause them extreme suffering and are in the end put to death.” San Marino as a first and only country in the world banned all animal experiments.

⁴⁰ Legislação Informatizada - DECRETO N° 24.645, DE 10 DE JULHO DE 1934, O Chefe do Govêrno Provisório da República dos Estados Unidos do Brasil, usando das atribuições que lhe confere o artigo 1° do decreto n. 19.398, [online], 11.11.1930, Brasil. It establishes protection against cruelty, especially for working animals.

⁴¹ See e.g. Criminal Code of Canada, RSC 1985, C-46, 1985, sections 445 to 447. Section 445, [online], 1.1.1985, Canada: “Every one commits an offence who willfully (a) causes or, being the owner, willfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird; (b) in any manner encourages, aids or assists at the fighting or baiting of animals or birds.”

⁴² See e.g. Illinois, Comp. Stat. 70/4.03: “It shall be unlawful for any person to wilfully and maliciously taunt, torment, tease, beat, strike, or administer or subject any desensitizing drugs, chemicals, or substance to (i) any animal used by a law enforcement officer in the performance of his functions of duties, (...).” Maine: Mr-Rev. Stat. Ann. Tit. 17, § 1031, Cruelty to animals, H-1 “Commits bestiality on animals. For purposes of this paragraph, “commits bestiality” means that a person (1) Engages in a sexual act with an animal for the purpose of that person’s sexual gratification.”

⁴³ See e.g. Public Act 1999 No. 142, Animal Welfare Act, [online], 14.10.1999, New Zealand, Section 11 (1), Article 3A: “The owner of an animal that is ill or injured, and every person in charge of such animal, must ensure that the animal receives treatment that alleviates any unreasonable or unnecessary pain or distress being suffered by the animal.”

⁴⁴ See e.g. Tierschutzgesetz, (TSchG), [online], 16.12.2005, Schweiz, Art. 4(2): “No person may inflict pain, suffering or harm on an animal, induce anxiety in an animal or disregard its dignity in any other way without justification. It is forbidden to mishandle, neglect or unnecessarily overwork animals.”

⁴⁵ See e.g. Prevention of Cruelty to Animals Act, 1960. Act. No. 59 of 1960, [online], 26.12.1960. This act establishes for example in the Chapter III, 17, 2b) that “experiments are performed with due care and humanity, and that as far as possible experiments involving operations are performed under the influence of some anaesthetics of sufficient power to prevent the animal feeling pain.”

⁴⁶ See e.g. Taiwan Animal Protection Law, 2017, [online], Art. 25: slaughter, intentional injury or damage to animals resulting in “shattered limbs, organ failure or death” is punishable with sentence of up to two years of imprisonment.

others.⁴⁹ “Despite their distinct regulatory nature (i.e., the kinds of prohibited activities, a hierarchy of norms, penalties for violations, etc.), these norms prove that states have a shared understanding that animal cruelty must be condemned.⁵⁰ As a result, “there does seem to be convergence on the core idea that inflicting unnecessary or gratuitous suffering on animals should be proscribed. Even this rather minimal area of convergence implies agreement on some important ideas with potentially far-reaching implications: the recognition that animals are sentient and capable of suffering, that their suffering counts morally to some degree, and that it is a factor that should be weighed in the balance in the course of pursuing human needs and desires.”⁵¹

Welfare and anticruelty laws are based on the premise of animal sentience. Numerous states expressly acknowledge the existence of animal sentience. For instance, according to Tanzania’s Animal Welfare

⁴⁷ Prevention of Cruelty to Animals Law (Experiments on Animals) 5754-1994, [online], 1.12.2005, Israel, Art. 2 (a): “No person shall torture, treat cruelly or in any way abuse any animal.”

⁴⁸ See e.g. National Health and Medical Research Council, Australian Code of Practice for the Care and Use of Animals for Scientific Purposes, [online], 2013, Canberra Australia: “The purpose of the Code is to promote the ethical, humane and responsible care and use of animals for scientific purposes. The Code provides an ethical framework and governing principles to guide decisions and actions of all those involved in the care and use of animals for scientific purposes.”

⁴⁹ Indonesia, Kenya, Malaysia, Malta, Myanmar, New Zealand, Nicaragua, Nigeria, Norway, Papua New Guinea, Paraguay, Puerto Rico, Solomon Islands, South Africa, South Korea, Sri Lanka, Taiwan, Tanzania, Tonga, Turkey, Uganda, Ukraine, The United Kingdom, The United States, Vanuatu, Venezuela, Zambia, and other countries impose regulations on human treatment of animals and circumvention of animal suffering.

⁵⁰ BLATTNER, Charlotte, E., *Protecting Animals Within and Across Borders*, New York 2019, p. 74.

⁵¹ SYKES, Catherine, “Sealing Animal Welfare into the GATT Exceptions: The International Dimension of Animal Welfare in WTO Disputes”, *World Trade Review*, Vol. 12, No. 12, (2014), p. 480.

Act⁵² sentience is “the capacity of an animal to be aware of sensations, emotions, feeling pain, suffering and enjoying their species-specific needs”⁵³ and it expressly recognizes that “an animal is a sentient being”⁵⁴ and that “human being has a moral obligation to care, respect and protect an animal.”⁵⁵ Fundamental for the European Union is the Article 13 of Treaty on the Functioning of the European Union. It states that animals are sentient beings which requires “to 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.”⁵⁶ This Article constitutes a minimum standard that must be applied by the Member States. Those can, if they wish so, deepen its scope. France, for instance, made in the year 2015 a step forward by unanimously amending its Civil Code⁵⁷. As a result, animals are recognized for their intrinsic and not only commercial value, and they were moved from “personal property” status to “living being with sentience.”⁵⁸ We can

⁵² Animal Welfare Act, No. 19 of 2008, [online], Tanzania.

⁵³ *Ibid.*, Part I, Art. III.

⁵⁴ *Ibid.*, Part I, Art. 4, b), (ii).

⁵⁵ *Ibid.*, Part I, Art. 4, b), (iii).

⁵⁶ Consolidated version of the Treaty on the Functioning of the European Union, *OJ C 326*, 26.10.2012, Art. 13.

⁵⁷ Code Civil, *Journal officiel de la République française*, [online], 15.3.1803, France, Art. 515-14.

⁵⁸ *See more on the legal status of animals chapter no. I, D).*

also mention Slovakia,⁵⁹ Lithuania,⁶⁰ or Sweden⁶¹ as countries that expressly acknowledge animal sentience. Most recent EU country accepting animals as sentient is Spain.⁶² Although outside of the European Union, the United Kingdom recently recognized animal sentience and established a committee considering animal welfare when creating policy decisions.⁶³ Animal Welfare minister noted that “The UK has always led the way on animal welfare and now that we’ve left the EU we are free to drive for the highest standards of animal welfare in the world (...) Formally recognizing in the law that animals are sentient and experience feelings in the same way humans do is just the first step in our flagship Action Plan for Animal Welfare which will further transform the lives of animals in this country and strengthen our position as a global leader”⁶⁴ From other non-EU Members also Switzerland and Norway formally acknowledged animal sentience.

On the other side of the world, New Zealand recognized animals as sentient beings and banned their use for cosmetic testing. “To say that animals are sentient is to state explicitly that they can experience both

⁵⁹ Zákon č. 40/1964 Zb., Občianky zákonník, *Zbierka zákonov Slovenskej Republiky*, [online], 5.3.1964, Slovensko, Art. 118 (1).

⁶⁰ Gyvūnų gerovės ir apsaugos įstatyma pirmasis skirsnis bendrosios nuostatos, [online], 6.11.1997, Lietuvos Respublikos, Art. 1.

⁶¹ Djurskyddslag (2018:1192), Näringsdepartementet RSL, [online], 20.6.2018, Sverige.

⁶² Código Civil: Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil, *Boletín Oficial del Estado* [online], 25.7.1889, n. 206, España, Art. 333.

⁶³ Animal Welfare (Sentience) Bill, (HL), 2021.

⁶⁴ Lord GOLDSMITH, “Animals to be Formally Recognized as Sentient Beings in Domestic Law”, <https://www.gov.uk/government/news/animals-to-be-formally-recognised-as-sentient-beings-in-domestic-law>.

positive and negative emotions, including pain and distress.”⁶⁵ Quebec also acknowledged animal sentience stating that animals are not things but sentient beings with biological needs. Countries of Latin America are also participating in animal sentience recognition. Colombia, Chile,⁶⁶ Peru⁶⁷ and several Mexican regions⁶⁸ adopted welfare acts with the guiding principle of animal sentience. Asian and African region has not yet made step toward to conceding animals their sentience. However, countries without this express recognition do have anti-cruelty laws and laws minimizing animal suffering which comes from the fact that they can feel the pain and hence are sentient.

As we see, “(...) the world community seems to share certain core concerns about animals and how we treat them. A large number of states recognize animals as sentient beings, oppose the most despised acts against animals, demand that animals be treated humanely and that animal suffering be reduced. (...) taken as a whole, (this shows) that there is a universality dimension in animal law (...)”⁶⁹

c) On the international level

This can be further confirmed by actions on an international plane. According to the Resolution of the Consultative Assembly of the

⁶⁵ WILLIAMS, Virginia, “What is Sentience and Why Was It Included in The Animal Welfare Act?”, <https://www.mpi.govt.nz/animals/animal-welfare/national-animal-welfare-advisory-committee/animal-sentience-2017-workshop-speaker-videos/>.

⁶⁶ Ley 20380 Sobre Protección de Animales, [online], 3.10.2009, Chile.

⁶⁷ Ley 30407/ 2015, Ley de Protección y bienestar animal, [online], 8.1.2016, Peru.

⁶⁸ Federal District and Michacán.

⁶⁹ BLATTNER, Charlotte, *op. cit.*, p. 71.

Council of Europe human treatment of animals is one of the intrinsic values of western civilization.⁷⁰ Council of Europe also stated that “man has a moral obligation to respect all living creatures”⁷¹ and that there has to be “due consideration for their capacity for suffering and memory.”⁷² The *Resolution of the 1958 UN Conference of the Law of the Sea* noted that states have to “prescribe, by all means available to them, those methods for the capture and killing of marine life, especially of whales and seals, which will spare them suffering to the greatest extent possible.”⁷³ The *Declaration on Sustainable Development* created a concept of “human, equitable, caring society”⁷⁴ in which there is “human responsibility to one another, to the greater community of life and to our children.”⁷⁵ According to the UN General Assembly’s document, there is a need to “safeguard animal welfare and conserve biodiversity for future generations.”⁷⁶ Further, the *Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity* require “more efficient,

⁷⁰ Council of Europe, Recommendation 287, (1961), *International Transit of Animals*, p. 1.

⁷¹ Preamble of the European Convention for the Protection of Pet Animals, Council of Europe, ETS No. 125, (1987).

⁷² Preamble of the European Convention for the Protection of Vertebrate Animals used for Experimental and Other Scientific Purposes, Council of Europe, ETS. No. 123, (1986).

⁷³ Resolution 5, on the Humane Killing of Marine Life, 1958 UN Conference on the Law of the Sea, Official Records, Vol. II, Doc. A/CONF.13/38, Annexes.

⁷⁴ Johannesburg Declaration on Sustainable Development and Plan of Implementation of the World Summit on Sustainable Development: the final text of agreements negotiated by governments at the World Summit on Sustainable Development, 26 August-4 September 2002, Johannesburg, South Africa, para. 2.

⁷⁵ *Ibid.*, para. 6.

⁷⁶ United Nations General Assembly, A/66/750, *Letter dated 7 October 2011 from the Permanent Representative of Germany to the United Nations addressed to the President of the General Assembly*, UN.66th Session, (2012), pp. 8, 15, 18.

ethical and human use of components of biodiversity (...).⁷⁷ *The Earth Charter*, an international declaration of fundamental principles and values urges to “prevent cruelty to animals kept in human societies and protect them from suffering.”⁷⁸

Lastly, the examples of international hard and soft law analyzed in the previous chapter further enhance the existence of shared understanding of the necessity to protect and promote animal welfare. Animal welfare legislation is part of almost every country and it is part of universal public conscience.⁷⁹ Consequently, we can say that “(t)here are ample grounds for recognizing concerns for animal welfare both as a principle widely reflected in national legal systems and as a universal value, in the broader sense indicated by Judge Weeramantry.”⁸⁰ In his opinion, “[t]he ingrained values of any civilization are the source from which its legal concepts derive, and the ultimate yardstick and touchstone of their validity.”⁸¹ In this sense, the understanding of animal welfare as universal value is not a recent trend. It is well established in many

⁷⁷ CBD Guidelines, *Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity*, Decision VII/12, Annex II, Practical Principle 11, Operational Guidelines, <https://www.cbd.int/doc/publications/addis-gdl-en.pdf>.

⁷⁸ The Earth Charter, Paris 2000.

⁷⁹ PAVLOVA, Iliaya, “Animals: Property or Persons: The Legal Effects of Recognizing Their Sentient Nature in the European Union”, Thesis at the Hague University of Applied Sciences, Hague 2016, p. 3.

⁸⁰ BOWMAN, Michael/ DAVIES, Peter/ REDGWELL, Catherine, *International Wildlife Law*, Cambridge 2010, p. 678.

⁸¹ *Case concerning the Gabčíkovo-Nagymaros project (Hungary v. Slovakia)*, Separate Opinion of Judge Weeramantry, I.C.J Reports, (adopted Sep. 25, 1997). p. 98.

cultures, and these “multicultural traditions that exists on this important matter cannot be ignored (...)”⁸²

2) ANIMAL WELFARE AS GLOBAL PUBLIC INTEREST

*“We have entered an era of international law in which international law subserves not only the interests of individual States but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare. In addressing such problems, which transcend the individual rights and obligations of the litigating States, international law will need to look beyond procedural rules fashioned for purely interpartes litigation.”*⁸³

Judge Weeramantry

a) The context

International community encompasses different types of interests. First, there are concrete interests of individual states and other actors that are aiming at achieving their own objectives. Then, there are common interests of some of the members of the international community and lastly, there are collective interests.⁸⁴ Third category can be further divided into collective interests of group of states protected by a multilateral treaty and general interests of international community representing global public interests.⁸⁵

⁸² WEERAMANTRY, Christian, *Universalising International Law*, Leiden 2004, p. 478.

⁸³ *Case concerning the Gabčíkovo-Nagymaros project (Hungary v. Slovakia)*, *op. cit.*, p. 115.

⁸⁴ RODRIGO, Ángel, “Más Allá del Derecho Internacional: El Derecho Internacional Público”, in MENDÉZ-SILVA, Ricardo (coor.), *Derecho Internacional*, Ciudad de México 2019, p. 69.

⁸⁵ *Ibid.*

As has been illustrated in the chapter no. II, international law has undergone dramatic changes. It has developed from narrowly defined legal order into kaleidoscopic array of actors, subjects, sources, interests, and needs. “New global public space has emerged in which individuals, social groups and all types of entities, private and public interact and share problems, challenges and risks that transcend the frontiers of states.”⁸⁶ This transcendence and conformation of common social space originated global public interest.⁸⁷

An important question is what can be legally regulated by global public interest? It could be different global needs and issues, values, goods, spaces, and resources such as human dignity, maintenance of peace and international security, natural and cultural patrimony, diverse environmental problems, and as we will prove later on, animal welfare. In order to understand the notion of global public interest, we will address its main features. Characteristics of general interests are, according to Ángel Rodrigo as follows: they are qualitatively different, they are rational social constructions, they are subjected to normative decisions of international community, they are regulated by a variety of legal tools, their protection affect entire international community, they have an intergenerational dimension, and they lead to the creation of general regimes protecting these interests.⁸⁸

⁸⁶ IBANÉZ, Josep, “Poder y Legitimidad en la Gobernanza del Interés Público Global”, in BOUZA, Núria/ GARCÍA. Caterina/ ROGRIGO, J, Ángel (eds.), *La Gobernanza del Interés Público Global*, Madrid 2015, p. 102.

⁸⁷ *Ibid.*

⁸⁸ RODRIGO, Ángel, *op. cit.*, p. 70.

b) Characteristics of global public interests

First characteristic of global public interests is their “community dimension, which makes them different from the interests of the states adopted in individual way.”⁸⁹ It is not just a simple sum of individual separate interests of states. It is qualitatively different, as it derives from the condition of a member of international community.

Second, it is a “rationally constructed abstraction”⁹⁰ based on social reality, which is a result of open participation of all the members of international community. It addresses concrete problems and new necessities that result from “quantitative and qualitative increment of members (of the international community), from the increment of interdependency and from the appearance of the sentiment of belonging to a global community.”⁹¹ It represents a set of all the fundamental interests of international community, that have relevance on domestic as well as on international level.⁹²

Third, they do not represent an autonomous source of international obligations. They do not create new legal obligations for the members of international community as they are not objective truth from which legal obligations are derived.⁹³ Further, general interests can be

⁸⁹ BOUZA, Núria/ GARCÍA, Caterina/ RODRIGO, Ángel, “Hacia Worldfalia? La Gobernanza Política y Jurídica del Interés Público Global”, p. 43, in BOUZA, Núria/ GARCÍA, Caterina/ RODRIGO, Ángel (eds.), *La Gobernanza del Interés Público Global*, Madrid 2015. (Own translation).

⁹⁰ RODRIGO, Ángel, *op. cit.*, p. 71.

⁹¹ *Ibid.* (Own translation).

⁹² KULLICK, Anthony, *Global Public Interest and International Investment Law*, Cambridge 2012, p. 3.

⁹³ RODRIGO, Ángel, 2019, *op. cit.*, p. 71.

regulated via different legal tools for the creation of global public norms, such as multilateral treaties or resolutions of international organizations.⁹⁴ “In addition, the legal regulation of these interests can give rise to different legal or technical statutes that allow different degree of intervention of the international community: common concern of humankind, common heritage of mankind, and so on.”⁹⁵

Fifth characteristic tells us that their protection is not subjected to the satisfaction of individual state interests and to a mutual reciprocity between them. “For that reason, their protection, as a general rule, cannot be left to free disposition of states, either individually or inter se, but it is the responsibility of the international community as a whole.”⁹⁶

General interests also have an intergenerational dimension, as its beneficiary is the humanity in its entirety⁹⁷ as well as the nature in itself. It is not only the states and other actors of international law that benefit from them. This is because general interests represent an overlapping umbrella of needs and interests of a global dimension.

Lastly, global public interests represent diverse needs and issues. For that reason, it is “advisable that their recognition and legal protection is done through public interest norms and international institutions that

⁹⁴ *Ibid.*

⁹⁵ *Ibid.* (Own translation).

⁹⁶ RODRIGO, Ángel, 2019, p. 72. (Own translation).

⁹⁷ CASANOVAS, Oriol/ RODRIGO, Ángel, J., *op. cit.*, p. 344.

would form a specific international regime allowing adaptation to change and supervision of application.”⁹⁸

c) Characteristics of animal welfare as global public interest

Now, that we understand what the nature of global public interests is, we will answer whether this notion could be applied to animal welfare issues.

i) Community dimension

Negative influence of animal agriculture to environment and human health, species extinction, whaling, trophy hunting, fur farms (for fashion purposes), animal fighting, conditions of animals in zoos, factory farms and animal experimentation are some examples of the animal welfare areas that attract vast public interest of international community. These and other animal welfare issues are highly complex, entangled, and multi-layered. In the subchapter dedicated to common concern of humankind we will show how actions in one field, for example intensive animal farming, influence biodiversity and climate change in other parts of the world. The existence of negative consequences of bad animal welfare for entire international community and humanity itself is undoubtful. Animal welfare issues thusly reflect a global problem that needs to be tackled internationally. Hence it is in the interest of the international community *in its entirety* to adopt a holistic comprehensive response. It is not just a sum of individual interests of states. It is a *common* worry and a global interest in tackling

⁹⁸ RODRIGO, Ángel, 2019, *op. cit.*, p. 72. (Own translation).

animal welfare issues. There is a global preoccupation of states,⁹⁹ multinational corporations and civil society concerning animal welfare. There is a strong public support towards the amelioration of animal welfare practices and pressure towards effective national and international reforms. For example, the growth of live animal transports and increase in meat and dairy exports has enhanced the public awareness of welfare issues in their own States as well as in foreign lands.¹⁰⁰ The global aspect of animal welfare is therefore materialized in public support throughout the world, as was exemplified in the subchapter A). But we will provide even more examples.

In the *Sustainable Development Goal* consultation process animal protection received the second highest score as the 17th additional goal in the My World 2015 survey.¹⁰¹ According to the Eurobarometer Survey, 94% of Europeans, including the UK citizens, recognize the importance of farm animal welfare.¹⁰² In the US, 50% of consumers eating beef and 44% pork consumers said that it is important that the meat comes from farms treating animals humanly.¹⁰³ 63% Americans

⁹⁹ See e.g.: the existence of animal cruelty and welfare laws on national and international level mentioned in the subchapter B), 1) and international developments analyzed in the chapter no. IV.

¹⁰⁰ BLATTNER, Charlotte, E, *op. cit.*, p. 423.

¹⁰¹ COX, Janice/ BRIDGES, Jessica, “Why is Animal Welfare Important for Sustainable

Consumption and Production?”, *Perspectives*, No. 34, (2019), p. 1.

¹⁰² TNS Opinion & Social, Special Eurobarometer 442: November-December 2015, *Attitudes of Europeans towards Animal Welfare*, requested by Directorate General Health and Consumer Protection, European Commission, March 2016.

¹⁰³ Animal Welfare Institute, “Consumer Perceptions of Farm Animal Welfare”, https://awionline.org/sites/default/files/uploads/documents/fa-consumer_perceptionsoffarmwelfare_-112511.pdf.

said that they would buy less likely from a company with bad welfare reputation while in another study 80% consumers said that they were feeling disturbed after learning about the treatment of animals in intensive farming¹⁰⁴ and 95% of participants of another national study said that they are very concerned about farm animal welfare. Study conducted in New Zealand showed that for most of the citizens it matters how animals are treated, that we as humans have responsibilities towards them and that their use must be humane.¹⁰⁵ In Australia the survey showed that 95% of respondents have welfare concerns and 91% require a reform.¹⁰⁶ These concerns are being translated into consumers choices. Whilst some years ago vegan products were available in specialized bio shops, now they are in supermarkets such as Lidl, Mercadona, Tesco, Billa, Walmart and such. It is now the private sector that requires its suppliers to provide more ethical products in alignment with welfare requirements of their consumers. The vegan market is growing, and it is a clear indication of consumers preoccupations and ethical considerations regarding animal protection. Also, the number of flexitarians¹⁰⁷ is on the rise. The fact that vegan options are available in

¹⁰⁴ *Ibid.*

¹⁰⁵ Ministry for Primary Industries, “Animal Welfare Matters. New Zealand Animal Welfare Strategy”, White Paper, 2013, <https://www.mcguinnessinstitute.org/wpcontent/uploads/>.

¹⁰⁶ McGreevy, Paul/ CORNISH, Amelia/ JONES, Bidida, “Not Just Activist, 9 out of 10 People are Concerned About Animal Welfare in Australian Farming”, <https://theconversation.com/not-just-activists-9-out-of-10-people-are-concerned-about-animal-welfare-in-australian-farming-117077>.

¹⁰⁷ People with semi-vegetarian diet.

most of the restaurants is another proof of strong public opinion, at least in the West.

Nevertheless, we can also see increasing welfare concerns in other regions. For example, in China the citizens express growing concern for higher and safer levels of industrial farming for the purposes of food safety and minimization of diseases and for the environment. Study showed that “[m]ost respondents agreed that it was either very or extremely important to care for animals.”¹⁰⁸ In Latin America the surveys showed that Mexican consumers are interested in farm animal welfare and that they feel empathy towards animal needs. In Chile, the information about animal treatment that takes place before their slaughter are important and they are willing to pay more for meat products coming from humanely operated farms. In Brazil the knowledge on welfare and its implications have increased and Brazilians prefer farms that provide more freedom of movement. Also, they do not agree with zero-grazing and cow-calf separation because of its adverse consequences for animal welfare and food quality.¹⁰⁹

The public worry can be seen not only in the area of farm animal welfare. Concerning animal testing for example, 8 million people signed the petition promoted by Cruelty Free International and The Body Shop

¹⁰⁸ CARNOVALE, Francesca/ JIN, Xiao/ ARNEY, David/ DESCOVICH, Kris/ GUO, Wenliang/ SHI, Binlin/ PHILLIPS, Clive, “Chinese Public Attitudes Towards, and Knowledge of, Animal Welfare”, *Animals*, Vol. 11, No. 3, (2021), p. 22.

¹⁰⁹ VARGAS-BELLO-PÉREZ, Einar/ MIRANDA-de la LAMA, Genero/ LEMOS TEIXEIRA, Dayane/ ENRÍQUEZ-HIDALGO, Daniel/ TADICH, Tamara/ LENSING, Joop, “Farm Animal Welfare Influences on Markets and Consumer Attitudes in Latin America: The Cases of Mexico, Chile and Brazil”, *Journal of Agricultural and Environmental Ethics*, Vol. 30, No. 1, (2017), pp. 698- 709.

calling on the “countries of the UN to formalize an international framework to end cosmetic animal testing.”¹¹⁰ In the field of wild animal welfare, NGOs, conservation experts and members of the European parliament are calling on the European Union to prohibit the imports of hunting trophies.¹¹¹

The community dimension is also reflected in the increasing welfare legislation adopted on national and international level. Great examples are the advancements in different countries, European Union and on international plane mentioned in the previous subchapter dedicated to universal values and in the chapters no. IV and VII.

By the end of this chapter, after having developed the theory of common concern of humankind, the conclusions will confirm the existence of a common global preoccupation with regards to animal welfare issues, the existence of negative consequences of bad animal welfare for entire international community and humanity itself and the transboundary nature and major seriousness of the issues. All of this, together with the strong public support towards better animal welfare, creation or corporate animal friendly policies and growing national, regional, and international reforms, suggests the existence of a community dimension of animal welfare issues.

¹¹⁰ PRNEWswire, “The Body Shop and Cruelty Free International Bring a Record-Breaking 8.3 Million Signatures to the United Nations to End Cosmetic Animal Testing Globally”, https://www.beautypackaging.com/contents/view_breaking-news/2018-10-10/the-body-shop-brings-8-million-signatures-to-un-to-end-cosmetic-animal-testing-globally.

¹¹¹ HSI, “Leading Animal Protection NGOs Call for EU Ban on Hunting Trophy Imports”, <https://www.hsi.org/news-media/leading-animal-protection-ngos-call-for-eu-ban-on-hunting-trophy-imports/>.

ii) Rational abstractions

Animal welfare meets also the second condition of general interests of international community. It is a rational abstraction derived from the concrete problems and needs of international community. It represents concrete global problems and challenges that must be regulated internationally. Animal welfare problems are emerging especially because of the intensification of transboundary trade and globalization processes. We see quantitative increase of states, multinational corporations, NGOs, international organizations, and individuals that either cause animal welfare problems or try to solve them. Many times, the actors are at the same time the perpetrators as well as the agents solving the issue as the problems are entangled and very complex. The economic interdependency between states is another element causing for instance, environmental problems in the case of intensive farming. China, heavily dependent on meat from for example Brazil, imports huge quantities of products thanks to transboundary trade. However, Brazil bears the consequences of mass meat production such as warming climate, loss of biodiversity both in cases of fauna and flora, water, air and soil pollution and many more. On the other hand, change in the eating habits of Chinese population adopting western lifestyle is contributing to steep rise of obesity and cardiovascular health problems. As a result, far reaching aftereffects of cultural interdependency and homogenization of culture are present also in the case of animal welfare. The necessity to protect animal welfare globally stems from real-time problems that we face as a humanity. The increasing concern from civil society but also from states and international organizations are proof of

the materialization of this preoccupation. This criterion represents constitutive effect of global public interest as on one hand it describes and synthesizes the importance of certain needs, values, or goods, in our case good animal welfare, and on the other hand it helps to configure the interests of the members of the international community (strong public support towards better animal welfare).

iii) Plurality of normative categories

Thirdly, animal welfare as global public interest does not establish by itself international legal obligations that prescribe or forbid certain behavior to the members of international community. The recognition, protection and administration of general interests of international community is done via plurality of normative categories, legal techniques and institutions.¹¹² In other words, different legal tools need to be adopted in order to create global public norms throughout which this particular interest will be protected, such as multilateral treaties, resolutions of international organizations or other soft law norms but also different legal techniques such as, in our case, common concern of humankind and global public goods. Variety of these legal tools will lead to different grade of intervention of international community.¹¹³

iv) Protection by international community

Next, animal welfare issues need to be protected by international community in its entirety. With the environmental awakening, states

¹¹² RODRIGO, Ángel, 2019, *op. cit.*, p. 76.

¹¹³ *Ibid.*

discovered international dimensions of deteriorating environmental processes and the need for action as a response defending common interest.¹¹⁴ International community is beginning to understand that animal welfare issues are interconnected with sustainability problems whether it is food security, agricultural productivity, poverty, human and animal health, the climate, loss of biodiversity, clean water, ... As we have seen, one state strategies and parochialism are not sufficient and are not able to solve global problems that we as humanity are facing with regards to animal welfare issues. Comprehensive international approach needs to be adopted as the misuse of animals has unprecedented consequences not only for welfare of animals but also for the human health and for the conservation of environment as well as for cultural and economic development. Cooperative actions by international community are necessary to adopt effective and meaningful advancements in the treatment of animals. Consequently, good treatment of animals must be “mainstreamed in development policy and international development work.”¹¹⁵

v) Necessity for a global response

On the following pages concerning common concern of humankind, we will establish the necessity for a global response. The problems of outsourcing, the interdependency between states with regards to intensive animal farming, trophy hunting, animal transportation, animal

¹¹⁴ JUSTE, José, “La Protección del Interés Público Global en Materia de Medio Ambiente”, p. 470, in BOUZA, Núria/ GARCÍA, Caterina/ RODRIGO, Ángel (eds.), *La Gobernanza del Interés Público Global*, Madrid 2015.

¹¹⁵ COX, Janice/ BRIDGES, Jessica, *op. cit.*, p. 5.

tourism, wildlife trafficking cannot be tackled on national or regional levels and so on. Animal welfare issues need to be treated in a holistic way, “as it is part of a broader system that includes food safety and security, human and animal health, environmental and ecological development, as well as sustainable development. Animal welfare is also a shared responsibility among governments, communities, the people who own, care for and use animals, civil society, educational institutions, veterinarians and scientists.”¹¹⁶

vi) Intergenerational dimension

Further, as a sixth criterium, animal welfare has a clear intergenerational dimension. It is undeniable that it is the humanity itself who would benefit from an overreaching international animal welfare framework. “There is a growing awareness that all peoples and nations inevitably share the planet earth and that they have responsibilities to each other and to future generations for preserving its environment.”¹¹⁷ Human well-being cannot exist without environmental and animal health. Both human and animal health “are interdependent and linked to the health of the ecosystems in which they co-exist.”¹¹⁸ “The absence of a global

¹¹⁶ FAO, “Animal Welfare, The Issue We Need To Care About”, <http://www.fao.org/china/news/detail-events/en/c/1235599/>.

¹¹⁷ BILDER, Richard, B, “The Role of Unilateral State Action in Preventing International Environmental Injury”, *Vanderbilt Journal of Transnational Law*, Vol. 14, No. 1, (1981), pp. 73-74.

¹¹⁸ UNEP, “UNEP Joins Three International Organizations in Expert Panel to Improve One Health”, <https://www.unep.org/news-and-stories/story/unep-joins-three-international-organizations-expert-panel-improve-one-health>.

protection of animals puts humanity at risk.”¹¹⁹

Despite our technological progress, we are still part of the ecosystem, we are dependent on the resources and the environment. Terms such as “ecological debt”, “sustainable development”, “degrowth” and “ecological footprint” are emerging from legal, political, and scientific areas.¹²⁰ They point to the need not to compromise the ability of future generations to meet their own needs. Issues of animal welfare touch upon myriad of different areas, from food security to antimicrobial resistance, zoonotic diseases, environmental problems including climate change and loss of biodiversity as well as impacts in sociocultural fields. These interlinkages are progressively recognized in wider policy circles, as was shown above, especially via the IPCC reports but also in other documents such as “The Future in Now: Science for Achieving Sustainable Development”¹²¹ created by the Independent Group of Scientists appointed by the UN Secretary-General.¹²² Here furthermore, it was affirmed that animal welfare is missing in the 2030 Agenda stating that “[t]he clear link between human health and well-being and animal welfare is increasingly being recognized in ethics- and rights-based frameworks. Strong governance should safeguard and the well-being of

¹¹⁹ BRELS, Sabine, “Why Include Animal Welfare in the 2022 Declaration?”, <https://wfa.org/animals-2022-declaration/>.

¹²⁰ MAINGUY, Gaell, “Theories on Intergenerational Justice: A Synopsis”, *Surveys and Perspectives integrating Environment and Society*, Vol. 1, No. 1, (2008), p. 61.

¹²¹ Independent Group of Scientists appointed by the Secretary General, *Global Sustainable Development Report 2019: The Future is Now. Science for Achieving Sustainable Development*, United Nations, New York, 2019.

¹²² BRELS, Sabine, *op. cit.*

both wildlife and domesticated animals with ruled on animal welfare embedded in transnational trade.”¹²³

Clear link between good animal welfare and sustainability in food production has been established also by the EU.¹²⁴ In “Farm to Fork Strategy”¹²⁵ it is stated that “[b]etter animal welfare improves animal health and food quality, reduces the need for medication and can help preserve biodiversity.”¹²⁶ Animal welfare as intrinsic part of the sustainable development can be also found in the UN Sustainable Development Goals adopted in 2015.¹²⁷

vii) Public interest norms

Lastly, we argue that global public norms would be ideal for protecting animal welfare internationally. This notion will be analyzed in more detail in the no. chapter VI. For now, it suffices to say that global public norms serve to defend general interests of international community. Global public norms establish collective obligations of *interparte* and integral structure that have vocation of universality. “These norms can

¹²³ *Global Sustainable Development Report 2019, op. cit.*, p. 117.

¹²⁴ European Commission, “Feedback from: Eurogroup for Animals”, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12451-EU-trade-&-investment-policy-review/F538009_en.

¹²⁵ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system*, COM(2020)381 final.

¹²⁶ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Farm to Fork Strategy for fair, healthy and environmetally-friendly food systems*, COM/2020/381, 2020, p. 10

¹²⁷ UN General Assembly, *Transforming our world: the 2030 agenda for sustainable development*, Un G.A., Res, A/RES/70/1., 2015.

be created through any of the norm-making procedures of the international legal order: by customary norms, by general principles of law, by multilateral international treaties, by resolutions of international organizations or by resolutions of treaty management bodies for the protection of general interests.”¹²⁸

Given the characteristics above, it is clear that good treatment of animals represents general interest of international community. From the analysis we can affirm that the concern for good animal welfare constitutes interests in which state interests coincide with interests of the humanity in its entirety.¹²⁹ The notion of global public interest contains animal welfare issues as the protection of animals has global and intergenerational dimension and it constitutes general interests of international community. This is crucial for our subsequent construction of international animal law as general international regime, as those are protecting general interests of international community.

C) ANIMAL WELFARE AS COMMON CONCERN OF HUMANKIND

1) THE CONTEXT

Next question to address is whether animal welfare can be understood as a common concern of humankind.¹³⁰ The term common concern of humankind offers a structure for addressing global issues. Issues of

¹²⁸ RODRIGO, Ángel, 2019, *op. cit.*, p. 79.

¹²⁹ JUSTE, José, *op. cit.*, p. 472.

¹³⁰ Sometimes referred to by its abbreviation CCH.

common concern transcend the boundaries of a single state and they need collective action in response.¹³¹ These concerns have “long-lasting adverse effects, potentially devastating to the future generations. Common concern of humankind therefore includes a strong focus on intergenerational equity¹³² and “fair burden sharing.”¹³³ The CCH encompasses the most pressing and unresolved global shared issues that threaten the international community as a whole and its peace and stability.¹³⁴ It suggests that the “matter at hand is worrying, but at the same of great interest or importance and to be taken care of. Concern not merely describes a fact, a problem or adverse effects, but equally entails a normative component that there is a problem which needs to be addressed.”¹³⁵ It focuses on issues that are essential to all mankind.¹³⁶ According to Friedrich Soltau, CCH is based on the community interests that that go beyond the borders of individual states and are concerned with ethics and values of global implication. The threats to those interests are serious and possibly irreversible. To protect them,

¹³¹ SHELTON, Dinah, “Common Concern of Humanity”, *Environmental Law and Policy*, Vol. 39 No. 2, (2009), p. 83.

¹³² SHELTON, Dinah, *op. cit.*, 2009, p. 83.

¹³³ Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity, *Report of the Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity on the Work of its Second Session* (March 7, 1991), p. 4.

¹³⁴ COTTIER, Thomas/ AHMAD, Zaker, *The Prospects of Common Concern of Humankind in International Law*, Cambridge 2021, p. 14.

¹³⁵ *Ibid.*, p. 38.

¹³⁶ TRINIDADE, Caçado Antônio/ ATTARD, D. J, “Report on the Proceedings of the Meeting, Prepared”, in ATTARD, D.J, (ed.) *The Meeting of the Group of Legal Experts to Examine the Concept of the Common Concern of Mankind in Relation to the Global Environmental Issues*, UNEP, Nairobi 1991, pp. 19-47.

collective actions and responsibility is inevitable.¹³⁷ More precisely, the CCH addresses shifts and negative consequences in different areas that are harmful to the ecosystems and human life.¹³⁸ For instance, in climate change the concern is climate warming and in biodiversity its deterioration and destruction.¹³⁹ “The problem to be addressed thus relates to the management of change and of adverse and harmful effects.”¹⁴⁰

Furthermore, it is important to distinguish common concern of humankind from the notion of “common heritage of mankind”, which is related to “property in the sense that everyone or every State may have a property interest in anything that is so designated.”¹⁴¹ “By developing the concept of “common concern of humankind,” one can avoid the focus on a property interest and focus instead on the common interest that all have in protecting the resources and environmental systems essential for humankind.”¹⁴² The term common concern of humankind is therefore devoid “of connotation of exploitation and sharing of resources or benefits.”¹⁴³ Another point of difference is the

¹³⁷ SOLTAU, Friedrich, “Common Concern of Humankind”, in GRAY, Kevin/ TARASOFSKY, Richard/ CARLARNE, Cinnamon (eds.), *The Oxford Handbook of International Climate Change Law*, New York 2016, pp. 207-208.

¹³⁸ BRUNNÉE, Jutta, “Common Areas, Common Heritage and Common Concern”, p. 565, in BODANSKY, Daniel/ BRUNÉE, Jutta/ HEY, Ellen (eds.), *The Oxford Handbook of International Environmental Law*, Oxford 2007.

¹³⁹ COTTIER, Thomas/ AHMAD, Zaker, *op. cit.*, p. 38.

¹⁴⁰ *Ibid.*

¹⁴¹ WEISS, Brown, *op. cit.*, p. 12.

¹⁴² *Ibid.*

¹⁴³ TRINIDADE, Antonio, A., C., *International Law for Humankind. Towards a New Jus Gentium*. Leiden, Boston 2010, p. 351.

spatial factor. Common concerns are not limited to a specific location, on the contrary they transcend the jurisdictions of single states and are by nature transboundary. Hence, it encompasses questions fundamental to all humankind. The “long-term temporal dimension (underlying the term *humanity*), to encompass both the present and the future generations”¹⁴⁴ is another significant difference.

What implications arise when certain area is considered as CCH? It “implies some kind of enhanced commitment and obligations to international cooperation, reinforcing the shift of classical international law from coexistence to cooperation, and ultimately perhaps even to integration and legal harmonization in specific regulatory areas.”¹⁴⁵ Further, “[i]t may deploy symbolic and psychological effects. It may stimulate debate and action, emphasizing the seriousness of a problem.”¹⁴⁶ As a result, the notion of CCH “leads to the creation of a legal system whose rules impose duties on society as a whole and on each individual member of the community.”¹⁴⁷ If nothing more, the CCH materializes the necessity for international cooperation via global institutions to face common concern.¹⁴⁸

¹⁴⁴ *Ibid.*, p. 352.

¹⁴⁵ COTTIER, Thomas/ AHMAD, Zaker, *op. cit.*, p. 24.

¹⁴⁶ SHELTON, Dinah, *op. cit.*, 2009, 27.

¹⁴⁷ *Ibid.*, p. 85.

¹⁴⁸ BOWLING, Chelsea/ PIERSON, Elizabeth/ RATTÉ, Stephanie, “The Common Concern of Humankind: A Potential Framework for a New International Legally Binding Instrument on the Conservation and Sustainable Use of Marine Biological Diversity in the High Seas”, White Paper, 2017, p. 3, https://www.un.org/depts/los/biodiversity/prepcom_files/BowlingPiersonandRattéCommonConcern.pdf.

So far, the CCH has been interconnected with ecological and environmental problems. It was expressly recognized in the areas of preservation of biodiversity and climate change. The United Nations Environment Programme¹⁴⁹ examined the notion and concluded that “the concept (...) was sufficiently flexible to warrant its general acceptance as providing a broad basis for the consideration of environmental issues (...)”¹⁵⁰ In 1992 the United Nations Framework Convention on Climate Change declared that “change in the earth’s climate and its adverse effects are a common concern of humankind.”¹⁵¹ Consequently *Paris agreement* from 2015 confirms it by “acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, (...)”¹⁵² The *Declaration of Ethical Principles* in relation to Climate Change reaffirms it by “[a]lso recognizing that climate change is a common concern for all humankind, and convinced that the global and local challenges of climate change cannot be met without the participation of all people at all levels of society including States, international organizations, sub-national entities, local authorities, indigenous peoples, local communities, the private sector, civil society

¹⁴⁹ UNEP.

¹⁵⁰ United Nations Environment Programme, *Beijing Symposium on Developing Countries and International Environmental Law*, (Beijing, China 1991), Nairobi, UNEP, 1992, p. 4.

¹⁵¹ United Nations Framework Convention on Climate Change, United Nations, General Assembly, New York 1992, preamble.

¹⁵² Paris Agreement to the United Nations Framework Convention on Climate Change, Paris 2015, T.I.A.S, No. 16-1104, preamble.

organizations, and individuals.”¹⁵³ With regards to preservation of biodiversity, the *Convention on Biological Diversity* likewise recognizes the existence of common concern of humankind by affirming that: “conservation of biological diversity is a common concern of humankind.”¹⁵⁴ Besides those treaties, the CCH has been connected also to the protection of the atmosphere, in the reports of the International Law Commission of the United Nations: “The atmosphere is a natural resource essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems, and hence the degradation of atmospheric conditions is a common concern of humankind.”¹⁵⁵

2) APPLICATION OF CCH TO ANIMAL WELFARE

In this section we will analyze the reasons that justify the legal qualification of animal welfare as a common concern of humankind. We will identify and systemize the possible international legal status of CCH in relation to animal welfare by applying it to the most prominent example of animal welfare issues: the farm animal welfare.

Since states have formally applied the concept of common concern of humankind to two international agreements with global participation, we reckon that it could now be examined for the case of animal welfare.

¹⁵³ Records of the General Conference, 39th session, 30 October - 14 November 2017, v. 1: Resolutions, Annex III, Declaration of the Ethical Principles in relation to Climate Change, preamble.

¹⁵⁴ Convention on Biological Diversity of The United Nations Environment Program adopted 1992 in Rio de Janeiro, Preamble.

¹⁵⁵ UN General Assembly, *Report of the International Law Commission*, 7 August 2015, A/70/10, p. 20.

We argue that the common concern of humankind is applicable to animal welfare, more precisely, to the adverse effects of its poor implementation- these are, as we will see, environmental, ethical, social, political, and economic. This has been already partially established in the *EC Seal Product case*, when the WTO noted that there is an emerging consensus in the international doctrine towards the inclusion of animal welfare as a global concern, which is a moral responsibility of humans.¹⁵⁶ The connection of common concern of humankind to animal questions is important because this notion has fostered to achieve international cooperation and compliance mechanism in previously mentioned areas of biodiversity and climate change.¹⁵⁷ To argue that the animal welfare is encompassed within the CCH we ought to demonstrate several points. First, the issues and their negative consequences must be transboundary and of major seriousness. In these cases, individual states do not have effective tools to tackle them. The problem is spread across the globe and therefore only international collaboration can create holistic tactics and long-lasting results. Also, the issues must be of significant dimensions. “A threshold level has to be reached which calls for mobilization of public opinion and action taken on all levels of governance.”¹⁵⁸ Therefore, to demonstrate that animal welfare questions are indeed a CCH we will prove their transboundary nature and their major magnitude for society as a whole. Along the pages of this dissertation, we have proved that animal welfare issues do not

¹⁵⁶ Panel Report, European Communities- Measures Prohibiting the Importation and Marketing of Seal Products, ¶ 7.625, WT/DS400/R, WT/DS401/R.

¹⁵⁷ BOWLING, Chelsea/ PIERSON, Elizabeth/ RATTÉ, Stephanie, *op. cit.*, p. 3.

¹⁵⁸ COTTIER, Thomas/ AHMAD, Zaker, *op. cit.*, p. 39.

respect the limits of a single state and its individuals. Let us develop our previously mentioned examples and introduce new ones to strengthen our case.

a) Transboundary dimension

The intensification of transboundary trade and economic activity has been transforming national animal issues into international ones. Animal welfare has a global scope, it addresses global issues, and it needs a global perspective. It reflects a shared problem of a global community. For example, in the last century the farming practices have profoundly shifted towards the increase of the production and decrease of the expenses. The western model has been exported to developing countries and it represents a standard in today's world. As a result, billions of farm animals are reared in astonishingly inhumane conditions of factory farms throughout the world. The transboundary element is visible especially through live transport of animals which is inherent part of current farming and economic practices. Millions of animals such as cattle, sheep, pigs, goats, or horses are transported to faraway places, many times even continents, by road but also by air, sea or even foot. Often the vehicles are overcrowded, and animals do not receive enough nutrition and rest. This leads to their exhaustion, extreme stress, dehydration, and injuries.¹⁵⁹ All of this plus the lack of hygiene contributes to the creation and cross-border transmission of diseases

¹⁵⁹ Worldanimal, "Farm Animals", https://worldanimal.net/documents/4_Farm_Animals.pdf.

dangerous to both animals and humans and the degradation of the moral status of animals.

Other transboundary aspects of animal agribusiness are the relocation and outsourcing practices. In order to save costs and evade animal welfare laws, corporations often relocate their entire production or outsource part of it to countries with more relaxed rules, cheaper labor and operational expenses.¹⁶⁰ Furthermore, negative ecological consequences of current rearing systems also represent borderless element and a global threat to our environment and food security.¹⁶¹

b) The severity and intensity of current animal agribusiness model

We established that farm animal welfare issues possess a transboundary dimension. Now we will look at a second element of CCH- the seriousness of the issue and its application to farm animals. We can declare that current intensive factory farming model is unsustainable. It leads to environmental problems such as water pollution, air pollution, soil pollution, climate change, but also to deforestation, loss of biodiversity, animal-born disease outbreaks, health hazards, resource waste and ethical issues. Livestock farming is considered as “one of the most significant contributors to today’s most serious environmental problems.”¹⁶² Effects of livestock production are multilayered and interconnected. One phenomenon can lead to multitude of results that

¹⁶⁰ See chapter no. VII, B), 3) and IX, B).

¹⁶¹ See chapter no. VII, A) 3).

¹⁶² HENNING, Steinfeld, *Livestock’s Long Shadow: Environmental Issues and Options*, FAO, Rome 2006, p. XX, <https://www.fao.org/3/a0701e/a0701e.pdf>.

are influencing each other, directly or indirectly. This can be seen especially on the impact on biodiversity. Intensive farming (especially land for cattle and crops) leads to a habitat destruction and affects the microclimate of the zone. In turn, the “[b]iodiversity erosion creates a negative feedback: it reduces the system’s resilience and thereby indirectly reinforces desertification.”¹⁶³ The inter-linkage is becoming more and more apparent, and we only begin to understand full implications of this circle of interconnected phenomena and effects. Moreover, animal agribusiness is also a social justice issue. Corporations are grabbing lands of indigenous people in rainforests, harassing, and even detaining and abducting them.¹⁶⁴ The demand for animal products is driving the violence against local communities. In addition, the cattle ranches and plantations growing soya for animal feed maintain their workers in terrible working conditions, especially in developing countries.¹⁶⁵ As we can see, negative consequences of intensive animal farming are very complex and cannot be explained in few sentences, therefore we will offer their full analysis in the chapters no. VII and VIII.

c) Conclusions

We could continue giving examples of other areas of animal welfare such as animal testing, wildlife, animals used in circuses, zoos and other forms of entertainment, animals used in tourism, animals used in sport

¹⁶³ *Ibid.*, p. 50.

¹⁶⁴ GREENPEACE, “Under Fire”, <https://storage.googleapis.com/planet4-international-stateless/2020/04/86b5fe06-greenpeace-underfire-artwork-pages.pdf>.

¹⁶⁵ GREENPEACE, “7 Reasons why meat is bad for environment”, <https://www.greenpeace.org.uk/news/why-meat-is-bad-for-the-environment/>.

or animals used as pets, and prove that they meet the criteria of common concern of humankind. However, we believe that we have built a strong case establishing that ramifications of poor animal welfare materialize a CCH and, therefore, represent a matter that is globally important and in a need of international regulation. It is in the interest of all of us to combat animal welfare's challenges. We have seen that the consequences of poor animal welfare are essential for both human survival¹⁶⁶ and for the planet itself¹⁶⁷ as “[a]nimal welfare is directly related to such fundamental rights as the right to food and adequate nutrition, livelihood, decent work conditions and overall social justice; and such global common goods as biodiversity and natural resources.”¹⁶⁸ To formally consider animal well-being as a common concern of humankind could trigger international cooperation leading to a higher animal protection and creation of an ethical society. It could “provide a basis for future legal instruments, guidelines, and best practices to address the growing range of transnational issues.”¹⁶⁹ Therefore, actions to solve poor animal welfare must in aggregate be international in scope. By recognizing that the consequences of poor animal welfare have become a common concern of humankind, we promote understanding of their seriousness and create a normative basis on which to facilitate global cooperation in addressing the catastrophic effects and in managing them. Finally, in order to

¹⁶⁶ Food safety, spread of zoonotic diseases, spread of “civilization diseases”, hampering the development of in vitro effective biomedical research, etc.

¹⁶⁷ Climate change, species extinction, water, soil, and air pollution, ...

¹⁶⁸ COX, Janice/ BRIDGES, Jessica, *op. cit.*, p. 2.

¹⁶⁹ WEISS, Brown, “The Coming Water Crisis: A Common Concern of Humankind”, *Transnational Environmental Law*, Vol. 1, No. 1, (2012), p. 163.

incorporate common concern of humankind to public international law, we need international norms that would have as their objective the protection of animal welfare which is representing global public interest. Precisely this topic will be tackled in the next chapter.

To close this chapter, the analysis confirmed that animal welfare is indeed encompassed within the legal notions of universal values and general interests of international community and that it can be protected and reflected via the legal statute of common concern of humankind. By framing animal welfare in this way, we see that the multifaceted issues of this area can be tackled by plurality of legal statutes that accentuate the need, the emergency, and the interest of international community towards their global regulation. Our exploration confirmed that animal welfare is an area that needs an urgent international regulation as its issues are transboundary and of a major magnitude for entire humanity, which is reflected in public opinion all around the world, in corporate policies as well as in the beliefs, religions and laws of diverse states and cultures. As a result, with the knowledge acquired in this chapter we will be well prepared to construct international animal law as general international regime that protects global public interests of international community, encompasses common concern of humankind, and protects universal values.

CHAPTER VI
INTERNATIONAL ANIMAL LAW AS GENERAL
INTERNATIONAL REGIME

Seismic shifts in the international community and international law described in the chapter no. II led to the proliferation of subjects, actors, and areas, to new sources of law, to new understanding of jurisdiction as well as to the emergence of the international regimes. What once was constructed as narrow scope of affairs is now a prismatic and interconnected international community characterized by variety of values, needs, concerns and challenges. Hierarchical pyramid structure has been transformed into a multi-layered web of relations and heterogeneous system of legal prescriptions. As a result, new bodies of rules, international regimes appeared. Our hypothesis is that international animal law is emerging as a new general international regime of public international law. Thusly, questions that we will ask in this chapter are as follows: what is an international regime? Why do we use the term general? What constitutes it? What types of norms can we find in it? How can we justify international animal law as general international regime? What other steps are necessary to be taken to finalize the process of the formation of this regime? These inquiries will lead us towards the construction of strong and well-designed pillars of international animal law that will be able to face the legal scrutiny and contribute to effective changes protecting animals internationally. Because only when we can legally justify the existence of international body of animal law, we will be able to truly advance in animal welfare matters.

A) GENERAL INTERNATIONAL REGIMES AND INTERNATIONAL ANIMAL LAW

1) CHARACTERISTICS OF GENERAL INTERNATIONAL REGIMES

As we already know from the second chapter, there are two types of international regimes. Special international regimes and general international regimes.¹ Special international regimes regulate and protect specific or common interests of states that are materialized in an international treaty. This is the case of the regimes of international rivers, diplomatic relations or foreign investments, intellectual property, etc.² These regimes recognize specific rights to two or more states, and they establish the consequences if an infraction is produced.³

On the other hand, general international regimes represent “set of principles, norm and modalities of application that regulate general interests of international community.”⁴ We can see that the main difference between specific and general regimes is the scope of their regulation. General regimes protect global public interests; hence they touch upon needs and challenges that are universal and involve entire international community including civil society and individuals. They are normative subsystems integrated by a set of norms of different nature- from treaties, resolutions, declarations to codes of conduct, “that can be found in a plurality of normative texts and that regulate

¹ CASANOVAS, Oriol/ RODRIGO, Ángel, J. *Compendio de Derecho Internacional*, Tenth Edition, Madrid 2021, p. 350.

² *Ibid.*

³ *Ibid.*, p. 351.

⁴ *Ibid.*

cooperation of states in a specific field for the protection of collective interests or general interests of international community.”⁵ They are results of public concerns of international community. Their objective constitutes a general interest and global concern of international community. Their content is universal and transboundary. They reflect aforementioned global public interests and common concerns of humankind.

By establishing international animal law as general international regime we will highlight the existence of some elements that can be found in the international community: multitude of actors involved in animal welfare issues, expansion of scope of regulation within the international legal order towards novel topics including animal welfare, and diversity of relations and obligations. Next, we will look at some of the characteristics of general international regimes.

a) Protection of global public interest

As has been explained above, general international regimes have, as their purpose, the protection of a shared objective of international community. The interests encompassed by general regimes are interest of collective nature that transcend specific interests of individual states. “International regimes protecting *general* interest of international community in its entirety regulate the interests of not only set of states,

⁵ *Ibid.*, p. 354. (Own translation).

but also of other members, such as non-state entities and persons.”⁶

b) Relative autonomy

From second chapter we also already know that both specific and general international regimes form inherent parts of international legal order. They do not exist in a normative vacuum, and they do not represent “entirely autonomous legal subsystems.”⁷ They are not auto-sufficient regimes, their validity and continuity depend on the application of general norms of international law.⁸ As Bruno Simma put it, “[s]ocial systems cannot exist in splendid isolation from their environment”⁹ and “[t]here will always be some degree of interaction, at least at the level of interpretation.”¹⁰ As a consequence, they are not fully autonomous legal orders. On the contrary, they are embodied in the international legal order even in the cases of specific international regimes with strongly developed set of *lex specialis*.¹¹

⁶ RODRIGO, Ángel, “Más Allá del Derecho Internacional: El Derecho Internacional Público”, in MENDÉZ-SILVA, Ricardo (coord.), *Derecho Internacional*, Ciudad de México

2019, p. 84. (Own translation).

⁷ SIMMA, Bruno/ PULKOWSKI, Dirk, “Of Planets and the Universe: Self-Contained Regimes in International Law”, *The European Journal of International Law*, Vol. 17, No. 3, (2016), p. 492.

⁸ BROTONS, REMIRO, Antonio, “La noción de regímenes internacionales en el derecho internacional público”, p. 169, in RODRIGO, J, Ángel/ GARCÍA, Caterina (eds.), *Unidad y pluralismo en el derecho internacional público y en la comunidad internacional*, Madrid 2011.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ As was explained in the chapter no. II, specific regimes can be understood as self-contained regimes if they include secondary norms excluding general international law of state responsibility. However, they do not represent completely autonomous legal subsystems.

c) Complexity

The complexity of general international regimes is resulting from multilayered issues that touch upon economic, political, social, legal and many other aspects. Their interconnections lead to a web of multidimensional problems that need a holistic approach. Often, there are interconnections even between general international regimes themselves, as general interests are often in mutual correlation and interdependency. Furthermore, the variety of governmental and non-governmental actors including individuals, NGOs, multinational corporations, scientific communities, tribes, and syndicates contribute to the complexity feature.¹²

d) Dynamic character

Concerns encompassed by general interests of international community as well as norms regulating them often have a dynamic character. Global issues are constantly evolving. This is due to the interconnections between the states and other actors and their influence on the particular problem area. Other factor is scientific knowledge, which is advancing rapidly, urging the international community to adopt effective international responses. As a result, more precise norms are being adopted in order to solve the pressing issues.¹³

e) Centralized or decentralized nature

¹² CASANOVAS, Oriol/ RODRIGO, Ángel, J., *op. cit.*, p. 393.

¹³ *Ibid.*

Whether general international regimes have centralized or decentralized nature depends on particular regime and the norms and institutions that form it. Often, general international regimes have a decentralized structure both at normative as well as institutional level. This is due to the small number of universal institutions which would have competence for the creation and applications of norms protecting certain general interest. Also, the complexity of problems leads to fragmented adoption of norms.¹⁴ Examples include the regime of environmental protection,¹⁵ or the regime of high seas.¹⁶ However, there are regimes which are institutionally centralized such as the regime of protection of international peace and security given the existence of United Nations Security Council or the regime of international commerce and its World Trade Organization.

f) Diversity of norms and obligations

The protection of global public interests is executed throughout diverse legal statutes and substantive tools such as public interest norms, common concern of humankind, global public goods, important soft law advancements, obligations with integral structures¹⁷ and others.¹⁸ There are therefore diverse ways of reacting to the problems of a global nature. Special focus will be given to public interest norms in the next section.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, p. 393.

¹⁶ *Ibid.*, p. 362.

¹⁷ For example, in the case of the regime of environmental protection.

¹⁸ CASANOVAS, Oriol/ RODRIGO, Ángel, J., *op. cit.*, p. 394.

g) Normative structure: Primary and secondary norms of general international regimes

With regards to their normative structure, general international regimes contain primary norms that prescribe rights and obligations and secondary norms of identification, creation, and application of primary norms. Their main object is the protection of global public interest.¹⁹

i) Primary norms

One of the features of general international regimes is the existence of primary norms- public interest norms. In the previous chapter we have already outlined that some of these norms have character of *jus cogens* norms having *erga omnes* nature of obligations. But it is important to highlight that not all public interest norms are peremptory norms of international law. There are also public interest norms protecting and regulating general interests of international community.²⁰ General international regimes are, therefore, not limited only to *jus cogens* norms as “public interest norms have bigger material reach than imperative norms, as these regulate and protect essential interest of international community in its entirety, while (public interest norms) can regulate entire material area of general interests, whether essential or not.”²¹ The conclusion is, therefore, that all *jus cogens* norms are public interest norms, but not all public interest norms are imperative norms. Similarly,

¹⁹ As opposite to specific regimes that protect specific interest or common interests of certain states, but that do not have the threshold of global public interest.

²⁰ RODRIGO, Ángel, *op. cit.*, 2019, p. 78.

²¹ *Ibid.* (Own translation).

not all public interest norms have *erga omnes* effect.²² Of course, these norms can produce effects for third states and other actors. These effects will however always be imposed on states because of their membership in international organization or international treaty.²³ Main feature of public interest norms is that they regulate and defend values and interests of a general nature within the international community²⁴ such as human rights, protection of environment and as we also argue, animal welfare. Further, public interest norms establish obligations of integral structure that are owed by the recipient states, whether they are group of states (*erga omnes partes* obligations derived from a multilateral treaty) or entire international community (*erga omnes* obligations derived from the norms of general international law).²⁵

The fulfillment of these obligations is not based on reciprocity or *quid pro quo*. This means that the fulfillment of public interest norms of one state is not dependent on its fulfillment by other states. Finally, they have vocation of universality.²⁶ Hence, public interest rules aspire to be applicable to all states by reason of their content. “These norms can be created through any of the norm-making procedures of the international legal order: by customary norms, by general principles of law, by multilateral international treaties, by resolutions of international organizations or by resolutions of treaty management bodies for the

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*, p. 80.

²⁵ *Ibid.*

²⁶ *Ibid.*, p. 81.

protection of general interests.”²⁷

ii) Secondary norms

Secondary norms of application can result in mechanisms that follow the compliance of primary norms as well as into the means of dispute resolution.²⁸ Secondary norms of normative creation can result into a variety of normative tools from treaties, resolutions of international organizations, declarations, codes of conduct, and so on.²⁹ What characterizes them is that their creation is a result of discourse held not only between states, but also other entities such as NGOs.³⁰

2) CHARACTERISTICS OF INTERNATIONAL ANIMAL LAW AS GENERAL INTERNATIONAL REGIME

We argue in favor of the creation of international animal law as a newly emerging sub-system of public international law, more specifically a general international regime. To prove our stance, we will apply the theory of international regimes to animal welfare issues. We will see that this regime is in the process of its formation, as there is a lack of institutionalization and lack of norms. We are only at the inception of the materialization of this regime. Nevertheless, we claim that international animal law is indeed being formed as a general international regime due to its characteristics such as the protection

²⁷ *Ibid.*, p. 79. (Own translation).

²⁸ CASANOVAS, Oriol/ RODRIGO, Ángel, J., *op. cit.*, p. 355.

²⁹ *Ibid.*, p. 354.

³⁰ *Ibid.*

global public interests and universal values, its complexity, dynamic character, relative autonomy, etc.

a) Protection of global public interest

First, the objectives of general international regimes must represent global public interests. This has been successfully and extensively established on previous pages.³¹ Animal welfare problems represent global public interest; common concern of humankind and good animal welfare is a universal value. It is in the interest of humanity in its entirety to regulate these matters with promptness. Animal welfare issues are interconnected with many other sustainability problems, and they influence each other in a circle of interdependency. Consequently, the global feature of our subject matter is clear and undisputable.

b) Relative autonomy

Next, international animal law has a relative autonomy. It is a regime which is not self-sufficient³² because it is not separated from general international law. It is an inherent part of international legal order. The consequence is that the sources of law, dispute resolution means, mechanisms for norm creation, international responsibility norms are those of public international law.³³ So, when there is no secondary law or it is insufficient, the fallback to general international law is justifiable and necessary.³⁴ International animal law is a regime that certainly does

³¹ See chapter no. II, D) and chapter V, B), 2).

³² In the sense that it is fully divided from international law.

³³ CASANOVAS, Oriol/ RODRIGO, Ángel, J., *op. cit.*, 2018, p. 393.

³⁴ SIMMA, Bruno/ PULKOWSKI, Dirk, *op. cit.*, p. 485.

not have a fully developed secondary norms. On the contrary, it is just an emerging regime in the beginning of its development.

c) Complexity

Another characteristic of general international regimes is that they are very complex,³⁵ and animal questions are indeed interdisciplinary as we come across biologic, etymologic, philosophic, economic, social, environmental, and legal aspects. Animal issues are interconnected with deforestation, soil and water pollution, loss of wildlife habitat and with sociocultural effect affecting livelihoods and job opportunities in rural areas, ... They are not straightforward problems but rather far-reaching ones with multidimensional factors. Next component of the complexity is variety of actors from states, international organizations, NGO's, individuals, transnational corporations, variety of communities, etc. Another characteristic is the diversity of norms and obligations³⁶- protection of animals is currently done through many different instruments- from soft law declarations, recommendations, codes of conduct to hard law treaties like CITES. They also have decentralized structure.³⁷ In international animal law there is no single treaty tackling all the animal concerns- this would be very problematic given the complexity of animal issues. Neither there is a universal international organization for these purposes.

³⁵ CASANOVAS, Oriol/ RODRIGO, Ángel, J., *op. cit.*, p. 393.

³⁶ *Ibid.*, p. 394.

³⁷ *Ibid.*, p. 393.

d) Dynamic character

Moreover, general international regimes have a dynamic character and so are the challenges and threats to animal welfare.³⁸ In the case of international animal law, we can see an ongoing evolution of animal issues. The interconnectedness between different aspects that together influence animal welfare are constantly in motion. New adverse effects of our globalized world towards animals are unfolding as we speak. It is therefore necessary to stay in the concordance with scientific discoveries that analyze these problematics. For instance, it was recently discovered that climate change is changing the shape of warm-blooded animals. They are getting larger beaks, legs, or ears to regulate their body temperature as the planet gets hotter.³⁹ Here we can see the linkages between various actions and consequences. Industrial farming as the biggest contributor to greenhouse gasses is warming our planet, which is alarming not only for us as humans, but for the entire ecosystem. The IPCC reports⁴⁰ and myriad of scientific articles are showing us rapid and dynamic processes that are encompassed within the area of animal welfare. New challenges are unfolding but at the same time also new solutions. For example, in animal testing, the development of novel of non-animal methods is on the rise. Due to scientific innovations, animal tests are being substituted with cell cultures and tissues, computer modelling, etc. The area of international animal law has to react quickly

³⁸ *Ibid.*

³⁹ RYDING, Sara/ KLAASSEN, Marcel at all, "Shape-shifting: changing animal morphologies as a response to climate warming", *Trends in Ecology & Evolution*, Vol. 37, No. 1, (2021), pp. 1-13.

⁴⁰ The Intergovernmental Panel on Climate Change. *See e.g., IPCC, Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge 2021.

and flexibly to these challenges, which in turn reinforces the dynamic element of this particular international regime. As a result, we forecast a legislative dynamism within the international animal law in form of a multitude of possibilities of responses.

e) Decentralized nature

Further, international animal law has a decentralized nature on both normative and institutional level. First, it is a regime which is not fully developed. It is still in its beginnings. As was analyzed in the chapter no. IV, there is no universal institution protecting animal welfare. However, there are organizations that have their importance on international level, such as the World Animal Health Organization (OIE), which is adopting soft law norms ameliorating terrestrial aquatic farm animal welfare. Further, there are various institutions that operate exclusively within the adopted treaties such as the Conference of the parties and Subsidiary body for Scientific, Technical and Technological Advice within the CBD⁴¹ or the Animals Committee within the CITES. As a result, there is a normative decentralization, as the few existing norms protecting animals are being adopted in a fragmented way.

f) Diversity of norms and obligations

From the analysis conducted in the chapters no. IV and V we have established that animal welfare can be regulated via a diverse set of legal tools, such as common concern of humankind,⁴² soft law

⁴¹ Convention on Biological Diversity of The United Nations Environment Program adopted 1992 in Rio de Janeiro.

⁴² See chapter no. V.

advancements⁴³ and public interest norms.⁴⁴ In addition, in some countries and on a regional level, animal welfare is considered also as a global public good. Global public goods are material and immaterial goods that are protected by international law.⁴⁵ Their benefits and costs affect all countries and generations. They also materialize the general interest of international community. According to economic theory, they are “non-excludable⁴⁶ and non-rivalrous.⁴⁷ This economic definition was widened to encompass a broader number of concerns in order to enhance the scope for global governance. UK legislation for example, has held for a long time that animal welfare itself is a public good, therefore animals should be protected in the public interest, European Parliament called for recognition of animal welfare as a public good, backed by wide support of EU citizens,⁴⁸ European Commission with Food and Agricultural Organization (FAO) are promoting animal welfare as public good, World Organization for Animal Health (OIE) is listing animal welfare as one of a global public goods.⁴⁹ As we know, public goods are non-excludable, and they are not rivalry in

⁴³ See chapter no. IV.

⁴⁴ Public interest norms in relation to animal welfare will be developed in the subchapter C of this chapter.

⁴⁵ HUESA, Rosario, “La Protección del Interés Público Global: Una Nueva Dimensión Para las Normas y Organizaciones Internacionales”, in RODRIGO, J. Ángel / GARCÍA, Caterina/ BOUZA, Nuria (dirs.) / PAREJA, Pablo (coord.), *La Gobernanza del Interés Público Global*, Barcelona 2013, p. 254.

⁴⁶ No one can be excluded from the good’s consumption.

⁴⁷ The good’s consumption does not reduce its availability to others.

⁴⁸ EUROGROUPFORANIMALS, “European Parliament Sees Stronger Position For Animal Welfare in Future Cap”, <https://www.eurogroupforanimals.org/european-parliament-sees-stronger-position-for-animal-welfare-in-future-cap>.

⁴⁹ World Organization for Animal Health, “What’s new?” <https://web.oie.int/RR-Europe/eng/>.

consumption therefore, reduction of suffering and animal well-being in a broader sense can be considered as a global public good, because “anyone can experience pleasure from better animal care.”⁵⁰ Currently the concept of public goods is still imprecise from a legal standpoint, as the term has been used in legal texts in very broad areas. Its importance and applicability to animal welfare are, therefore, of interpretative nature for the time being.

In all cases, this dissertation is showing us that animal welfare can be regulated by a variety of different legal tools, therefore, complying with the requirement of diversity of international animal law regime. Common concern of humankind accentuates the existence and seriousness of the animal welfare issues, stimulates legal debate, and potentially leads to the creation of soft law and public interest norms effectively protecting welfare of animals. Other instruments also emphasize the urgency of animal welfare regulation. With the escalation of animal and environmental issues, we can predict that their application will be growing, thusly highlighting the diversity characteristic.

B) NORMS OF INTERNATIONAL ANIMAL LAW AS PUBLIC INTEREST NORMS

Next characteristic of general international regimes is the existence of public interest norms through which global public interests of international community are protected. Due to their complexity and importance for the advancement of international animal law, we will

⁵⁰ NORWOOD, Baily/ LUSK, Jayson, “The Farm Animal Welfare Debate”, Choices, *The magazine of Food, Farm and Resource Issues*, Vol. 24, No. 3, (2009), p. 4.

dedicate separate subchapter to analysis of their existence and development within this new regime. As a result, the main question will be how we can build global norms protecting animal welfare.

1) EXISTING PUBLIC INTEREST NORMS PROTECTING ANIMAL WELFARE

The main question is whether there are global norms protecting animal welfare already in the existence. Currently, it is difficult to identify public interest norms protecting animal welfare on an international plane. To say it other way, we have not encountered internationally binding norms protecting animal welfare in form of multilateral treaty on animal welfare, customary norms, general principles of law or resolutions of international organizations. The lack of their existence reflects the fact that international animal law is only an emerging international regime, that is at the inception of its creation. The important step for legal scholars is now to focus on the effective tools through which animal welfare could be protected. Public interest norms included in multilateral treaties could be one of them given their nature consisting in universality and protection of general interests. Before delving into that possibility let us have a look at the animal welfare norms adopted within the European Union, that as we regard, represent regional public interest norms.

a) Primary EU law

Commitment to the protection of animal welfare in the primary law can be found in the Treaty on the Functioning of the European Union,

Article 13. As Article 13 forms part of the TFUE,⁵¹ one of the EU treaties that are the “starting point for the EU law”⁵² setting down the EU objectives, it is owed by all member states. It is an obligation of integral structure derived from a treaty which fulfilment if not based on reciprocity. Through this Article the EU considers welfare needs of animals as sentient beings in its action. Article 13 “puts animal welfare on equal footing with other key principles mentioned in the same title, *i.e.*, promotion of gender equality, guarantee of social protection, protection of human health, combating discrimination, promotion of sustainable development, ensuring protection of personal data.”⁵³ The significance of the Article is that it expressly recognized that animals are sentient beings and therefore they deserve special protection. Also, this Article creates a legal obligation for the EU itself and for its Member States to pay full regard to animal welfare in the formulation and implementation of their policies. Further, it gives more leverage to NGOs in negotiations with policymakers and governments. This Article is the result of a robust public pressure from European citizens, NGOs and corporations demanding an effective amelioration of animal welfare. Article 13, therefore, reflects global public interest and an important value within the EU which has been confirmed in already analysed *EC- Seal Product case*⁵⁴ in which it was emphasized that “moral

⁵¹ Consolidated version of the Treaty on the Functioning of the European Union, *OJ C 326*, 26.10.2012.

⁵² European Commission, “What the European Commission does in law”, https://ec.europa.eu/info/about-european-commission/what-european-commission-does/law_en.

⁵³ PRITCHARD, D. G, “The Impact of Legislation and Assurance Schemes on Alternative Systems for Poultry Welfare”, p. 37, in SANDILANDS, Victoria/HOCKING, Paul, M., *Alternative Systems for Poultry*, Cambridge 2021.

⁵⁴ Panel Report, European Communities- Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/R, WT/DS401/R (adopted Nov. 25, 2013)

concern with regards to the protection of animals is regarded as a value of high importance in the European Union, which is now expressly enshrined in its constitutional treaties.”⁵⁵

b) Secondary EU law

For the past decades, the concern for poor animal welfare has been exponentially growing within the EU, one reason being the data showing that animals can feel pain, data on the interconnection between animal health and human health and data proving the horrific impacts of factory farming in the environment, especially the climate change. The EU takes input from scientific state of the art opinions,⁵⁶ they also consider needs and interests of various stakeholders⁵⁷ and they listen to the concerns of its citizens.⁵⁸ This is very important as “[a]nimal welfare is being increasingly perceived as an integral element of overall food quality, having important knock-on effects on animal health and food safety.”⁵⁹ Also, “the mindset of consumers and producers has undergone a seismic shift from merely preventing cruelty and avoidable suffering to animals, and instead becoming focused on promoting their

and Appellate Body Report, European Communities- Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R, (adopted Jun. 16. 2014).

⁵⁵ Panel Report, European Communities- Measures Prohibiting the Importation and Marketing of Seal Products, ¶ 7. 625, WT/DS400/R, WT/DS401/R.

⁵⁶ EFSA Panel on Animal Health and Welfare, studies including socio/economic reports on the impacts of the legislations, etc.

⁵⁷ Scientific community, NGOs, consumers, intergovernmental organizations, political sphere, financial institutions, and producers of animal products.

⁵⁸ Regarding ethical treatment of animals, environmental concerns of animal agricultural, food safety, etc.

⁵⁹ HORGAN, R./ GAVIELLI, A., “The Expanding Role of Animal Welfare Within EU Legislation and Beyond”, *Livestock Science.*, Vol. 103, No. 3, (2003), p. 303.

wellbeing and meeting their most important needs.”⁶⁰ Therefore, the EU is highly invested in developing strong animal welfare norms via its secondary law. EU policies reflect public demands and concerns, they are ethically justified, and they protect not only animal but also human health while making good economic sense.

There are many examples within the secondary EU law, that can be regarded as public interest norms on the EU level, such as Directives and Regulations that regulate the protection of different categories of animals. For example, the *Council directive laying down minimum rules for the protection of chickens kept for meat production*⁶¹ effectively improves the lives of chickens by reducing the overcrowding of chickens, setting the minimum period of darkness for resting, mandating the ventilation and fresh litter, minimizing the noises, and setting obligatory inspections of their wellbeing twice a day. This and other similar legislations are results of a long-term effort of the EU towards the creation of the most progressive animal welfare framework in the world. This commitment is conditioned by above-mentioned public pressure, the fact that animal welfare is an important value and interest for the EU citizens and scientific studies showing negative consequences of current agricultural model for the sustainability, the environment and public health. As a result, EU norms protecting animal welfare found in directives and regulations protect, on the EU level, the general interest of animal welfare.

⁶⁰ *Ibid.*

⁶¹ Council Directive 2007/43/EC of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production, *OJ L 182*, 12.7.2007.

Secondly, we can find different types of legislation within the legal framework of the European Union. Important animal welfare norms are encompassed, as has been mentioned, in Regulations and Directives that will be analysed in the chapter no. VII. Regulations are binding acts that must be applied in their entirety by all member states. Directives on the other hand contain goals that member states must achieve, however the way they reach them is up to them. Independently on which legislation animal welfare norms are contained, we can conclude that the obligations have an integral structure and are not based on reciprocity. This is because the recipient states are bound by them, they do not have a freedom to decide whether to apply them or not.

Lastly, they have a vocation of universality, even though they are only applied by the EU member states. As we already know animal welfare is a universal value and EU animal welfare norms are protecting it on the regional level. The existence of EU regional public interest norms on animal welfare is an indication that animal welfare has shaped as a serious concern that does not respect the frontiers of individual states and that will sooner or later crystalize on international level as well. This is because “[t]he welfare of farm animals is a matter of growing concern in developed countries as well as in the developing world. Animal welfare is coming to be recognized as a core component of responsible livestock practices (...)”⁶²

To conclude, we have identified public interest norms protecting animal welfare, although only on the EU level. This suggests that animal

⁶² FAO, “Review of animal welfare legislation in the beef, pork and poultry”, p. ix, <https://www.fao.org/3/i4002e/i4002e.pdf>.

welfare is a major concern and an important value receiving increasing support which is a result of scientific discoveries, public awareness, consumer demands and development of private standards set by industry associations. The fact that EU has created a progressive animal welfare legal framework tells us that there is a need, on international level, to deal with globalized issues concerning animals. How this could be done specifically will be analyzed in the following subchapter.

2) MULTILATERAL TREATY PROTECTING GENERAL INTERESTS OF ANIMAL WELFARE

a) Multilateral treaty as an ideal instrument

We regard that the ideal outcome, on the international level, would be the adoption of a unified body of international animal law via a multilateral treaty for animal welfare. This is because there is a necessity, on international plane, to adopt a binding umbrella treaty with at least some basic principles on animal welfare. There is a need for harmonization of differing practices, for granting the animals status of sentient being, for protecting them from cruel practices via set of principles and for effective enforcement mechanisms. Also, multilateral treaties protecting general interests are one of the most ideal instruments for the creation of public interest norms. These treaties could be characterized as “multilateral treaties with the object of regulation and protection of general interests of international community through the creation of some of the public interest norms from which obligations of integral structure are derived and that have

vocation of universality.”⁶³ Treaties protecting general interest have several characteristics. First, the object and the purpose of the treaty is the regulation and the protection of global public interests.⁶⁴ They create global public norms from which internal obligations are derived⁶⁵ and lastly, they have a universal vocation which is reflected in the process of their creation and adoption as well as in the number of parties and in their open structure inviting other states to join. However, in the case of animal welfare, there is no such treaty in existence so far despite the urgent need of regulation in this area. There are treaties on animal conservation⁶⁶ and biodiversity,⁶⁷ but animal welfare has not been yet encompassed into a hard law.

b) Difficulties with the adoption of multilateral treaties for animal welfare

In any case, would it be possible to adopt such a treaty due to the complexity of animal issues and diverging political opinions? Is it feasible to adopt it at the moment? We know, that in many areas of international law, the “failure to reach an agreement is the rule, rather than the exception.”⁶⁸ Should we therefore rather focus on soft law

⁶³ RODRIGO, Á., J./ ABEGÓN, M., “El Concepto y Efectos de los Tratados de protección de Intereses Generales de la Comunidad Internacional”, *REDI*, Vol. 69, No. 1, (2017), p. 169. (Own translation).

⁶⁴ RODRIGO, Á., *op. cit.*, 2019, p. 81.

⁶⁵ *Ibid.*

⁶⁶ Convention for International Trade of Endangered Species of Wild Fauna and Flora, United Nations, adopted 1973 in Washington.

⁶⁷ Convention on Biological Diversity of The United Nations Environment Program adopted 1992 in Rio de Janeiro.

⁶⁸ BLATTNER, Charlotte., *op. cit.*, p. 55.

instruments, such as codes of conduct, guidelines, recommendations, or UN General Assembly resolutions?

i) High variability in animal welfare domestic regulations

We believe that the adoption of a hard law treaty is unrealistic for the time being. There are several reasons. First, domestic legal systems have different approaches towards animal welfare, often with conflicting goals. There is high variability in national laws and to find a common ground seems like a major challenge. For example, some States expressly confirmed animal sentience, granted animals special type of personhood, or identified animal welfare as public good. Others, especially in Africa and Asia are far from such developments. The level of protection is characterized by high variability. “Even within those countries where animal welfare laws are in place, the law may be heavily qualified, providing protection to animals in some settings and not in others, and the concept of protection itself may vary, from a narrow prohibition of cruelty to a wider conception which requires meeting the basic welfare needs of an animal.”⁶⁹ The investment- driven states fear that the commercial interests would be negatively influenced by stronger welfare laws and “they tend to underregulate.”⁷⁰ This leads us to political reluctance to adopt a such a treaty. On the other hand, the consumer-orientated states tend to overregulate in order to satisfy the consumer preferences.⁷¹ “Both states are biased toward protecting

⁶⁹ WHITE, Steven., “Into the Void: International Law and the Protection of Animal Welfare”, *Global Policy Journal*, Vol. 4, No. 4, (2013), p. 1

⁷⁰ BLATTNER, Charlotte., *op. cit.*, p. 55.

⁷¹ *Ibid.*

either producers or consumers.”⁷² As a consequence, it is no surprise that with diverse interests at stake, States are reluctant to open animal welfare discussion and discuss the creation of hard laws in this field.

ii) Moral imperialism and westernization of animal welfare regulation

Further, developing countries often perceive welfare advancement and pressure to change farming and other practices as moral imperialism and westernization of their settled relationships with animals. “Conflicts over traditional, often religiously coloured practices, festivals, rites or simply habits involving animals are rampant in all multicultural societies. Practices range from animal sacrifice to animal fights (bulls, dogs, cocks, and so on) to eating those animals (dogs, whales, horses) that are adored as companions by others.”⁷³ However, welfare movement is not based on one directional transfer of ideas from west to developing countries. “It would be inaccurate to see this process as a unidirectional transfer of “Western” values to the rest of the world, although this type of transmission has happened. Rather, the story overall has been, and continues to be, a far more complex one of engagement and negotiation involving the interaction of actors and norms in a context of cross-cultural dialogue, conflict, and accommodation.”⁷⁴ The invocation of culture as a reason for not advancing welfare norms is based on our speciesist⁷⁵ attitude towards animals. “[S]imply because these are

⁷² *Ibid.*

⁷³ PETERS, Anne., “Animals in International Law (Vol. 410)”, p. 558, in *Collected Courses of the Hague Academy of International Law*, Leiden 2021.

⁷⁴ SYKES, Katie., “Nations Like Unto Yourselves?: An Inquiry into the Status of a General Principle of International Law on Animal Welfare”, in *Canadian Yearbook of International Law*, British Columbia 2011, Vol. 49, p. 45.

⁷⁵ Speciesism is a discrimination based on membership to specific species.

traditions does not mean that they are immutable and worth protecting as such. Instead, morals, traditions, and legal provisions (in short: culture) are made, practised and applied by human beings capable of learning, and often can and should change.”⁷⁶

iii) Lobbying preventing animal welfare advancements

Lobbying on national and international level is another problem. For instance, meat and dairy groups pressured United Nations to support increased meat production and hinder the transformation of current global agricultural systems towards more sustainable versions. New studies show how livestock and agricultural lobbying groups are spending millions of dollars in their campaigns against climate actions and dismantling the connections between animal agriculture and global warming.⁷⁷ On national level, farmers often push back advancements such as the ban of gestation crates for sows and battery cages for chickens in which animals cannot move and suffer greatly. In US for example, lobby groups such as the American Meat Institute or the National Cattlemen’s Beef Association have a strong influence in the federal decision-making. “It is just a political context, a culture that has developed over the years at the political level, the food safety program at the USDA thinking of the industry as the customer rather than the

⁷⁶ PETERS, Anne., *op. cit.*, p. 564.

⁷⁷ GUSTIN, Georgina, “Big Meat and Dairy Companies Have Spent Millions Lobbzling Against Climate Action, a new Study Finds”, <https://insideclimatenews.org/news/02042021/meat-dairy-lobby-climate-action/>.

consumer and thinking in terms of efficient inspection rather than protecting public health.”⁷⁸

In conclusion, the creation of animal welfare public interest norms in form of a multilateral treaty is not promising in the near future. However, in the absence of legally binding global norms, the activity has been resorted towards soft law instruments. With the endpoint of universal treaty for animal welfare, there should be simultaneous efforts to adopt myriad of soft law achievements that would trigger the change eventuating into the hard law legislations.

3) SOFT LAW AS AN ALTERNATIVE TO HARD LAW

In this section we will identify three points of importance that situate animal welfare soft law as a bridge towards the construction and adoption of multilateral treaties: first, soft law identifies and addresses concrete animal welfare issues. There are important best practices adopted by different international organizations that focus on better animal treatment on a global level. Second, soft law recognizes animal welfare as universal value, global public interest, and common concern of humankind and lastly, soft law facilitates international cooperation which leads to dissemination of higher animal welfare standards.

a) Soft law identifies concrete animal welfare issues

⁷⁸ JOHNSON, Steve., “A Look at the Meat Industry’s Influence on Capitol Hill”, <https://www.pbs.org/wgbh/pages/frontline/shows/meat/politics/>.

First, soft law identifies concrete animal welfare issues. For instance, the *Guiding principles of the Terrestrial Animal Health Code*,⁷⁹ a set of recommendations for amelioration of animal health and welfare adopted by OIE,⁸⁰ identify particular animal issues. These are the conditions of farm animals during transportation by land, by sea and by air, slaughter of animals for human consumption, killing of animals for disease control purposes and the control of stray dog population. Or, the *Guidance for Responsible Agricultural Supply Chains*,⁸¹ an OECD⁸²-FAO⁸³ document identifies the necessity of governments to follow so called five freedoms: freedom of farm animals from hunger and thirst, freedom from discomfort, from pain, injury of disease, freedom to express normal behavior, freedom from fear and distress. Soft law instruments are increasingly focusing on the plight of animals as they try to ameliorate current state of their protection. Even though they are not binding, they do have an important impact on increasing the knowledge of individuals, states, and business operators on animal welfare and even effectively contribute to real change. For instance, the inclusion of OIE's standards in trade agreements is a clear sign of their significance and ability to influence the change in farm animal welfare.⁸⁴

⁷⁹ OIE, *Terrestrial Animal Health Code*, Vol. 29, Paris, 2021.

⁸⁰ Office International des Epizooties. In 2003 the organization adopted the name of the World Organization for Animal Health, but it kept its original acronym- the OIE. Hereinafter the OIE.

⁸¹ OECD-FAO, *OECD-FAO Guidance for Responsible Agricultural Supply Chains*, Paris 2016.

⁸² Organization for Economic Co-operation and Development.

⁸³ Food and agricultural organization.

⁸⁴ See on that point, section c) of this subchapter.

b) Soft law recognizes animal welfare as universal value, global public interest and common concern of humankind

Second, these soft law instruments recognize animal welfare as global public interest and concern of international community. They materialize the urgent need for further and stronger regulation of different aspects of animal welfare and gradually change our perception of animals by pointing out to their sentience, vulnerability, and their importance in the ecosystem. This can be seen in the aforementioned OIE's Terrestrial Animal Health Code and also in Aquatic Animal Health Code.⁸⁵ This is important as these non-binding instruments are in concordance with the essence of general international regime of international animal law and therefore, they could lead to materialization of hard law containing public interest norms.

c) Soft law facilitates cooperation and triggers hard law

Third, by promoting the seriousness of animal welfare issues, they create a basis on which to facilitate global cooperation in addressing the catastrophic effects of poor animal welfare. They trigger not only greater interest of public and governments in animal welfare issues but also international cooperation leading to a higher animal protection and creation of an ethical society. Soft law instruments in animal law set the benchmark to help states to create new animal welfare legislation and encourage the comparison of welfare policies between the different countries. As a result, soft law could "bring weaker legislative and policy regimes more into line with stronger ones, leading to improvements in

⁸⁵ OIE, *Aquatic Animal Health Code*, Vol. 23, Paris 2021.

animal welfare protections.”⁸⁶ They could provide a basis for future multilateral treaties and serve as a first step towards the creation of a legally binding global norms on animal welfare. OIE’s recommendations are great example of such developments. EU trade and association treaties such as *EU-Mexico Trade Agreement*⁸⁷ include Articles dedicated to animal welfare, specifically referring to OIE standards. “The Parties recognise the value of the OIE animal welfare standards and shall endeavour to improve their implementation while respecting their right to determine the level of their science- based measures on the basis of OIE animal welfare standards.”⁸⁸ Or in the *Association Agreement between the EU and Ukraine*,⁸⁹ “animal welfare standards mean standards for the protection of animals as developed and applied by the Parties and, as appropriate, in line with the OIE standards and falling within the scope of this Agreement.”⁹⁰ Further, the *EU-Chile Agreement* led, with the support of the OIE to the creation of EU-Chile Animal Welfare Working Group that improved Chilean animal welfare regulations as well as contributed to the adoption of new ones.⁹¹ The OIE welfare standards found their way also to *EU-Brazil*

⁸⁶ GIBSON, Miah., “The Universal Declaration of Animal Welfare”, *Deakin Law Reviv.*, Vol. 16, No. 2, (2011), p. 550.

⁸⁷ Modernisation of the Trade Part of the EU-Mexico Global Agreement. 21 April 2018.

⁸⁸ *Ibid.*, Art. XX, para. 2.

⁸⁹ Association Agreement Between the European Union and its Member States, of the one part, and Ukraine, of the other part, of 21 May 2014, SL L 161, 29.5.2014.

⁹⁰ *Ibid.*, Art. 63, para. 13.

⁹¹ Agreement establishing an Association between the European Community and its member States, of the one part, and the Republic of Chile, of the other part, signed on 18 November 2002, entry into force on 1 March 2005, OJ EU 2002 L 352.

*Memorandum of 2013,*⁹² to *Association Agreement between EU and Georgia*⁹³ and to *Association Agreement between EU and Moldova*.⁹⁴

As a result, soft law advancements in animal welfare are proving to be efficient instruments that trigger international cooperation, and they highlight the need for amelioration of animal welfare issues. They determine the existence of the problem and the reasons for urgent regulation. As the adoption of multilateral treaty protecting general interest of animal welfare is not realistic for the time being, soft law fills the legal vacuum. It leads to hard law developments as we can see on the examples of the trade treaties between the EU and other states. We believe that this is only the starting point for more comprehensive advancements and that with more soft law instruments, chances for adoption of multilateral treaty containing public interest norms are growing.

To conclude this subchapter, we argued, that the ideal instrument for their creation would be a multilateral treaty, given the lack of public interest norms protecting animal welfare. However, the chances of its adoption in the near future are slim due to various factors such as the high variability of domestic approaches to animal welfare, the

⁹² Administrative Memorandum of Understanding on Technical Cooperation in the Area of Animal Welfare Between the Ministry of Agriculture, Livestock And Food Supply of The Federative Republic of Brazil and the Directorate General of Health and Consumers of the European Commission of 24 January 2013.

⁹³ Association Agreement between the European Union and their member States, of the one part, and Georgia, of the other part of 27 June 2014, entry into in force 1 July 2016, OJ EU 2014 L 261, Art. 53, para. 13.

⁹⁴ Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, of the other part of 27 June 2014, entry into force 1 July 2016, OJ EU 2014 L 260.

complexity of animal welfare issues, the invocation of moral imperialism and the lobbying. To solve the difficulties with its adoption, we proposed to focus at the moment on soft law advancements that are proving to be effective alternatives triggering cooperation and eventually leading to hard law protecting animal welfare.

C) THE SCOPE OF INTERNATIONAL ANIMAL LAW

In our dissertation we have established that international animal law needs to focus first on the concept of animal welfare. It needs to build a new global framework for animal protection based on the welfarist approach. Strong international welfare regulations that could effectively ameliorate lives of animals are urgently needed. At the same time, we believe that the concept of animal rights will be simultaneously developing and progressively incorporating within this general international regime, broadening its scope, and granting animals a more thorough protection.

The scope of international animal law could be robust due to the complexity and diversity of animal welfare issues.⁹⁵ In this subchapter we will offer the readers possible ramification of international animal law including farm animal welfare, wild animal welfare and laboratory animal welfare as three main sectors encompassing the most pressing issues. However, future international animal law could also encompass the welfare of animals used in the entertainment industry, in tourism, in zoos, etc.

⁹⁵ With a possible overlap to animal rights as the regime develops.

1) WILD ANIMAL WELFARE

a) *The context*

As we know, international animal law regulates globalised animal issues of a major seriousness. Wildlife animal welfare represents concerns for individual wild animals within the conservation policies.⁹⁶ “Wild animals are impacted by human activities and there is increasing recognition that their welfare is a legitimate moral concern.”⁹⁷ Even though protection of wild animals is regulated under international environmental law, and it is first and foremost a conservationist issue, welfare implications are relevant here as well. The importance of cooperation between international environmental law and international animal law is crucial. This synergy can lead to positive impacts for the environment and to sustainability challenges such as climate change, biodiversity loss, etc.⁹⁸ There are striking consequences of not protecting individual wild animals on our collective future.⁹⁹ “For example, the broad implications of the wildlife trafficking crisis on biodiversity, species conservation, and human health result in part from the ways in which live traded

⁹⁶ BEAUSOLEIL, Ngaio, J., “I am a Compassionate Conservation Welfare Scientist: Considering the Theoretical and Practical Differences Between Compassionate Conservation and Conservation Welfare”, *Animals*, Vol. 10, No. 2, (2020), p. 1.

⁹⁷ BUTTERWORTH, Andrew, Report of the Workshop to Support the IWC’s *Consideration of Non-Hunting Related Aspects of Cetacean Welfare*, Cambridge 2017, p. 6.

⁹⁸ GLOBALIMPACT, “Policy Brief: Animals in the Global Pact for the Environment”,

<https://globalpact.informea.org/sites/default/files/documents/Global%20Pact%20Gaps>

[%20Brief.pdf](#).

⁹⁹ *Ibid.*

animals are treated, which is addressed by CITES,¹⁰⁰ illustrating the need for the well-being of individual wild animals to be associated with wider concerns and enshrined within environmental principles.”¹⁰¹

b) Trophy hunting

One of the most pressing issues within the wildlife welfare is the trophy hunting,¹⁰² *i.e.*, killing animals for sport and trade.¹⁰³ “The circumstances in which trophy animals are targeted, the fact that many trophy hunters are not necessarily experts shot, and the promotion of methods of killing that are clearly not primarily aimed at achieving an instantaneous death, mean that trophy-hunted animals do not enjoy the protection from harmful welfare impacts at the point of death that would be expected for other types of animals that are deliberately killed. This anomaly raises substantial animal welfare concerns.”¹⁰⁴ Chasing the animal sometimes during days and their separation from family formation causes distress. Also, the removal of the hunted animal can cause negative impacts for its remaining animals in the group.¹⁰⁵ For

¹⁰⁰ Convention for International Trade of Endangered Species of Wild Fauna and Flora,

United Nations, adopted 1973 in Washington.

¹⁰¹ *Ibid.*

¹⁰² Trophy hunting is legal in certain regions if proper permits are obtained. It has to be

differentiated from poaching which is always illegal.

¹⁰³ The legality of trophy hunting is based on the argument “killing them to save them”. The money obtained from hunters is used to manage large portions of land where big amounts of animals live, including lions and elephants. This philosophy is, however, under a serious critique.

¹⁰⁴ BUTTERWORTH, Andy (Ed.), *Animal Welfare in a Changing World*, Bristol 2018, pp. 50-51.

¹⁰⁵ *Ibid.*, p. 51.

example, targeting of “tusker” bull elephants by trophy hunters has resulted in a serious decline in the number of such animals with the consequent loss of vitally important accumulated social and ecological experience from which younger animals learn.”¹⁰⁶ Another serious problem is breeding animals for hunt according to so-called wildlife management plans. “South Africa’s Biodiversity Management Plan for African Lion estimates that there were, (...) as many as 6000 lions held in over 200 captive predator breeding facilities in the country.”¹⁰⁷ The living conditions of these animals are often substandard and unethical. It is of no surprise that these practices are vastly rejected by public. Breeding wild animals for entertainment of shooting them is seen as retrograded and cruel, and rightly so.

Furthermore, trophy hunting contains a clear transboundary element, which highlights the need for a unified international regulation. Trophy hunting is driven by commercial interests and international commerce in this area is very robust. EU alone imported almost 15,000 hunting trophies proceeding from 73 internationally protected species between 2014 to 2018.¹⁰⁸ Global outrage towards hunting, especially megafauna animals such as lions, elephants, rhinos or even cubs is considerably growing. The death of Cecil the Lion in 2015 in Zimbabwe by a British dentist sparked a major public indignation¹⁰⁹ and as a result, many

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*, p. 52.

¹⁰⁸ HIS, “Trophy Hunting by the Numbers: The European Union’s Role in Global Trophy Hunting”, <https://www.hsi.org/wp-content/uploads/2021/06/Trophy-hunting-numbers-eu-report.pdf>.

¹⁰⁹ International Fond for Animal Welfare, “Killing for Trophies”, https://d1jyxxz9imt9yb.cloudfront.net/resource/36/attachment/original/Killing_For_Tro

countries started the discussion on banning the imports of trophy hunting. For instance, France banned the import of lion trophies and the Netherlands banned trophy imports of more than 200 species. Furthermore, NGOs, conservation experts from Kenya, Zimbabwe and South Africa and members of the European parliament are calling on the European Union to prohibit the imports of hunting trophies.¹¹⁰

c) Species migration

Species migration across borders is another example of transboundary wildlife issues. Man-made problems such as climate change, habitat destruction and loss of biodiversity are threatening these species during their long journeys. Although migratory species are protected by conservationist treaty, the Convention on Migratory Species,¹¹¹ protecting and focusing on individual members of species could lead to conservation of species as such as well as biodiversity. Slowly, page by page, we begin to grasp the complicated multi-layered linkages between our actions in one place and consequences in another. In this case, the impacts of intensive farming and meat overconsumption on climate change and habitat destruction are deteriorating the journeys of migratory animals. Their individual welfare as well as species survival is at stake. Positive actions towards animal welfare in one area will

[phies.pdf](#).

¹¹⁰ HSI “Leading Animal Protection NGOs Call for EU Ban on Hunting Trophy Imports”, <https://www.hsi.org/news-media/leading-animal-protectionngos-call-for-eu-ban-on-hunting-trophy-imports/>.

¹¹¹ Convention on the Conservation of Migratory Species of Wild Animals, United Nations. adopted in 1979 in Bonn.

therefore ameliorate remote places and welfare of, on the first sight, unrelated animals.

d) Wildlife tourism

Another transboundary element of wildlife welfare issues is wildlife tourism. People all over the world are travelling to see animals in their natural habitat.¹¹² Even though wildlife tourism can economically benefit these areas, the number of tourists is increasing, and their negative impact is visible. The adverse consequences are materialized in three main ways- changes in their physiology, their behaviour and damage to their habitats.¹¹³ For example, more than 40, 000 visitors come to Antarctica each year to see breeding seals, seabirds, and penguins. However, the behaviour of animals can be significantly altered because of tourists interfering during their mating season.¹¹⁴ “The scientific evidence base for limiting human disturbance impacts to Antarctic wildlife is inadequate in almost all respects, and is in urgent need of improvement (...)”¹¹⁵ As a result, “the breeding success is being reduced and the stability of colonies affected, which can adversely affect the welfare of individuals and ultimately affect the survival of the

¹¹² African safari, Antarctica cruise, Galápagos Islands, ...

¹¹³ Working Group on Environmental Auditing, “Impact of Tourism on Wildlife Conservation”, http://iccd.cag.gov.in/wp-content/uploads/2014/02/2013_vgea_Wild-Life_view.pdf.

¹¹⁴ University Federation for Animal Welfare, “Tourism”, <https://www.ufaw.org.uk/whyufaws-work-is-important/tourism>.

¹¹⁵ Scientific Committee on Antarctic Research, “Wildlife Approach Distances in Antarctica”, Scar Papers to the Antarctic Treaty Consultative Meetings, Vol. ATCM XXXVIII and CEP XVIII, (2015), p. 5.

population as a whole.”¹¹⁶ Damage to the habitat is another frequent problem. For example, large quantities of ocean divers lead to damage of coral reefs which in turn results in the destruction of reef organisms and reduction of the habitat where fish are spawning and feeding, and the richness of marine life is reduced.¹¹⁷ As we know, entire international community depends on healthy ecosystems and richness of planet’s biodiversity. Since the transboundary wildlife tourism has negative impacts on essential fauna and flora, it is in the global interest to regulate it from an international perspective.

Although, the notion of animal welfare originated in connection to farm animals, the increasing concerns relative to human impact on wildlife and the insufficient conservation policies, extended its application to the protection of individual wild animals. The diverse human-animal interactions in the natural habitat of animals have, as we have shown, influence not only on entire species, but also on individual animals. “Unregulated hunting, poaching and unsustainable fishing by humans can, over time, reduce the number of wild animal individuals to a level where they can no longer proliferate and will become extinct.”¹¹⁸ The inclusion of welfare element is important as wildlife research and conservational policies include animal welfare risks. “An increases interest in animal welfare can relate to various aspects of capture methods, the design of enclosures for breeding animals or heated-

¹¹⁶ University Federation for Animal Welfare, *op. cit.*

¹¹⁷ Working Group on Environmental Auditing, “Impact of Tourism on Wildlife Conservation”, http://iced.cag.gov.in/wp-content/uploads/2014/02/2013_wgea_Wild-Life_view.pdf.

¹¹⁸ BERG, Charlotte/ LETNER, Henrik/ BUTTEWORTH, Andrew/ WALZER, Chris, “Editorial: Wildlife Welfare”, *Front. Vet. Sci.*, Vol. 7, (2020), pp. 1.3.

started animals, preparation of captive-bred animals for life in the wild, preparation of release-sites to improve the survival chances of newly released animals, and proper post-release monitoring.”¹¹⁹ As there is an increased attention to welfare of individual animals as an crucial part of species survival and well-being, its inclusion to international animal law is expected and needed.

2) LABORATORY ANIMAL WELFARE

“It is easy to say, a priori, ‘It has to be done- it’s the price we pay for human safety and progress. But we ourselves neither pay that price nor even look at the cost. And until you see the cost, you cannot rationally weigh what is essential and what is

*not.’”*¹²⁰

Matthew Scully

a) The context

More than 115 million animals worldwide are tested in laboratories every year worldwide.¹²¹ Animal experimentation is unfortunately, still a reality. In 2019 whole world discovered horrific experiments happening behind closed doors of a German toxilogical and pharmacological laboratory. Monkeys were restrained by braces, kept alone in cages spinning in circles because of the distress and handled with violence by the scientists.¹²² Dogs and cats were laying in their

¹¹⁹ *Ibid.*

¹²⁰ SCULLY, Matthew, *Dominion*, New York 2002. p. 998.

¹²¹ HSI, “About Animal Testing”, <https://www.hsi.org/news-media/about/>. The precise number is unknown. It is however much higher as many countries do not collect and publish data concerning animal experimentation.

¹²² For example, smashing monkeys head against a door frame.

own blood.¹²³ This appalling picture is even more horrifying knowing that it happened within the European Union, the “golden standard” of animal welfare. We can only begin to imagine what is happening in other parts of the world. The topic of brutal and barbaric treatment of animals used in laboratories is of a major importance. It reflects our speciesist attitudes to nonhuman animals, our disconnection from reality of animal testing and even our unwillingness to discover the horrifying truth. As long as everything occurs behind the laboratory walls and governments pass some sort of welfare regulation, we feel that everything is fine. However, thanks to whistleblowers and media attention, the abhorrent realities of animal testing are emerging into the surface. Public furore is growing, and citizens are demanding transparency and stricter legislation.¹²⁴ For instance, 8 million people signed the petition promoted by Cruelty Free International and The Body Shop calling on the “countries of the UN to formalize an international framework to end cosmetic animal testing.”¹²⁵

In addition to cosmetic testing, animals are also subjected to genetic, medical, or educational tests, toxicity tests, food safety test, tests within the chemical industry, psychological behavioural tests and many more.

¹²³ BUSBY, Mattha, “Barbaric tests on Monkeys Lead to Calls for Closure of German Lab”, <https://www.theguardian.com/environment/2019/oct/15/barbaric-tests-on-monkeys-lead-to-calls-for-closure-of-german-lab>.

¹²⁴ SCULLY, Matthew, *op. cit.*, p. 998.

¹²⁵ PRNEWswire, “The Body Shop and Cruelty Free International Bring a Record- Breaking 8.3 Million Signatures to the United Nations to End Cosmetic Animal Testing Globally”, <https://www.prnewswire.com/news-releases/the-body-shop-and-cruelty-free-international-bring-a-record-breaking-8-3-million-signatures-to-the-unit%ADed-nations-to-end-cosmetic-animal-testing-globally-300724770.html>.

All new chemicals for use in agriculture, household, food, and cosmetic and other industries are tested on animals, and substances from pesticides, solvents, paints, fertilizers, thinners, cleaning agents are applied to their eyes, ears, skin or internally. And it is not only new chemicals that are tested.¹²⁶ It is frequent practice to test chemicals again like in the cases of benzine and butadiene, turpentine, or cyclonite rat poison. “They have to test rat poison again, to see if it’s poisonous, and gasoline, to make sure we shouldn’t drink it, and propane and butane, to have a look just one more at what happens when they’re inhaled in large quantities.”¹²⁷ Sadly, “[m]any experiments inflict severe pain without the remotest prospect of significant benefits for human beings or any other animals. Such experiments are not isolated instances, but part of major industry.”¹²⁸ Experiments are often performed without certainty that this suffering and death would save a single human life.¹²⁹

b) Field of psychology

To portray the seriousness of the matter, we will not abstain from realistic descriptions of experiments frequently performed. One of the most disturbing and sadistic experiments are performed in the field of psychology. Animals are applied electric shocks, tortured by thirst and near starvation, dismembered, drugged, frozen and fatigued to study their behavioural changes such as reactions to punishments or altering

¹²⁶ There are more than 87.000 manmade chemicals already on the market. *See e.g.*: SCULLY, Matthew, *op. cit.*, p. 997.

¹²⁷ SCULLY, Matthew, *op. cit.*, p. 998.

¹²⁸ Singer, Peter, *Animal liberation*, New York 2009, p. 36.

¹²⁹ *Ibid.*, p. 29.

their behaviour towards aggression and fear. All of this to cast light on the secrets of human mind. For instance, “Chinese experiments genetically manipulated monkeys so that they’d be plagued with mental health issues, including anxiety, fear, depression, behavior associated with schizophrenia, and sleep disorders-and then cloned them. The experiments plan to create a whole colony of monkeys who are likely to experience the most severe form of psychological suffering.”¹³⁰ Scientist are also “sewing shut the eyelids of half of the kittens while rearing the others for one year in total darkness, and then killing them all to examine the effects of this experience on their brains.”¹³¹ The borders of ethics are under serious jeopardy. More so when many of psychological experiments are trivial with obvious outcomes. “We all need to say that experiments serving no direct and urgent purpose should stop immediately, and in the remaining field of research, we should, whenever possible, seek to replace experiments that involve animals with alternative methods that do not.”¹³²

c) *Cosmetic industry*

In the field of cosmetic industry, “half a million animals are used and killed by experiments done for cosmetics products alone each year.”¹³³

Variety of painful experiments are performed such as the Draize

¹³⁰ PRIYA, S, “6 Horrific Experiments on Animals and What You Can Do to End Cruel Tests”, <https://www.peta.org.uk/blog/6-horrific-experiments/>.

¹³¹ SCULLY, Matthew, *op. cit.*, p. 1000.

¹³² Singer, Peter, *op. cit.*, p. 40.

¹³³ COX, Janice/ BRIDGES, Jessica, *op. cit.*, p. 8. The number of animals used in experiments in all industries is difficult to determine as accurate figures are not available. It is estimated that millions of animals each year are tested in laboratories.

irritation test.¹³⁴ Chemicals are applied on the sensitive shaved skin around the eyes or directly into the eyes without any pain relief.¹³⁵ Rats are forced feed for weeks or even months for lipstick ingestion.¹³⁶ Researchers are then looking for signs of cancer or birth defects.¹³⁷ The lethal dose test is also performed. In this test, animals are forced to swallow large quantities of chemicals to establish the dose that leads death.”¹³⁸ The multimillion-dollar industry is creating thousands of new products every year to make us look more attractive, however at the expense of our fellow nonhuman animals. Millions of consumers everyday shape global production and consumption patterns that are crucial in determining our environmental future.¹³⁹ This is the proof that animal experimentation is commercially driven and that in the most cases it is unnecessary and does not lead to safeguarding human health. The case of cosmetic testing is therefore directly connected with sustainable consumption and production. “In order to protect the

¹³⁴ Eye irritancy can be tested without animal experimentation using the tissue systems that mimic the characteristics of the eye. *See e.g.*: LEE, Miri/ HWANG, Jee-Hyun/ LIM, Kyung- Min, “Alternatives to In Vivo Draize Rabbit Eye and Skin Irritation Tests with a Focus on 3D Reconstructed Human Cornea-Like Epithelium and Epidermis Models, *Toxicological Research*, Vol. 33, No. 3, (2017), pp. 191-203. and LOTZ, Christopher/ SCHMID, Freia/ HANSMANN, Jan/ WALLEES, Heike/ BECKER-GROEBER, Florian, “Replacing the Draize Eye Test: Impedance Spectroscopy as a Method to Discriminate Between All GHS Categories for Eye Irritation”, *Scientific Reports*, Vol. 8, (2018), pp. 1-13.

¹³⁵ VINDARDELL, Maria Pilar/ MITJANS, Marina, “Alternative Methods for Eye and Skin Irritation Tests: An Overview”, *Wiley InterScience*, Vol. 97, (2008), pp. 46-59.

¹³⁶ Humane Society, “Cosmetics Testing”, <https://www.humanesociety.org/resources/cosmetics-testing-faq#performed>.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ GLOBALIMPACT, “Policy Brief: Animals in the Global Pact for the Environment”, <https://globalpact.informea.org/sites/default/files/documents/Global%20Pact%20Gaps%20Brief.pdf>.

environment, biodiversity, and a sustainable future for humanity, it is critical to address the systematic over- consumption and mass production patters that are largely responsible for the continuing trends of climate change, biodiversity loss, pollution and environmental degradation.”¹⁴⁰ Consequently, “raising awareness about non- animal alternatives to cosmetic testing can empower a wider, lifestyle change, towards one where the sustainability of a product is increasingly a determining factor.”¹⁴¹

Public disagreement with cosmetic animal testing is especially visible within the EU. In response to public disagreement of European citizens with cosmetic testing, the EU adopted a Resolution banning animal testing on ingredients used in cosmetic products, unless necessary.¹⁴² This was a significant progress, an example for the entire world that moving away from animal testing is indeed possible. In 2018 the European Parliament adopted a resolution calling for a global ban to end animal testing for cosmetics by 2023.¹⁴³ However, new analysis found chemicals tested on animals in different cosmetic products.¹⁴⁴ This is the result of conflicting EU laws. The European

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² Regulation (EC) 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products, *OJ L 342*, 22.12.2009.

¹⁴³ European Parliament, *European Parliament resolution of 3 May 2018 on a global ban to end animal testing for cosmetics (2017/2922 (RSP))*, (2020/C 41/07).

¹⁴⁴ KNIGHT, Jean/ ROVIDA, Costanza/ KREILING, Reinhard/ ZHU, Cathy/ KNUDSEN, Mette/ HARTUNG, Mette, “Continuing Animal Tests on Cosmetic Ingredients for REACH in the EU”, *ALTEX-Alternatives to Animal Experimentation*, (2021), p. 14.

Chemical Agency¹⁴⁵ can, under the *Reach Regulation*,¹⁴⁶ “impose in vivo testing on those same ingredients under its chemical testing requirements.”¹⁴⁷ Those are performed to determine toxicity data and worker safety assessments. “This can include chemicals being manufactured exclusively for use in cosmetic, eclipsing the animal testing ban for cosmetic ingredients.”¹⁴⁸ The chemicals law “is being used to force companies, despite strenuous objections and even legal challenges, to commission questionable new animal testing as part of bureaucratic box-ticking exercise.”¹⁴⁹ As a result, more than 400 companies and NGOs wrote a joint statement,¹⁵⁰ condemning various “ECHA Board of Appeal’s decisions requiring unnecessary animal tests for occupational safety assessment of single used cosmetic ingredients.”¹⁵¹ We can see that even the most advanced welfare

¹⁴⁵ ECHA.

¹⁴⁶ Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, *OJ L 396*, 30.12.2006.

¹⁴⁷ KNIGHT, Jean/ ROVIDA, Costanza/ KREILING, Reinhard/ ZHU, Cathy/ KNUDSEN, Mette/ HARTUNG, Mette, *op. cit.*, p. 1.

¹⁴⁸ GILBERT, Natasha/ GORVER, Natalie, “Hundreds of UK and EU Cosmetics Products Contain Ingredients Tested on Animals”, <https://www.theguardian.com/environment/2021/aug/19/hundreds-of-uk-and-eu-cosmetics-products-contain-ingredients-tested-on-animals>.

¹⁴⁹ *Ibid.*

¹⁵⁰ UNILEVER, “Cosmetic Animal Testing Ban Effectively Shredded”, https://www.unilever.com/Images/open-letter-cosmetics-animal-testing-ban-effectively-shredded_tcm244-557069_en.pdf.

¹⁵¹ LAPERROUZEM Jeanne, “The European Parliament Must Protect the Animal Testing Ban on Cosmetics”,

legislation has serious gaps and an internationally harmonized rules are necessary.

d) Biomedical research

With regards to biomedical research, animal testing is seen as necessary, and the general rhetoric is that the ends justify the means. Proponents of animal experimentation say that the benefits are unrefusable.¹⁵² However, the reality is much more complicated. Evidence based medicine is giving us data that do not correlate with such one-sided views. The truth is that “even the most promising findings from animal research often fail in human trials and are rarely adopted into clinical practice.”¹⁵³ More than 90% of scientific discoveries fail to lead to human treatments within 20 years.¹⁵⁴ Moreover, 89% of preclinical studies could not be reproduced.¹⁵⁵ In the US, the NIH admitted that 95% of all drugs that tested as safe and effective fail in human trials¹⁵⁶ and “[t]oxicologist have known for a

<https://www.theparliamentmagazine.eu/news/article/the-european-parliament-must-protect-the-animal-testing-ban-on-cosmetics>.

¹⁵² PUND, Pandora/ BRACKEN, Michael/ BLISS, Susan, “Is Animal Research Sufficiently Evidence Based to be a Cornerstone of biomedical Research”, *Bmj*, Vol. 348, (2014), p. 1.

¹⁵³ *Ibid.*

¹⁵⁴ CONTOPOULOS-IOANNIDIS, Despina/ NTZANI, Evangelia/ IOANNIDIS, John, “Translation of Highly Promising Basic Science Research Into Clinical Applications”, *The American Journal of Medicine*, Vol. 114, No. 6, (2003), p. 478.

¹⁵⁵ PETA, “Experiments on Animals Fail 90% of the Time. Why Are They Still Done?”², <https://www.peta.org/blog/experiments-on-animals-fail-90-of-the-time-why-are-they-still-done/> and NPR, “Drugs That Work In Mice Often Fail When Tried In People”, <https://www.npr.org/sections/health-shots/2017/04/10/522775456/drugs-that-work-in-mice-often-fail-when-tried-in-people?t=1629561780658>.

¹⁵⁶ NATIONAL CENTER FOR ADVANCING TRANSLATIONAL SCIENCES, “About New Therapeutic Uses”, <https://ncats.nih.gov/ntu/about>.

long time that extrapolation from one species to another one is a highly risky venture.”¹⁵⁷ The most notorious drug to have caused unexpected harm to humans is thalidomide- which was extensively tested on animals before it was released. Even after thalidomide was suspected of causing deformities in humans, laboratory tests on pregnant dogs, cats, rats, monkeys, hamsters, and chickens, all failed to produce deformities.”¹⁵⁸ “As well as exposing people to harm, testing on animals may lead us to miss out on valuable products that are dangerous to animals but not to human beings.”¹⁵⁹ Insulin for example produces deformities in infant mice and rabbits, but not to humans. Morphine causes drug frenzies in mice, but it is safe with humans. Consequently, animal testing frequently leads to “misleading safety studies, potential abandonment of effective therapeutics, and direction of resources away from more effective testing methods.”¹⁶⁰ And what happens at the end of animal testing? The death is inevitable. If the animals survived the horrors of experimentation, they are killed, usually without pain relief. The act is performed by decapitation, neck-breaking or asphyxiation.¹⁶¹ However, there are viable alternatives to animal experimentation. In vitro models based on human or animal cell cultures and tissues, engineered tissues, human volunteer studies, computer modelling predicting toxic hazards, non-invasive scanning

¹⁵⁷ Singer, Peter, *op. cit.*, p. 57.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ AKHTAR, Aysha, “The Flaws and Human Harms of Animal Experimentation”, *Cambridge Quarterly of Healthcare Ethics*, Vol. 24, No. 4, (2015), p. 407.

¹⁶¹ HSI, “Cosmetics Testing”, <https://www.humanesociety.org/resources/cosmetics-testing-faq#performed>.

¹⁶¹ SCULLY, Matthew, *op. cit.*, pp. 1012-13.

technologies like magnetic resonance imaging, basic molecular analysis, and mathematical modelling. “Methods of testing that do not use animals are being and continue to be developed which are faster, less expensive, and more accurate than traditional animal experiments for some purposes and further opportunities exists for the development of these methods of testing.”¹⁶²

Until all these alternatives can be applied throughout industries, the number of animal experiments should be cut down by the requirements of urgent necessity and essentiality to human lives. Meanwhile, ethics committees could oversee the work of laboratories, taxpayers should be properly informed about what experiments they are funding, audits could be performed frequently. And ideally, all of this should be done via harmonized international framework.

e) Outsourcing in animal testing

The outsourcing within animal testing is another grave issue. Animal testing is often relocated to developing countries like China “where scientists are plentiful, but activists aren’t”¹⁶³ and where the regulations with regards to animal welfare and transparency are considerably looser. That is why increasing number of companies are relying on Chinese laboratories and Chinese-bred animals. “Each year, Chinese authorities use 12-12 million animals in research, and China exports 40.000 laboratory primates annually. China is, in fact,

¹⁶² *Ibid.*

¹⁶³ POCHA, Jehangir, “Outsourcing Animal Testing”, http://archive.boston.com/business/healthcare/articles/2006/11/25/outsourcing_animal_testing/.

the majority supplier of nonhuman primates (mainly macaque monkeys) to U.S. laboratories, and many of those monkeys come from countries with even worse levels of regulation, such as Laos. Given the immense size of the animal testing industry in China, concerns over welfare and ethic cannot be brushed aside.”¹⁶⁴ As we can see outsourcing practices can easily circumvent strong welfare standards. Therefore, international regulation is necessary to avoid relocation.

Finally, we can establish that the case of animal experimentation meets sufficiently the criteria for its inclusion to international animal welfare regime as it is indeed a matter of major global magnitude. Bizarre test performed on animals without real urgency and their cruel treatment form part of the mosaic representing the consequences of poor animal welfare, our detachment from reality and ethical crisis. Science has in many cases overridden morality, and what is labelled as science is often commercially driven.¹⁶⁵ As pope said “[r]esist the temptations of productivity and profit that work to the detriment of respect for nature. When you forger this principle, becoming tyrants and not custodians of the Earth, sooner or later the Earth rebels.”¹⁶⁶

¹⁶⁴ CAO, Deborah, “Ethical Questions for Research Ethics: Animal Research in China”,

Journal of Animal Ethics, Vol. 8, No. 2, (2018), p. 140.

¹⁶⁵ SCULLY, Matthew, *op. cit.*, p. 1000.

¹⁶⁶ John Paul II, “Jubilee of the Agricultural World”, https://www.vatican.va/content/john-paul-ii/en/homilies/2000/documents/hf_jp-ii_hom_20001112_jubilagric.html.

3) FARM ANIMAL WELFARE

Intensive livestock farming does not have a very long tradition in the history of agriculture. It is the result of modern scientific discoveries and technological developments. As a result of the methods of intensive husbandry, meat is cheaper and more accessible, but it is also necessary to take into account the ethical and environmental problems of modern factory farming. These are the negative consequences for animal welfare, biodiversity, climate warming and environment at large. Massive industrial farming is one the most important branches of the agricultural industry, but also one of the most serious polluters: it occupies 30% of the total land area, it produces up to 60% of ammonia, which contributes to the acid rains, it produces greenhouse gases and pollutes soil and watercourses.¹⁶⁷ As for the soil, herds degrade and erode it, creating areas of desertification. In addition, antibiotics and the hormones given to farm animals, as well as fertilizers and insecticides, which are used to spray the crops that are fed to them, contribute to soil and atmospheric pollution. As we learnt in the chapter no. V, farm animal welfare is a materialization of globalized animal welfare issues. It encompasses transboundary problems with serious negative consequences for animal health, human health, and the environment. We will not delve into more details here, because in the next chapter we will offer a detailed analysis of this particular sector of international animal welfare.

¹⁶⁷ O POTRAVINACH, “Veľkočov a jeho vplyv na životné prostredie”, <https://www.opotravinach.sk/sciences/view/VELKOCHOV%20a%20jeho%20vplyv%20na%20životné%20prostredie>.

To conclude the chapter, along these pages we have learnt that international animal law is emerging as general international regime. As we demonstrated throughout the thesis, current norms concerning animal welfare are circumstantial both on national and regional level and most lawyers are unfamiliar with them, not to mention the total lack of international regulation. Therefore, it is crucial to dedicate the legal debate to this problem. For that reason, we offered the conceptualization of international animal law. We analysed its structure as general international regime, determined its characteristics, identified ideal instruments for protection of animal welfare and drew possible outcomes. We reckon that we contributed to the advancement of international animal law by furnishing legal justifications for its creation. By defining it as general international regime we proved that protection of animal welfare is essential not only to various states, but to humanity in its entirety as well as to future generations. As a result, chapters no. V and VI have built the backbone of international animal welfare protection on which basis effective global responses can be adopted. Having defined international animal law as general international regime is an important step towards practical advancement of animal welfare protection on a global level. With well-founded reasons grounded in the theory of public international law it will be easier to argue in favour of animal welfare protection from an international perspective. Because only with a solid footing it will be possible to persuade the governments and international organizations about the necessity to take the action, whether in form of hard law or soft law.

PART III

THE CASE OF EU FARM ANIMAL WELFARE

At this point, we have gone a long way together. From studying philosophy, jurisprudence and understanding current international animal welfare regulations, to proposing an original structure for international animal law that would foster its development and justify its existence. This work, however, would not have been complete and sufficiently persuasive without an analysis of a practical case of animal welfare to which we would apply legal notions, instruments and mechanisms used in the first two parts of the dissertation.

Consequently, third part will be dedicated to EU¹ farm animal welfare of land animals. Even though different sectors of animal welfare could be used, such as the welfare of laboratory animals, pets, animals used in entertainment, zoos, or wild animals, we decided to focus on animals raised for meat. There are three main reasons for choosing EU farm animal welfare as a case study. First, it represents one of the most pressing animal welfare issues from ethical, environmental, social, human, and animal health perspectives. Second, there are considerable concerns of EU civil society and public in relation to current farming practices and third, this pressure is translated into concrete legal reforms within the European Union- a pioneer in adopting farm animal welfare legislation. EU has the most important and advanced binding rules concerning animal welfare on international level² and its international

¹ European Union.

² We did not say that EU has the *only* binding rules on animal welfare on international level for a reason. There is also Council of Europe and its Conventions on this topic.

animal welfare activities has considerably influenced the raising awareness “about AW³ standards in the global agenda, starting a policy dialogue on the subject, increasing the standing of AW policy among partner Government institutions, and has been successful in facilitating incorporation of AW standards in the legislation of many non-EU Countries.”⁴ We will see, that EU can be considered as an exporter of norms, contributing to the adoption of animal welfare standards beyond the EU Member States.

Formally, this part proceeds in three chapters. In the chapter no. VII, we will explain how farm animal welfare is protected within the EU; through study of the reasons for animal welfare protection and objectives of the legislations we will determine whether farm animal welfare meets the criteria of universal values, common concern of humankind, global public interest and public interest norms. In the chapter no. VIII, we will determine the limitations of current EU system and propose necessary changes leading to higher protection of animals used for food. In the chapter no. IX, we will describe European Union as a driver of global changes in animal welfare and we will suggest how this could be used for further advance of international animal law. However, we will also critically acknowledge the limitations of regional advances mainly because of the outsourcing and relocations practices and the global dimension of the matter at hand. Finally, we will

They were important source of inspiration for EU. However, we will focus only on the EU.

³ Animal welfare.

⁴ European Commission, Directorate-General for Health and Food Safety, *Study on the impact of animal welfare international activities: executive summary: final report*, Publication Office 2017, p. 1.

emphasize the need for an international regulation of animal welfare in form of multilateral treaty and soft law.

All in all, we will study how can the EU influence and enrich the development of general international regime of international animal law. Its extensive reforms, strategies and policies, public opinions of European citizens and their values, the gaps and limitations and possibilities for improving will be analyzed in order to prove that EU farm animal law is constructed upon the same instruments as we have proposed for the creation of international animal law and hence it can effectively influence changes on international level. In this manner we will present a comprehensive work that is built not only on theoretical ideas but also on application of these ideas to practical case and offer a wholesome manual for the development of new international regime.

CHAPTER VII

TOWARDS EU FARM ANIMAL WELFARE SYSTEM

The introductory chapter of third section will present the construction of current EU farm animal welfare system and identification of the reasons for its existence. On the example of European Union, we will illustrate how are farm animals protected via the different norms and policies. In this way, we will familiarize the reader with their protection within the European Union. We will study farm animal welfare acts by determining motives for their adoption and their objectives. In this process, we will apply the lenses of general international regimes as we will localize the notions of universal values, common concern of humankind and global public interest in the different legislations and strategies. We will also see that EU legislation on farm animal welfare includes public interest norms (with a regional character). On the grounds of these findings, we will bridge the theory from chapters no. V and VI with practical examples from EU law.

A) MOVING FORCES BEHIND THE EU FARM ANIMAL WELFARE SYSTEM

1) SENTIENTIST ETHICS

In the EU law animals have been defined as sentient beings since 1997, when in the protocol to the *Treaty of Amsterdam* animals were referred to as “sentient beings.”¹ Following the amendment of the *Treaty on the*

¹ Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, signed on 2

*Functioning of the European Union*² by the *Lisbon Treaty*,³ explicit recognition of animal sentience was incorporated via Article 13. Animal sentience relates to “[a]ll animals used by people.”⁴ This means that these animals are no longer seen as mere agricultural products. This shift is a result of ethical concerns on the quality of life of animals.⁵ “Contextually, (...) the inclusion of a recognition of animal sentience fits in with the historical background of a growing concern for animal welfare and thus appears to constitute recognition of the importance of animal interests.”⁶ This is also recognized in the EU legislation, for example “[a]nimal welfare considerations have increased in importance in the EU and this is significant in a society that claims to be an advanced civilized one.”⁷

Sentience means that animals can feel pain, suffering, but also pleasure. This are so called affective states.⁸ “The behaviour of animals is

October 1997, entered into force 1 May 1999, *OJ C 340/1*, Protocol on Protection and Welfare of Animals.

² Consolidated version of the Treaty on the Functioning of the European Union, *OJ C 326*, 26.10.2012. Hereinafter also the TFEU.

³ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, signed on 13 December 2007, *OJ C 306*, 17.12.2007.

⁴ BROOM, Donald, *Animal Welfare in the European Union*, Commissioned by Directorate-General for Internal Policies, European Policy Department, Citizen’s Rights and Constitutional Affairs, Petitions (PE 583.114), 2017, p. 47.

⁵ European Commission, Health and Consumer Protection Directorate-General, *The welfare of animals during transport*, Report of the Scientific Committee on Animal Health and Animal Welfare, 2002, p. 6.

⁶ KOTZMAN, Jane, “Recognising the Sentience of Animals in Law: A Justification and Framework for Australian States and Territories”, *Sydney Law Review*, Vol. 42, No. 3, (2020), p. 294.

⁷ European Economic and Social Committee, *Opinion of the European Economic and Social Committee on the Proposal for a Council Regulation on the protection of animals at the time of killing*, (COM/2008, 2009/c 218/14), Art. 2, para. 1.

⁸ Affective states mean experiencing the feeling underlying emotional state. It is any kind of sentimental condition.

motivated by the emotional need to seek satisfaction and avoid suffering.”⁹ Sentient animals are aware of their environment, of the circumstances they are in, and these feelings trigger their behaviour. In the EU law, Art. 13 TFEU links animal sentience and animal welfare. It means that animals are sentient and thereof we must consider their welfare. It is a justification for the legal obligation to “pay full regard to the welfare requirements of animals.”¹⁰ The ethical reasoning reflects the intrinsic value of animals. It is the criterion that connects moral worth to animals. The ethical reasoning of sentience is however backed up by scientific criteria. It is the science that confirms that certain animals are sentient.¹¹ Therefore, we need to imagine that the line dividing sentient and non-sentient animals is made with pencil and that more and more animals are being moved to the sentient side. “By determining that those animals who feel pain and suffering must be protected, the law delimits the personal scope of animal protection acts with reference to scientific findings, excluding for example, non-sentient animals. Thus, if scientific findings show that an animal is sentient, this is sufficient to bring them directly under the purview of the law (...)”¹² Sentience is, therefore, a “gateway to accruing animals protection under the law.”¹³

⁹ WEBSTER, John (Ed.), *Management and Welfare of Farm Animals, The UFAW Farm Handbook*, Fifth Edition, Oxford 2011, p. 7.

¹⁰ KOTZMAN, Jane, *op. cit.*, p. 297.

¹¹ Depending on clinical, physiological, behavioural, brain function measures, ...

¹² BLATTNER, Charlotte, “The Recognition of Animal Sentience by the Law”, *Journal of Animal Ethics*, Vol. 9, No. 2, (2019), p. 121.

¹³ *Ibid*, p. 131.

In the EU, the recognition of animal sentience has been a motor of a legal change towards higher and more effective animal protection. The necessity to take into account moral and ethical principles associated with animal welfare is reflected in EU Directives, Regulations, Opinions, reports, statements, etc. For example, we can find the following: “[t]here is sufficient scientific evidence to demonstrate that vertebrate animals are sentient beings which should therefore fall within the scope of this Regulation”¹⁴ or “(...) 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 must pay full regard to the welfare requirements of animals, since animals are sentient beings; whereas EU legislation must therefore ensure that animals are kept in conditions that do not subject them to maltreatment, abuse, pain or suffering;”¹⁵ “whereas all action designed to ensure the protection and welfare of animals should be based on the principle that animals are sentient beings whose specific needs should be taken into account, and also that the protection of animals is an expression of humanity in the 21st century and a challenge facing European civilization and culture”¹⁶ or “The Treaty on the Functioning of the European Union defines animals as sentient beings. As a major importer of food, the EU has a moral responsibility to ensure that on-farm conditions for animals reflect its principles,

¹⁴ Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing, 18.11.2009, *OJ L 47*, 18.2.2009, Art. 18.

¹⁵ Committee on the Environment, Public Health and Food Safety, *Opinion of the Committee on the Environment, Public Health and Food Safety for the Committee on Agriculture and Rural Development*, 2020/2085 (INI), p. 3.

¹⁶ European Parliament, *European Parliament resolution on a Community Action Plan on the Protection and Welfare of Animals 2006-2010*, (2006/2046(INI)), point A.

including in respect of the food that it imports.”¹⁷ The EU Health Commissioner Stella Kyriakides said that “[a]nimals are sentient beings and we have a moral, societal responsibility to ensure that on-farm conditions for animals reflect this”¹⁸ and that “[a]cting to improve the welfare of animals is an ethical, societal, and economic imperative”¹⁹ in relation to phasing out the caged animal farming.

Furthermore, the necessity to minimize animal pain and suffering because they are sentient beings, and it is our duty to provide them *good welfare* has been translated to concrete norms. For example, “It shall be prohibited to (...) apply pressure to any particularly sensitive part of the body in such a way as to cause them unnecessary pain or suffering; (...) lift or drag animals by head, ears, horns, legs, tail or fleece, or handle them in such a way as to cause them unnecessary pain or suffering”²⁰ or in relation to animal transportation “[t]he Committee believes that the *duty of care due to animals* (emphasis added) during transport must be consistent with good animal husbandry practices informed by the best available advice from the most competent veterinarians dealing with animals.”²¹

¹⁷ European Parliament, *European Parliament resolution of 10 June 2021 on the European Citizens’ Initiative “End the cage age”*, 2021/2633(RSP), Art. 2.

¹⁸ European Commission, “European Commission, European Citizens’ Initiative: Commission to propose phasing out of cages for farm animals”, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3297.

¹⁹ *Ibid.*

²⁰ Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97, *OJ L 3*, 5.1.2005, Art. 1, para. 8, b), d).

²¹ European Economic and Social Committee, *Opinion of the European Economic and Social Committee on the for a Council Regulation on protection of animals during transport and*

An overwhelming majority of EU citizens desire higher protection of farm animals as they have deep awareness of the realities of factory farming, and they perceive animals as sentient beings worth of our protection. “Concern for the welfare of animals is [an] important common value for EU citizens- there is no doubt about that.”²² Moreover, they don’t see it only as a “regional, national or a European preserve, but instead as a joint responsibility.”²³

The underpinnings shaping the basic attitude of EU animal welfare policy are based upon the sentientist ethics. The EU adopts increasing amount of legislation on animal welfare with the justification of animal sentience, *i.e.*, animals can feel pain and suffering hence we have moral and legal duty to ameliorate their wellbeing. The sentience argument is of course not the only one that the EU uses to adopt stronger animal welfare and it is not the only reason for the protection of farm animals, however it is the essential one. “The recognition of animal sentience is momentous because it suggests that animal law has overcome certain cognitive biases of scientists and that these results are directly translated into the law, without having to grapple with legislator’s’ cognitive biases too. Also, once animals are recognized for their capacity to feel pain and

related operations and amending Directives 64/432/EEC and 93/119/EC, (COM(2003) 425 final- 2003/0171 /CNS)), 2004/C 110/23, Art. 3, para. 1.

²² HAMELEERS, Reinke, for FOODNAVIGATOR, “Europeans Want Farm Animal Welfare”, <https://www.foodnavigator.com/Article/2016/03/16/Europeans-want-farm-animal-welfare>.

²³ WOJECIECHOWSKI, Janusz, Opening speech during the Eurogroup for Animals China report launch event, 2021.

suffering, ignoring their interests in protection and flourishing will require greater justification.”²⁴

2) PUBLIC PRESSURE AND CONSUMER CHOICES

a) Public pressure

“The mindset of consumers and producers has undergone a seismic shift from merely preventing cruelty and avoidable suffering to animals, and instead is becoming focused on promoting their wellbeing and meeting their most important needs.”²⁵

European Commission

The ethical motives for adoption of EU animal welfare legislation are directly connected with growing appreciation of EU NGOs, media, academia, scientists, and general public for higher animal protection. These voices articulate our ethical duties to protect sentient beings. “There has been a clear shift of public attitudes towards animals over recent decades and how animals are considered in society. European consumers provide a good example of such a change in mind-set, with many consumers increasingly focussing on “clean and green” production methods and being attracted by the possible food quality, safety, and animal health and welfare benefits of innovative production systems, such as free range or organic farming.”²⁶

²⁴ BLATTNER, Charlotte, *op. cit.*, p. 132.

²⁵ European Commission, *Commission working document on a Community Action Plan on the Protection and Welfare of Animals 2006-2010- Strategic basis for the proposed actions*, {SEC(2006) 65} /* COM/2006/0014 final */ , Art. 4., para. 1.

²⁶ *Ibid.*, Art. 1, para. 3.

Public opinion on the matter is best reflected via the Eurobarometer surveys. There have been two farm animal welfare related surveys done in the EU so far in the years 2005²⁷ and 2015.²⁸ The results confirm that the wellbeing of farm animals is of a great concern for EU citizens, and we can see that throughout the years there is an increase in the willingness to pay more for products respecting animal welfare²⁹, in the preference in buying animal friendly products³⁰, in the desire to receive more information regarding treatment conditions³¹ and in ensuring that imported animal products adhere to the same standards as those in EU.³²

In the latest survey, absolute majority of EU respondents viewed animal welfare as an important issue³³ and believed that farm animal welfare should be better protected than it is now.³⁴ There has been vast agreement that standards should be the same for products imported from outside the EU.³⁵ Most respondents also believe that an EU

²⁷ TNS Opinion & Social, Special Eurobarometer 229: February-March 2005, *Attitudes of consumers towards the welfare of farmed animals*, requested by Directorate General Health and Consumer Protection, European Commission, June 2005.

²⁸ TNS Opinion & Social, Special Eurobarometer 442: November-December 2015, *Attitudes of Europeans towards Animal Welfare*, requested by Directorate General Health and Consumer Protection, European Commission, March 2016.

²⁹ *Ibid.*, p. 15.

³⁰ *Ibid.*, p. 17

³¹ *Ibid.*, p. 9.

³² See for example: The Brazil-EU horsemeat conflict: ROUSSEAUM Oscar, "EU urged to ban Brazilian horsemeat", <https://www.foodnavigator.com/Article/2016/03/03/EU-urged-to-ban-Brazilian-horsemeat>.

³³ 94% in the 2015 Eurobarometer survey.

³⁴ 82% in the 2015 Eurobarometer survey.

³⁵ 62% in the 2015 Eurobarometer survey.

legislation should be adopted requiring people to care for farm animals.³⁶ Furthermore Europeans also expressed their wish for labels identifying animal friendly products.

These attitudes indicate the importance of animal welfare in itself but also, they represent an economic and ethical element: “EU producers should not be disadvantaged by unfair competition”³⁷ created by the imports coming from worse welfare conditions. Moreover, the citizens are aware of their power to influence animal welfare via through their purchasing behaviour. This is very important as majority of EU citizens are also willing to pay more for animal products sourced from a production system with higher animal welfare.³⁸

Important indicator of a public opinion is also first *European Citizens’ Consultations on the Future Priorities of the EU*³⁹ held in 2018 and 2019. The report shows that 1 out of 7 citizens said that animal welfare should be amongst the EU priorities, and it was ranked almost as highly as fight against the climate change and taxation.⁴⁰ Also, 69% of EU citizens, and record number of members of parliament believe that an *EU Commissioner for Animal Welfare* should be appointed in order to promote animal interests.⁴¹ One of the most recent successes of public pressure

³⁶ 89% in the 2015 Eurobarometer survey.

³⁷ TNS Opinion & Social, Special Eurobarometer 442, *op. cit.*, p. 34.

³⁸ *Ibid.*, p. 50.

³⁹ Kantar Public, *Online Consultation on the Future of Europe*, Interim report, Report requested by Directorate-General for Communication, European Commission, 2018.

⁴⁰ *Ibid.*, p. 6.

⁴¹ IPSOS, “Opinion Survey: European Commissioner for Animal Welfare, European study”, p. 11.

is *European Citizens' Initiative*⁴² called “End the cage age” signed by almost 1.4 million Europeans. It is the first ECI on animal welfare that led to a commitment to change the EU legislation and adopt revisions that will put an end to cruel caging system.⁴³ New legislation will be presented by 2023 with the aim of phasing out the cages by 2027.

b) Consumer choices

“Consumer concerns about animal welfare have important implications for the future of the animal-based food products industry within the EU.”⁴⁴ Free-range eggs, growing number of vegetarians and vegans, appeal to organic farming and to animal-friendly products are examples of such choices. This has been acknowledged also in the EU legislation, for example: “[t]he protection of animals at the time of slaughter or killing is a matter of public concern that affects consumer attitudes towards agricultural products”⁴⁵ or “pig production in the EU will be increasingly affected by global trade and by the changing of consumer values. Producers will have to take into account more and more than before consumers’ concerns and their preferences.”⁴⁶ Reports

https://www.eurogroupforanimals.org/files/eurogroupforanimals/2021-11/2021_06_ipsos_GAIA_EU%20Survey_Report.pdf.

⁴² Hereinafter the ECI.

⁴³ European Parliament, European Parliament resolution of 10 June 2021 on the European Citizens' Initiative “End the cage age”, *op. cit.*, Art. 2, para. 5.

⁴⁴ HARPER, Gemma (Ed.), “Consumer Concerns about Animal Welfare and the Impact of Food Choice, Report derived from project “Consumer Concerns about Animal Welfare and the Impact of Food Choice” (CT98-3678), p. 4. <https://orgprints.org/id/eprint/1650/2/EU/harper.pdf>.

⁴⁵ Council Directive 93/119/EC, *op. cit.*, Art. 4.

⁴⁶ European Commission, *Communication from the Commission to the Council and the European Parliament on the welfare of intensively kept pigs in particularly taking into account the welfare of sows reared in varying degrees of confinement and in groups*. Proposal for a Council

concerning the welfare of broiler chickens also say that “[h]owever, in some member states, it seems that an increasing number of consumers are expressing concern about the welfare of chickens since this is being reflected in the use of production standards by some food retailers.”⁴⁷

Previously, we shortly touched upon the changes in the eating habits of people, from a global perspective. Let us now have a look at the consumer choices within the EU. We all know that the plant-based lifestyle is a growing trend. However, few have expected such a rapid increase among EU citizens. From 2016 to 2020 the number has doubled from 1.3 million do 2.6 million of people abstaining animal products altogether representing 3.2% of the population.⁴⁸ However, if we also include vegetarians, flexitarians and pescatarians, the group represents as much as 30,9% of the population- a population that does not fall into the label of full-meat eaters. As a result, vegan market in Europe grew by 49% in two years reaching a 3.6 billion in sales. This includes plant-based milks, yogurts, cheese, meat, and other products.⁴⁹ Another study found that in 11 EU countries,⁵⁰ more than 40% of

Directive amending Directive 91/630/EEC laying down minimum standards for the protection of pigs, COM(2001)20_0, p. 15.

⁴⁷ Scientific Committee on Animal Health and Animal Welfare, “The Welfare of Chickens Kept for Meat Production (Broilers),” Report requested by European Commission, SANCO.B3/AH/R15/2000, p. 98.

⁴⁸ VEGANZ.COM, “Veganz Nutrition Study 2020”, <https://vegan.com/blog/vegan-nutrition-study-2020/>.

⁴⁹ SMARTPROTEINPROJECT.EU, “Plant-based foods in Europe: How big is the market”, Funded by EU’s Horizon 2020 research and innovation programme, <https://smartproteinproject.eu/wp-content/uploads/Smart-Protein-Plant-based-Food-Sector-Report-2.pdf>.

⁵⁰ Austria, Belgium, Germany, Italy, Lithuania, Netherlands, Portugal, Slovakia, Slovenia, Spain.

people reduced their meat intake⁵¹ and that they are willing to switch to more sustainable foods. Therefore, EU is also leading in the plant-based innovations. More than 18% of food launches in Germany were vegan, in Poland it was 16% and 15% in Netherlands. “And even US companies, including Domino’s and Starbucks, have debuted vegan versions of popular products in Europe before launching them in their domestic markets.”⁵²

It is important to add that the change in the consumers eating habits is happening not only because of the animal wellbeing *per se*. Their concern “bifurcates between concern about the actual animals, animal-centred or zoocentric concerns, and concern about the consumers themselves, human-centred or anthropocentric concerns. Anthropocentric concerns focus on the impact of animal welfare standards on food safety and quality, whilst zoocentric concerns focus on the impact of animal welfare standards on animal health and animal suffering.”⁵³ Those two concerns are interrelated and “rarely are they separated in the consumer’s mind.”⁵⁴ This is however confirmed also by the scientists. The wellbeing of farm animals is in direct correlation with quality and safety of products. Environmental impacts are also taken into consideration by consumers. With more subchapters to come we

⁵¹ THE EUROPEAN CONSUMER ORGANIZATION, “One Bite at a Time: Consumers and the Transition to Sustainable Food, Analysis of a survey of European consumers on attitudes towards sustainable food”, p. 4. https://www.beuc.eu/publications/beuc-x-2020-042_consumers_and_the_transition_to_sustainable_food.pdf.

⁵² DEAN, Grace, “Why Europe is Leading the Way in Plant-Baes Food Innovation”, <https://www.businessinsider.com/why-europe-leading-plant-based-vegan-food-innovation-2021-2>.

⁵³HARPER, Gemma (Ed.), *op. cit.*, p. 9.

⁵⁴ *Ibid.*

will understand better these connections. We will see how complicated and important the issue of farm animal welfare is and why it is so crucial to continue with its regulation.

To conclude this section, our findings suggest that first, EU citizens have deep knowledge on the problems of current production sites, second, they feel that the ethical treatment of animals is an inherent value of their society and as a result they demand higher animal protection, third, they relate better animal wellbeing with higher food quality and better environment and lastly their standing is translated to their consumer behaviour. EU reflects this pressure to its policies supporting changes in the agriculture to meet these demands. “More specifically, it makes a commitment to further research, aims to create an international consensus on the matter, and speaks of the need for labelling schemes to enable consumers to make informed choices.”⁵⁵

3) ENVIRONMENTAL REASONS

“The welfare of animals is not only about changing values, but about added value for all those involved.”⁵⁶

Andrea Gavinelli

a) Water shortage and pollution

According to the European Commission and FAO,⁵⁷ animal welfare needs to be at the centre of sustainability as together with animal

⁵⁵ TNS Opinion & Social, Special Eurobarometer 442, *op. cit.*, p. 2.

⁵⁶ GAVINELLI, Andrea, Presentation at the Conference: Animal welfare: the Pleasure of Respecting Rights, Italy 2014.

⁵⁷ Food and Agricultural Organization.

production they are inevitably connected with environmental issues.⁵⁸ Intensive animal production is associated with huge waste and water pollution. If we count the quantities of water necessary to grow crops served as animal feed and water consumed by these animals, we come to shocking numbers: 1 kg of beef needs up to 15.000 liters of water.⁵⁹ Herewith, on average, up to ten times more water is used to obtain 1 kg of beef protein than to obtain 1 kg of legume protein.⁶⁰ This also clearly suggest waste of resources, as more land is needed to produce considerably less amount of meat compared to land needed to produce vegetable proteins. Animal products provide only 18% of calories consumed but they use 83% of global farmland and are responsible for 60% of greenhouse gas emissions proceeding from agriculture.⁶¹ Further, when “when livestock are raised in intensive, high-concentration conditions, the production of waste often exceeds the land’s ability to buffer the pollution. This results in the pollution of water with nitrates (as well as other types of air and soil pollution as well).”⁶² “It is probably the largest sectoral source of water pollution, contributing to eutrophication, emergence of antibiotic resistance and

⁵⁸ FAO, “Animal Welfare at the Heart of Sustainability”, https://www.fao.org/ag/againfo/home/en/news_archive/2014_Animal_Welfare_at_the_Heart_of_Sustainability.html.

⁵⁹ HEINRICH BOLL STIFTUNG/FRIENDS OF THE EARTH EUROPE/BUND, “The Meat Atlas”, 2021, p. 38, https://eu.boell.org/sites/default/files/2021-09/MeatAtlas2021_final_web.pdf.

⁶⁰ CABREJAS-MARTÍN, María, *Legumes. Nutritional Quality, Processing and Potential Health Benefits*, London 2019, p. 4. Similar situation applies to other animal products.

⁶¹ POORE, Joseph/ NEMECEK, Thomas, “Reducing Food’s Environmental Impacts Through Producers and Consumers”, *Science*, No. 360, (2018), p. 4.

⁶² COX, Janice/ BRIDGES, Jessica, “Why is Animal Welfare Important for Sustainable Consumption and Production?”, *Perspectives*, No. 34, (2019), p. 4.

many others.”⁶³ This is especially precarious as water is becoming scarcer and more depleted.⁶⁴ It is projected that “by 2025, 64 percent of the world’s population will live in water-stressed basins (against 38 percent today).”⁶⁵

Water pollution caused by factory farming is of great EU concern. Nitrates represent the biggest pollutant of EU groundwater, more specifically more than 18% of the area of groundwater bodies. *The Nitrates Directive*⁶⁶ determined the negative pressures of farming activities on the health of water ecosystems. 61% of EU’s agricultural area was labeled as “Nitrate vulnerable zones” which are “areas that drain into waters that are polluted or at risk of pollution.”⁶⁷ Areas with high concentration of production sites are often prone to nitrate pollution of local water supplies.⁶⁸ For example, in Catalonia that rears more than 8 million pigs, local authorities reported the excision of nitrate pollution by 41% over the limit. As a result, more than 100,000 people could not access easily drinking water between the years 2010 to 2014.⁶⁹ In 2021, the EU took Spain to court over the water nitrate pollution that

⁶³ HENNING, Steinfeld, *op. cit.*, p. xxii.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, *OJ L 375*, 31.12.1991.

⁶⁷ European Commission, *Report from the Commission to the Council and the European Parliament on the implementation of Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources based on Member State reports for the period 2012-2015*, COM/2018/257, (2018b).

⁶⁸ FOEEUROPE, “The Urgent Case to Stop Factory Farms in Europe”, p. 16. https://www.foodandwatereurope.org/wp-content/uploads/2020/10/Factoryfarms_110920_web.pdf.

⁶⁹ *Ibid.*

damages marine environment and freshwater. This further leads to reduced quality of life in rural areas where these macro farms are located.⁷⁰

b) Land degradation

Land degradation is another dangerous consequence of intensive farming. Fertilizers and pesticides used on crops fed to farm animals are a significant element of soil pollution. They also infiltrate into waterways together with eroded sediments which result in further water pollution and killing of aquatic life. Rampant deforestation is another important consequence of mass confinement farms. Livestock production uses 83% of worlds arable land and almost 30% of the ice-free land of Earth.⁷¹ The intensification of animal production leads to forest logging or burning and conversion of forests into pastures. This process also releases carbon into the atmosphere and results in the loss of biodiversity. Thousands of hectares of Amazon rainforest are cut down to make space for cattle ranching and for soybean crops fed to the animals. Plantations of monocultures such as soybeans or corn which are fed to animals lead not only to deforestation but also to the degradation of biodiversity. Intensive production sites directly contribute to soil degradation because of the land overexploitation in order to produce animal feed. “Factory farming of livestock encourages the expansion and intensification of cereal and soya production, the over-use of synthetic fertilizers and pesticides, over-exploitations of soil

⁷⁰ European Commission, “Water: Commission decides to refer SPAIN to the Court of Justice of the European Union for poor implementation of the Nitrates Directive”, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6265.

⁷¹ FAO, “Livestock and Landscapes”, <http://www.fao.org/3/ar591e/ar591e.pdf>.

and the abandonment of crop rotations that would maintain soil fertility.”⁷² Nitrates are, as same as in the case of water, very dangerous for soil quality. Large number of livestock in factory farms produce so much manure, “that it can’t even be spread on the fields as liquid slurry, since it’s too much and plants and the soil cannot absorb it all.”⁷³ The soil filled with manure is ultimately too acidic and getting infertile. The rest of the unabsorbed manure then percolate into the groundwater or into the streams or lakes and sea. Moreover, clearing natural vegetation consequently leads to drier and hotter weather that in turn makes it more difficult to grow soybeans and other crops.⁷⁴ Lastly, overfertilization of soil also leads to soil degradation and water pollution.⁷⁵

In the EU, soil degradation caused among others by factory farming, is a serious problem. According to the European Commission, Europe

⁷² COMPASSION IN THE WORLD FARMING, “Beyond Factory Farming. Sustainable Solutions for Animals, People and the Planet”, 2009, p. 45, <https://www.compassioninfoodbusiness.com/media/3817096/beyond-factory-farming-report.pdf>.

⁷³ CHEMNITZ, Christine (ed.), “Agriculture Atlas. Facts and Figures on EU Farming Policy”, 2019, p. 50. https://www.boell.de/sites/default/files/agricultureatlas2019_web_190508.pdf.

⁷⁴ See e.g., FLACH, Rafaela/ ABRAHAO, Gabriel/ BRYANT, Benjamin/ SCARABELLO, Marluce/ SOTERRONI, Aline/ RAMOS, Fernando/ VALIN, Hugo/ OBERSTEINER, Michael/ COHN, Avery, “Conserving the Cerrado and Amazon Biomes of Brazil Protects the Soy Economy From Damaging Warming”, *World Development*, Vol. 146, (2021) or LEITE-FILJO, Argemiro/ SOARES-FILHO, Britaldo/ LEROY DAVIS, Juliana/ ABRAHAO, Gabriel/ BORNER, Jan, “Deforestation Reduces Rainfall and Agricultural Revenues in the Brazilian Amazon”, *Nature Communications*, Vol. 12, (2021).

⁷⁵ CHEMNITZ, Christine (ed.), *op. cit.*, p. 52.

loses 9 million metric tons of soil each year.⁷⁶ Excess on nitrates is regulated in the EU by the already mentioned *Nitrate Directive* and by *Marine Strategy Framework Directive*. However, they are not interlinked with the *Common Agricultural Policy*⁷⁷ which is a lost opportunity. CAP should promote forms of livestock raising where there are only as many animals as “its land can feed and its soil safely recycle the manure from.”⁷⁸

c) Air pollution and climate change

Livestock’s role in air pollution and climate change is another significant problem. It has major influence on global greenhouse gas emissions. World bank’s study showed that this industry is responsible for 51% of global greenhouse gas emissions. FAO’s study calculated 18% which is already more than all the emissions proceeding from transportation sector. The IPCC⁷⁹ reports⁸⁰ repeatedly recommend structural changes

⁷⁶ EUROSTAT, “Agri-Environmental Indicator-Soil Erosion”, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Agri-environmental_indicator_-_soil_erosion&oldid=254669#Key_messages.

⁷⁷ European Commission, *Political agreement on new Common Agricultural Policy: fairer, greener, more flexible*, 20 June 2021, hereinafter the CAP. CAP is a common policy for all Member States with a system of agricultural subsidies. See more on CAP in subchapter B, 2, d).

⁷⁸ CHEMNITZ, Christine (ed.), *op. cit.*, p. 51.

⁷⁹ The Intergovernmental Panel on Climate Change.

⁸⁰ See e.g., IPCC, “Climate Change and Land: an IPCC Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security, and Greenhouse Gas Fluxes in Terrestrial Ecosystems”, Cambridge 2019, https://www.ipcc.ch/site/assets/uploads/sites/4/2020/02/SPM_Updated-Jan20.pdf; IPCC, “Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change”, Cambridge 2021, https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Full_Report.pdf.

in factory farming leading to reduction of produce and meat consumption to mitigate climate change. Virtually each step of animal production creates process substances that disharmonize fragile atmospheric equilibrium.⁸¹ Animal production emits substantial amounts of gases such as carbon dioxide, methane, and nitrous oxide. “Direct emissions from livestock come from the respiratory process of all animals in form of carbon dioxide. Ruminants, and to a minor extent also monogastric, emit methane as part of their digestive process, which involves microbial fermentation of fibrous feeds. Animal manure also emits gases (...).”⁸² These greenhouse gases which retain heat (solar energy) in the atmosphere and thus slow down its escape into space. Furthermore, other gasses resulting from complex animal production chain degrade the overall quality of the air.⁸³ This is dangerous for human and animal health. “These air pollutants return to earth in the form of acid rain and snow, and as dry deposited gases and particles, which may damage crops and forests and make lakes and streams unsuitable for fish and other plant and animal life. (...) Air pollutants carried by winds can affect places far (hundreds of kilometers if not further) from the points where they are released.”⁸⁴

Focusing on the EU, greenhouse gas emissions coming from animal farming within the EU represent 17% of the EU’s emissions. This means that animal farming damages the climate more than all cars put

⁸¹ HENNING, Steinfeld, *op. cit.*, p. 79.

⁸² *Ibid.*, p. 83.

⁸³ Sulphur dioxide, oxides of nitrogen, nitric acids oxidants, etc...

⁸⁴ HENNING, Steinfeld, *op. cit.*, p. 83.

together.⁸⁵ “The scale of the problem means that the EU cannot reach the goals of the Paris climate agreement, and avoid the worst impacts of climate breakdown, without a reduction in the number of farm animals.”⁸⁶ Moreover, yearly emissions caused by factory farming increased by 6% between the years 2007 and 2018. The increase represents 39 million tons of CO₂, which is equivalent to 8,4 million cars to the EU or over 3 million flights around the circumference of the Earth.⁸⁷

Furthermore, these greenhouse gas emissions amount to more than “the combined total national emission of four Central European countries influential in EU’s climate politics, the Visegrád Group: Poland, Hungary, Czechia and Slovakia, “more than the combined emissions from Italy, Belgium, Denmark and Romania,”⁸⁸ and “more than 18 time the annual emissions of the biggest and most polluting coal power station in Europe, Poland’s gigantic Belchatów power plant.”⁸⁹ As a result, “[r]educed numbers of farmed animals, as well as meat and dairy products consumed would have benefits beyond tackling climate change. Other pertinent crises of our time are all exacerbated by overproduction and overconsumptions of meat and dairy: deforestation

⁸⁵ GREENPEACE, “Farming for Failure”, 2020, p. 9, <https://www.greenpeace.org/static/planet4-eu-unit-stateless/2020/09/20200922-Greenpeace-report-Farming-for-Failure.pdf>.

⁸⁶ GREENPEACE, “Animal Farming in EU Worse for Climate Than All Cars”, <https://www.greenpeace.org/eu-unit/issues/nature-food/45051/animal-farming-in-eu-worse-for-climate-than-all-cars/>.

⁸⁷ GREENPEACE, “Farming for Failure”, *op. cit.*, p. 10

⁸⁸ *Ibid.*, p. 9.

⁸⁹ *Ibid.*

and biodiversity loss, environmental pollution in the air, the waters (and) health hazards (...)⁹⁰

d) *The EU's answer*

Concrete steps have been implemented in the EU legislation to tackle the environmental impact of large-scale production sites which goes hand in hand with amelioration of animal welfare. For example, the Commission listed animal welfare and agroecology as core environmental practices in the new CAP. “I am glad that we have reached a political agreement on a new CAP in time for its implementation by the beginning of 2023. The new CAP combines higher environmental, climate and animal welfare ambitions with a fairer distribution of payments, especially to small and medium-sized family farms as well as young farmers.”⁹¹ By providing more addressed support to small farms both animal welfare and environmental aspects are targeted. Smaller number of animals is in direct correlation with better animal welfare and lesser environmental pressures which ultimately leads to a holistic transition towards sustainable farming.

New CAP reacts to *European Green Deal*,⁹² *Farm to Fork Strategy*⁹³ and the

⁹⁰ *Ibid.*, p. 15.

⁹¹ WOJCIECHOWSKI, Janusz, “Political agreement on new Common Agricultural Policy: fairer, greener, more flexible”, https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2711.

⁹² European Parliament, *European Parliament resolution of 15 January 2020 on the European Green Deal*, (2019/2956(RSP)). Hereinafter the EGD. EGD is a growth strategy of transitioning to a sustainable economy. The main objective is to be climate neutral continent by 2050. *See more on EGD in subchapter B, 2, c).*

⁹³ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system*,

*Biodiversity Strategy*⁹⁴ that address the environmental impacts of large-scale factory farms: from loss of biodiversity, greenhouse gases raising global temperatures, animal waste polluting the environment, etc... In F2F strategy, one of the objectives is for example to farm 25% of EU agro-land organically⁹⁵ and decrease the use of fertilizers by 20%.⁹⁶ Moreover, the Commission will revise current rules on animal transport to ensure higher animal welfare.⁹⁷ This could lead to favor transport “on the hook”, *i.e.*, the transport of meat and carcasses rather than live animals which is better not only for animal welfare but also for public health and environment. Animal slaughter legislation will also be revised.⁹⁸ Phasing out slaughter without previous animal stunning, electrical water-bath stunning used for poultry and high-concentration CO2 stunning of pigs could be achieved.⁹⁹

COM(2020)381 final. Hereinafter the F2F. It is a 10-years action plan of the *Commission* towards fairer, healthier and environmentally friendly food system in the EU. *See more on F2F in subchapter B, 2, c).*

⁹⁴ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU Biodiversity Strategy for 2030*, 2021COM(2020)380. It is a 10-year action plan to restore and conserve biodiversity in the EU.

⁹⁵ European Commission, *A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system*, *op. cit.*, p. 8.

⁹⁶ *Ibid.*, p. 7.

⁹⁷ European Commission, *A Farm to Fork Strategy for a fair, healthy and environmentally friendly food system*, *op. cit.*, p. 8.

⁹⁸ *Ibid.*

⁹⁹ EUROGROUP FOR ANIMALS, “The EU Farm to Fork Strategy: From More to Better, for the Animals and Humanity”, Report of Intergroup for the Welfare and Conservation of Animals, 2020, https://www.animalwelfareintergroup.eu/files/default/2020-06/Intergroup%2016%20June%202020%20F2F_final_PDF.pdf.

Recent win for caged animals was also achieved due to a negative environmental influence of caged livestock housing and the environmental footprint of such operations. Large amounts of livestock concentrated in cages in small area result in air and water pollution, unpleasant odours, ammonia deposition directly damaging the ecosystems and human health.¹⁰⁰ Environmental unsustainability of current rearing systems is acknowledged in the European Parliament's *Resolution Animal welfare, antimicrobial use and the environmental impact of industrial broiler farming*¹⁰¹ and Commission's *Communication*¹⁰² on the "End the Cage Age" ECI. There, scientific studies were mentioned attesting that "non-caged systems for laying hens are economically, environmentally and socially similar to furnished cage systems"¹⁰³ and that reports "outline the environmental and welfare challenges, opportunities and potential consequences of further animal welfare improvements and ending the use of cages in the production of certain farmed animals in the EU."¹⁰⁴ Commission clearly states that a new legislative proposal for a framework for a sustainable food system will

¹⁰⁰ KOLLEND, E/ HILLER, D., LORANT, A, "Transitioning towards cage-free farming in the EU: Assessment of environmental and socio-economic impacts of increased animal welfare standards", Policy report by the Institute for European Environmental Policy, 2020, p. 25-26, https://ieep.eu/uploads/articles/attachments/5acf278b-c1b1-4e88-a14e-6c5a4f04257a/Transitioning%20towards%20cage-free%20farming%20in%20the%20EU_Final%20report_October_web.pdf?v=63769792427.

¹⁰¹ European Parliament, *European Parliament resolution on animal welfare, antimicrobial use and the environmental impact of industrial broiler farming*, (2018/2858(RSP)).

¹⁰² European Commission, *Communication from the Commission on the European Citizens' Initiative (ECI) "End the Cage Age"*, 2021/C 274/01, C/2021,4747, OJ C 274, 9.7.2021, Art. 2.

¹⁰³ *Ibid.*, Art. 2, para. 3.

¹⁰⁴ *Ibid.*

be prepared before the end of 2023¹⁰⁵ and that a sustainable food labelling framework should “cover the nutritional, climate, environmental and social aspects of food products including animal welfare.”¹⁰⁶ New legislation will “consider available science, an assessment of social, economic and environmental impacts, (...)”¹⁰⁷ Here we can see, that the ethical rationale was supported by the environmental arguments as together they tackle different aspects of the same problem: overcrowded large production sites creating wellbeing issues for animals and environmental impacts for our planet.

4) ANIMAL AND HUMAN HEALTH

a) Zoonotic diseases

The science has demonstrated the links between poor farm animal welfare, industrial food production systems, and consequences for human health and food safety. “Stress and poor welfare in farm animals increase the transmission and virulence of a number of zoonotic diseases, and stressed animals during transport and slaughter often release more pathogens. Protecting the welfare of farm animals can therefore be an important factor in decreasing the spread of disease.”¹⁰⁸ “The data suggests that when the animal welfare of land-based farm animals is compromised there are resulting significant negative human health consequences due to environmental degradation, the use of non-

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*, p. 9.

¹⁰⁷ *Ibid.*

¹⁰⁸ COX, Janice/ BRIDGES, Jessica, *op. cit.*, p. 2.

therapeutic levels of antibiotics for growth promotion, and the consequences of intensification.”¹⁰⁹

The danger of global spread of zoonotic diseases and threat to food safety around the world is therefore another global consequence of poor animal welfare with major magnitude. Diseases appear as a result of long-haul animal transportation but also because of current agricultural practices of modern factory farming. “There is a major threat to humanity and it comes from the very food we eat- a terrible consequence of our modern farming systems. Some diseases that infect animal can also be passed on to humans.”¹¹⁰ Confined spaces, enormous number of animals in one place, breeding and feeding practices that increase the production are factors contributing to emergence of diseases.¹¹¹ “It is often at the expense of the animals’ welfare but it’s also putting human health at risk. It increases the risk of certain diseases, which can lead to serious illness in human and may be fatal. As we consume more animal products, particularly chicken and pig meat, there is greater risk of exposure to these illnesses.”¹¹² Among those diseases we can mention *Salmonella*, *E. coli*, *Campylobacter*. Moreover, influenza viruses that affect pigs and poultry can lead to flue capable of infecting humans. “The risk of new strains of influenza that can infect humans is of serious concern, now and in the future. Farm animal numbers have

¹⁰⁹ GOLDBERG, Alan, “Farm Animal Welfare and Human Health”, *Current Environmental Health Reports*, Vol. 3, No. 3, (2016), p. 1.

¹¹⁰ COMPASSION IN A WORLD FARMING, “Zoonotic Diseases, Human Health and Farm Animal Welfare”, (2013), p. 6, <https://www.ciwf.org.uk/media/3756123/Zoonotic-diseases-human-health-and-farm-animal-welfare-16-page-report.pdf>.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

risen rapidly, and large-scale concentration of poultry and pigs has become increasingly common, alongside long-distance transport. This increases the risk of new strains of influenza viruses emerging and spreading.”¹¹³ Global food safety and consumer health are therefore at risk because of poor welfare standards.

Here, we need to highlight that the EU has effective mechanisms of animal disease control systems in place that ensure the compliance with the requirements of the EU health certification for imported meat products. For example, the *Regulation 1099/2009 on the protection of animals at the time of killing*¹¹⁴ includes the requirement of equivalence at slaughter for imported meat, so called principle of equivalence. Regulation’s Annex listing contains a very well-defined AW standards for which the principle of equivalence for meat import applies.¹¹⁵ “Consequently, it became much easier to ensure a punctual comparison, this allowing for objective audits and controls”¹¹⁶ in the exporting third countries. Consequently, the compliance with the Regulation has had positive influence on AW outside of EU as the “technical assistance provided by EU experts was clearly visible (...)”¹¹⁷ This is yet another example of EU exporting AW standards to third countries.

b) Human diseases

¹¹³ *Ibid.*

¹¹⁴ Council Regulation (EC) No 1099/2009 on the protection of animals at the time of killing, *op. cit.*, Art. 37.

¹¹⁵ European Commission, Directorate-General for Health and Food Safety, *Study on the impact of animal welfare international activities, op. cit.*, p. 28.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

Another aspect of health consequences is growing scientific data proving links between “pandemics” of lifestyle diseases and meat-eating. They show that “[h]igher consumption of unprocessed red and processed meat combined (is) associated with larger risks of ischemic heart disease, pneumonia, diverticular disease, colon polyps and diabetes, and higher consumption of poultry meat (is) associated with higher risks of gastro-oesophageal reflux disease, gastritis and duodenitis diverticular disease, gallbladder disease and diabetes.”¹¹⁸ In 2015, processed meats such as bacon were categorized by the World Health Organization as carcinogens, with same effects as asbestos or tobacco.¹¹⁹ These connections are starting to be taken seriously and growing number of countries are promoting more balanced and plant-based diets.¹²⁰

¹¹⁸ PAPIER, Keren/ FENSON, Georgina/ KNUPPEL, Anika/ APPLEBY, Paul/ TONG, Tammy/ SCHMIDT, Julie/ KEY, Timothy/ PEREZ-CORNAGO, Aurora, “Meat Consumption and Risk of 25 Common Conditions: Outcome-Wide Analysis in 475,000 Men and Women in the UK Biobank Study”, *BMC Medicine*, Vol. 19, No. 53, (2021), p. 6.

¹¹⁹ World Health Organization, “Cancer: Carcinogenicity of the Consumption of Red Meat and Processed Meat”, <https://www.who.int/news-room/q-a-detail/cancer-carcinogenicity-of-the-consumption-of-red-meat-and-processed-meat>.

¹²⁰ RABB, Maxwell, “France’s Environmental minister Urges Cutting Meat From French Cuisine”, <https://thebeet.com/frances-environmental-minister-is-cutting-meat-from-french-cuisine/>; SANCHIR, Aruka, “Netherlands Aims to Shift to 69 percent Plant-Based”, <https://vegnews.com/2018/4/netherlands-aims-to-shift-to-60-percent-plant-based>; DAVIES, Caleb, “Eating Local and Plant-based Diets: How to Feed Cities Sustainably”, <https://ec.europa.eu/research-and-innovation/en/horizon-magazine/eating-local-and-plant-based-diets-how-feed-cities-sustainably>; PCMR, “California Assembly Passes Bill Incentivizing Plant-Based Meals in Public Schools”, <https://www.pcrm.org/news/news-releases/new-york-makes-plant-based-hospital-meals-law>; VON ALT, Sarah, “Mexico City Congress to Promote Plant-Based Meals After Support From Our Conscious Eating Program”; <https://mercyforanimals.org/blog/mexico-city-congress-to-promote-plant-based/>; SMITH, Kat, “Slovakian Doctors reverse Diabetes With Plant-Based Diet”, <https://www.livekindly.co/slovakian-researchers-vegan-diet-reverse-type-2-diabetes/>; VEGANFIRST, “Indian Government Urges You to Eat Plant-Based

c) The EU's answer

EU has taken the connections between poor farm animal welfare and animal and human health very seriously. This can be seen in several legislative actions. The Commission in its *Communication to European Parliament and European Council*¹²¹ recognized the interconnections between animal health, welfare and food safety. “There is increasingly wide acceptance of the link between animal welfare and animal health, and even, by extension, between animal welfare and food safety and food quality.”¹²²

In this regard we can see striking difference between the EU and US position. For example, in the EU different hormones leading to higher production rate were not allowed because of their negative impacts on animal welfare and health. This is the case of bovine somatotropin (bST) which is genetically engineered for higher milk production. The EU's *Scientific Committee on Animal Health and Animal Welfare* decided that high milk production leads to gastrointestinal illnesses, poor body condition, reproductive issues and susceptibility to lameness, mastitis, and heat stress.¹²³ However, in the US this hormone is allowed and used.

Foods to Fight Climate Change”; <https://www.veganfirst.com/article/indian-government-says-eat-plant-based-foods-to-fight-climate-change>; UNITED NATIONS, “UN Study Urges Governments to Develop Guidelines that Promote “Win-Win” Diets”, <https://news.un.org/en/story/2016/05/529712-un-study-urges-governments-develop-guidelines-promote-win-win-diets>.

¹²¹ European Commission, *Communication from the Commission to the Council and the European Parliament on Animal Welfare Legislation on farmed animals in Third Countries and the Implications for the EU*, COM(2002) 626 final.

¹²² *Ibid.*, Art. 36.

¹²³ Scientific Committee on Animal Health and Welfare, *Report on Animal Welfare Aspects of the Use of Bovine Somatotrophin*, 1999.

Long transportation of animals and its impacts on animal and human health and spread of illnesses were also acknowledged, for example: “[w]hereas the transport of live animals over long distances and inadequate rules and inspections have contributed to a sudden and dramatic spread of infectious animal diseases such as swine fever and foot-and-mouth disease,”¹²⁴ or “the various animal health crises experienced by the Union in recent years (in particular classical swine fever in the Netherlands (1997/98) and more recently foot-and-mouth disease) have been exacerbated by the large number of movements of live animals both within the Member States affected by the epizootic diseases and between the various Member States,”¹²⁵ “it is therefore appropriate to provide for specific measures safeguarding the health and welfare of animals when resting at control posts.”¹²⁶

Furthermore, the new “Animal Health Law”¹²⁷ applicable from 21 April 2021, created a harmonised EU framework for control of a spread of animal diseases than can pass from animal to animal or to humans. In this way, hundreds of pieces of legislation were harmonized and consolidated. The Regulation adopted “One Health” approach

¹²⁴ European Parliament, *European Parliament resolution on the experience acquired by Member States since the implementation of Council Directive 95/29/EEC concerning the protection of animals during transport*, COM(2000) 809- C5-0189/2001-2001-2085(COS).

¹²⁵ EU MONITOR, “Considerations on COM(2000)809-Experience acquired by Member States since the implementation of Council Directive 95/29/EC amending Directive 91/628/EEC concerning the protection of animals during transport”, https://www.eumonitor.eu/9353000/1/j4nvhdlglbmvdzx_j9vvik7m1c3gyxp/vikqhimfvqzo.

¹²⁶ Council Regulation (EC) No 1/2005, *op. cit.*, Art. 13.

¹²⁷ Regulation (EU) 2016/429 of the European Parliament and of the Council on transmissible animal diseases and amending and repealing certain acts in the area of animal health (“Animal Health Law”), *OJ L 84*, 31.3.2016.

concentrating on the relationship between animal and public health, feed and food safety, environment, animal welfare, food security, and social, economic, and cultural aspects: “(...) transmissible diseases may have a broader impact on animal or public health, with effects felt at population level,”¹²⁸ “as recent experiences have demonstrated, transmissible animal diseases may also have a significant impact on public health and food safety,”¹²⁹ “In addition, adverse interactive effects can be observed with regard to biodiversity, climate change and other environmental aspects (...)”¹³⁰ As a result, the connection between animal welfare and public health has been clearly acknowledged on the EU level.

Until now we have analysed the EU legislation and policies on animal welfare by identifying the reasons, the motives, the moving force behind their adoption. From that we can deduct their main objectives: the protection of animal welfare and minimization of pain and suffering because animals are sentient and morally significant beings, and because the EU citizens clearly voiced their concerns and preferences concerning animal protection. Second, the mitigation of environmental impacts of current production sites which is a more recent objective. However, it is becoming an increasingly pressing issue as we face the realities of environmental degradation, and we realize the connections between what and how we eat. And third, the protection of animal and human health is another aim of current EU animal welfare legislation.

¹²⁸ *Ibid.*, Art. 10.

¹²⁹ *Ibid.*, Art. 2.

¹³⁰ *Ibid.*, Art. 3.

As a result, we can see that along the years the EU has adopted a substantial body of law governing the treatment of animals and has reduced many cruel and unsustainable practices. The incentives and objectives that led the EU to adoption of different instruments are also applicable on the global level and could be an example for fostering international cooperation for better animal welfare. By understanding the most developed international animal welfare regulatory framework we can advance the creation of international animal law as a general international regime. We can take the lessons from the EU and use it as an inspiration for further global development of AW.

B) UNIVERSAL VALUES, GLOBAL PUBLIC INTEREST AND COMMON CONCERN OF HUMANKIND IN THE EU FARM ANIMAL WELFARE

Everything that we have learnt so far in this subchapter will lead us to the application of notions analysed in the previous part of the dissertation, to the specific case of the EU farm animal welfare. After analysing the motives for adoption of EU farm animal welfare legislation we can easily confirm its existence as universal value, global public interest, and common concern of humankind, all of that on regional level within the EU. To say in another way, we can prove the EU's contribution to aforementioned notions that reflect bigger, global attitudes. This is important as the EU legislation on animal welfare represents the most important binding international instruments that exist so far. By determining that those EU instruments are aligned with our hypothesis on international animal law as general international regime, we can conclude and that our construction is not a theoretical

proposal without practical applicability. On the contrary, we can see that there is already a materialization in the positive law, although so far only on the EU level.

1) EU FARM ANIMAL WELFARE AS PART OF UNIVERSAL VALUE

The study of the sentientist ethics, public pressure and consumer choices confirms the existence of farm animal welfare as an important value within the EU. “The protection of animals is becoming a “public value” for European citizens demanding public institutions to care about appropriate legislative or non-legislative initiatives in order to protect it.”¹³¹ Therefore, the concern for well-being of farm animals is rooted in the citizens’ values on the matter. In fact, “(...) the core structure of the EU regulatory framework on animals refers directly to citizens’ knowledge and values on the matter.”¹³² Those are one of the generators of legal change. Consequently, strong (and raising) public concern for welfare of farm animals, increasing ethical awareness, robust science and advancing legal protection are indicators pointing to farm AW as an important value for Europeans.

2) EU FARM ANIMAL WELFARE AS PART OF GLOBAL PUBLIC INTEREST

Next, EU public interest in farm animal welfare, which contributes to wider *global* public interest in AW itself, can also be confirmed. For that, several elements have to be met, as we learn in chapter n. V. First

¹³¹ GAVINELLI, Andrea, “The EU policy framework for animal welfare”, <https://www.derechoanimal.info/sites/default/files/attachments/A-Gavinelli-MC-EU-policy-framework-for-animal-welfare-eng.pdf>.

¹³² LEONE, Luca, “Farm Animal Welfare Under Scrutiny: Issues Unsolved by the EU Legislator”, *European Journal of Legal Studies*, Vol. 12, No. 1, (2020), p. 55.

element of global public interest, community dimension, is clearly proven. As we have seen in the previous section, the worry of EU citizens, NGOs, academia, and scientists over farm animal welfare is pervasive. Public awareness has played an important role in making the authorities to focus on protection of farm animals. On the other hand, the EU itself acknowledged the need for strong regional and international animal welfare rules. The EU institutions are including wellbeing of animals to their considerations on environmental and social aspects as the interconnections between the way we grow and raise our food and the health of our planet, the health and quality of life of animals and people are clear and alarming. Moreover, EU sees farm animal welfare as truly international and hence as a *community* problem. It understands that the regional regulation is not sufficient because of impact of the international trade on domestic farmers, for example. The inclusions of conditionality in the Mercosur agreement and other trade agreements with inclusion of OIE¹³³ standards is a proof of EU's intent to ameliorate animal welfare globally. The reason behind is not only the protection of EU competitiveness but it is also a reaction to consumer demands for animal friendly products and their pressure towards levelling the playing field. EU actively promotes animal welfare outside of its borders, for example, “[w]ith all the developments in the EU, such as the improvement of our animal welfare standards, there has never been a better time for us to discuss this topic with China.”¹³⁴

Farm animal welfare within the EU also embodies the element of rational abstraction. Europeans vocalize their worries over poor animal

¹³³ The World Organization for Animal Health.

¹³⁴ WOJCIECHOWSKI, Janusz, Opening speech, *op. cit.*

treatment because they regard it as a concrete problem of national, regional, and international community. It embodies a real issue with social, environmental, ethical, and economic impacts. This is reflected in the CAP,¹³⁵ EGD¹³⁶, and F2F¹³⁷ strategies. EU farm animal welfare also matches the next feature, which is plurality of normative categories, meaning that a variety of legal tools have been adopted by the EU to regulate AW of land animals, as we could evidently observe in our analysis from hard law to soft law and instruments such as common concern of humankind. Some of these instruments fall into the category of public interest norms as we will see later.

All of the above materializes, at the same time, other elements of global public interest: its protection by international community, necessity for global response and intergenerational dimension. On one hand, EU regulation of farm AW represents the EU portion of a wider global response. On the other hand, it is obvious that actions adopted only on regional level are not sufficient due to the interconnections between the economies and globalized AW issues. Even though EU adopts progressive AW regulation, and it is a beacon of hope for many animals, a more coordinated international approach is necessary to tackle AW globally. Furthermore, we have presented complicated liaisons between ethical, environmental, human, and animal health intergenerational issues and EU farm animal welfare. Interrelationships of such a scale

¹³⁵ European Commission, *Political agreement on new Common Agricultural Policy: fairer, greener, more flexible*, *op. cit.*

¹³⁶ European Parliament, *European Parliament resolution of 15 January 2020 on the European Green Deal*, *op. cit.*

¹³⁷ European Commission, *A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system*, *op. cit.*

cannot be resolved by one region. On the contrary, a global one is necessary.

3) EU FARM ANIMAL WELFARE AS PART OF COMMON CONCERN OF HUMANKIND

In the chapter no. V we have illustrated the importance of categorization of animal welfare as common concern of humankind.¹³⁸ We showed that it could encourage and stimulate “taking up responsibilities and to reflect and to develop appropriate policy instruments in addressing a challenge of magnitude.”¹³⁹ Also, “[a]s a source of inspiration, it assists in developing new forms of cooperation, funding and interaction emerging in state practice and treaty/making.”¹⁴⁰ The CCH has possibility to impact the development of international law especially when in our globalized times we face new, unprecedented challenges.¹⁴¹

We have also established that animal welfare meets the two criteria of common concern of humankind- the transboundary dimension and seriousness on of the issue.¹⁴² As an example, we used the case of farm animals, therefore, we have already determined that farm animal welfare represents the CCH. Let us therefore briefly recapitalize main points and add some new considerations.

¹³⁸ Heriafter also the CCH.

¹³⁹ COTTIER, Thomas/ AHMAD, Zaker, *The Prospects of Common Concern of Humankind in International Law*, Cambridge 2021, p. 26.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *See* chapter no. V, C).

a) Long journeys

Both elements of CCH can be found in the case of live animal transport which is inherent part of current farming and economic practices in EU and the world. Untold numbers of animals are sent every day from one place to another for hours, weeks even months. “For example, approximately 3 million head of cattle are transported for fattening annually”¹⁴³ only within the EU. As we will see in the chapter dedicated to live animal transports,¹⁴⁴ the welfare of animals during these journeys is very poor, whether by road or sea. Many of them die or suffer an injury. Those that survive, must cope with often untrained personnel treating them without proper care, they must endure cruel conditions that don’t allow them to express their natural behavior as they travel in big quantities. This makes it impossible for them to move, to scratch, to lie down, to turn when they need. Many times, they are not provided with sufficient water and food. Also, extremely high, or low temperatures in trucks or ships and bad ventilation lead to stress and health problems, even deaths, especially on sea. Animals are anxious, distressed, and tired. This is not only ethical problem but also a health issue as stressful events trigger the health problems.¹⁴⁵ European Union is aware of these interconnections and because of that it is continuously working on ameliorating rules on animal transport, with the aim to outlaw long-haul transports of live animals.

¹⁴³ PADALINO, Barbara/ TULLIO, Danielle/ CANNONE, Severio/ BOZZO,, Giancarlo, “Road Transport of Farm Animals: Morbidity, Species and Country of Origin at a Southern Italian Control Post”, *Animals*, Vol. 8, (2018), p. 155.

¹⁴⁴ See chapter no. VIII, B), I).

¹⁴⁵ *Ibid.*

b) Welfare problems in importing countries

Another element of cross-border nature and of a major magnitude is the fact that the welfare standards of exporting country do not apply during the transportation on sea and after arriving, in the importing country. So, even though one country, or region, has relatively strong welfare regulations, those do not apply beyond their jurisdiction. The most striking differences are between EU and Australia in relation to Asia. EU audits, study visits, documentation from NGOs and undercover media stories reported grave AW violations on long-haul animal transports by road and sea. The Commission concluded that “current legal situation, its implementation by operators and its enforcement by competent authorities does not effectively protect animals from pain, suffering, injury and death during long journeys, in particular in third countries.”¹⁴⁶

c) Outsourcing

Another transboundary feature of animal welfare is outsourcing. “[M]ultinational corporations, which own most of the world’s domesticated animals, are highly mobile and do not shy away from moving production to states with lower animal welfare standards if home states introduce or announce stricter animal protection standards.”¹⁴⁷ Agricultural outsourcing is expected to represent third wave of outsourcing, after industry and manufacture outsourcing

¹⁴⁶ MARAHRENS, M/ KERNBERGER-FISHER, I, *Research for ANIT-Committee-The practices of animal welfare during transport in third countries. An overview*, European Parliament, Policy Department for Structural and Cohesion Policies, PE 690.877, 2021, p. 51.

¹⁴⁷ BLATTNER, Charlotte, E, *op. cit.*, p. 423.

carried out in the past.¹⁴⁸ This is due to fact that “[r]ich food importers are acquiring vast tracts of poor countries’ farmland.”¹⁴⁹ Interconnected economies of today’s world are enabling the existence of global supply chains, animal production not excluded. Intensive livestock production depends upon vast quantities of feed crops and dynamic relations between numerous nations. Brazil, for example is the largest soybean exporter, the second largest beef exporter, and the fourth largest pork exporter.¹⁵⁰ Exports are destined particularly to China, but also to EU. The U. S. is exporting soybeans and corn which is also used as nutrition for farm animals in other markets, including EU.

Because of scarcity of natural resources, such as water, China is dependent on importing crops, meat, and live animals.¹⁵¹ In this example we can see the interdependence of animal production between China, Brazil, U. S. and EU. Global supply chains of animal production are becoming a commonplace in intensive farming industry. “Today, actions that affect animal production and protection are so globally entangled that jurisdictional connections cannot be traced to a single

¹⁴⁸ The Economist, “Outsourcing’s Third Wave”, <https://www.economist.com/international/2009/05/21/outsourcings-third-wave>.

¹⁴⁹ *Ibid.*

¹⁵⁰ ZHOU, Wanqing, “The Evolution and Future of Industrial Animal Agriculture in the U.S., China, and Brazil”, https://brightergreen.org/wp-content/uploads/2015/11/the_triangle_discussion_paper_final.pdf.

¹⁵¹ *Ibid.*

state.”¹⁵² New CAP,¹⁵³ *Biodiversity strategy*¹⁵⁴ and F2F¹⁵⁵ react to these interconnections and therefore they focus on small farmers, boost organic farming and change overall agricultural practice in Europe. Hence, it is clear, from all the above, that farm animal welfare is for the EU matter of a great concern and that it represents one piece of mosaic that forms the common concern of humankind.

Moreover, as has been shown on the previous pages, the enormous detrimental environmental consequences of animal agriculture also materialize both transboundary element and element of a major seriousness. The climate change, soil corrosion, water shortages, biodiversity destruction are adverse global outcomes of current animal agribusiness that have transboundary nature and pose threat to our entire planet.

What did we achieve by proving that EU farm animal welfare forms part of a bigger global public interest, universal values, and common concern of humankind? First, we enriched our conceptual proposal for the creation of general international regime of international animal law by analyzing another specific ramification of animal welfare. Second, we have demonstrated that our theoretical construction on which international animal law could stand is already in the existence, although only on the regional level. We have applied our hypothesis on real case

¹⁵² BLATTNER, Charlotte, E, *op. cit.*, p. 423.

¹⁵³ European Commission, *Political agreement on new Common Agricultural Policy: fairer, greener, more flexible*, *op. cit.*, p. 1.

¹⁵⁴ European Parliament, *European Parliament resolution of 15 January 2020 on the European Green Deal*, *op. cit.*, p. 12.

¹⁵⁵ European Commission, *A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system*, *op. cit.*, p. 3.

showing that it indeed has potential and that it is not just a hortatory theory with no application. And third, we prepared the foundations for further analysis of public interest norms within the EU that could stand as an example for international advancement of animal law.

C) MAPPING EU FARM ANIMAL WELFARE SYSTEM

Before we start analyzing current EU laws and policies on farm animal welfare and identifying their gaps and limitations in the next chapter, it is necessary to understand the EU system for protection of animals raised for food. What are the instruments that compose it and where can we find them? We will not proceed to their exhaustive description as our aim is to introduce the scheme and offer its basic comprehension to acquire introductory knowledge. In this way, next chapters will be easier to grasp and digest.

It is necessary to underline that we will only focus on the acts adopted within the European Union. For that reason, we will not dedicate a separate section to the Council of Europe event though it was “first supra-national organisation that proposed measures to ensure animal welfare”¹⁵⁶ and its conventions on animal welfare create, from a global perspective, an unprecedented system of agreements for the protection of animals in human care.

¹⁵⁶ VEISSIER, Isabelle/ BUTTERWORTH, Andrew/ ROE, Emma, “European approaches

to ensure good animal welfare”, *Applied Animal Behaviour Science*, Vol. 113, No. 4, (2008), p. 280.

As we will see, the provisions, strategies and policies on EU farm animal welfare can be found in plurality of instruments, some of them specifically dedicated to this topic, in other cases animal welfare is regulated within broader topic of agricultural policies, environmental assessments or trade agreements. In other words, EU animal welfare policy is constructed upon myriad of legislative and non-legislative tools. As a result, farm animal welfare as a primary topic can be found in the primary law and in secondary law adopted by the EU Institutions. These would be the Directives, Regulations, Recommendations and Opinions with main topic of farm AW as well as variety of policies such as resolutions, actions programmes, declarations, interinstitutional agreements, reports which are non-legal acts.

In the *Common Agricultural Policy*,¹⁵⁷ animal welfare does not have a principal position, but it figures for example, as an incentive for farmers to receive greater funding. Also, trade agreements with third countries are important element of progress for animal welfare, as the EU often requires from the parties the amelioration of their farming practices if they want to export animal products to the EU.

1) EU NORMS ON FARM ANIMAL WELFARE

¹⁵⁷ European Commission, *Political agreement on new Common Agricultural Policy: fairer, greener, more flexible*, *op. cit.* See also European Commission, “CAP Strategic Plans and Commission observations, Summary overview for 19 Member States”, https://ec.europa.eu/info/sites/default/files/food-farming-fisheries/key_policies/documents/overview-cap-plans-ol-220331.pdf; European Commission, “A Greener and Fairer CAP”, https://ec.europa.eu/info/sites/default/files/food-farming-fisheries/key_policies/documents/overview-cap-plans-ol-220331.pdf.

“The system of norms of European Union is based on a *summa divisio* between primary and secondary norms which has been established since the origin of the European framework.”¹⁵⁸ Primary norms “set the constitutional framework for the life of the EU, which is then fleshed out in the Unions’ interest by legislative and administrative action by the Union institutions.”¹⁵⁹ Their basic characteristics are following: primary norms are materially and formally international norms, governed by norms of general international law on international treaties.¹⁶⁰ They encompass constitutional element that is manifested in their content (they establish principles, determine attributed powers and their limits, they structure institutional system,...) and in their preeminence over any other norm.¹⁶¹ Further, they regulate specific material areas such as union freedoms, competence rules or common policies.¹⁶² They represent norms that are so important that the Member States decided to include them in primary law so they could be protected by their supremacy.¹⁶³

As we have learnt previously, animal welfare is mentioned in the TFEU although at a very general level. According to the Art. 13 TFEU, EU takes into account welfare needs of animals as sentient beings, in its action. The commitment to the protection of animals in the primary EU

¹⁵⁸ MARTÍN, MANGAS Araceli/ NOGUERAS, LIÑÁN, Diego, *Instituciones y Derecho de la Unión Europea*, Tenth Edition, Madrid 2020, p. 377. (Own traslation).

¹⁵⁹ BORCHARDT, Klaus-Dieter, *The ABC of EU Law*, Manuscript of European Commission, Luxembourg 2016, p. 90.

¹⁶⁰ MARTÍN, MANGAS Araceli/ NOGUERAS, LIÑÁN, Diego, *op. cit.*, pp. 377-378.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

law is therefore expressed in vague terms. On the other hand, secondary EU law regulates the protection of different categories of animals in more detail. It needs to be mentioned that the section of the Treaty that contains article 13 does not represent a legal base for the EU to act on animal welfare. “It is an obligation to consider this aspect within the framework of a list of specific EU policies. Therefore, all pieces of EU legislation on animal welfare are based on one of these EU policies such as agriculture for farmed animals or the internal market for laboratory animals where the EU has a legal base to act.”¹⁶⁴

Next, the secondary law represents “a body of law that comes from the principles and objectives of the treaties.”¹⁶⁵ It is adopted “by the Union institutions through exercising the powers conferred on them.”¹⁶⁶ Secondary law is all the law not included in the constitutive norms representing primary law in the sense that their basis, scope, and limits are found in the constitutive norms, independently on their nature and form.¹⁶⁷ It results from the legislative activity of EU institutions and any act of an institution of the Union shall be regarded as a secondary act, irrespective of its legal obligation and possible direct effect.¹⁶⁸

¹⁶⁴ SIMONIN, Denis/ GAVINELLI, Andrea, “The European Union Legislation on Animal Welfare, State of Play, Enforcement and Future Activities”, p 60, in HILD, Sophie/ SCHWEITER, Loius (coord.), *Animals Welfare: From Science to Law*, Paris 2019.

¹⁶⁵ European Commission, “Types of EU law”, https://ec.europa.eu/info/law/law-making-process/types-eu-law_en.

¹⁶⁶ BORCHARDT, Klaus-Dieter, *op. cit.*, p. 90.

¹⁶⁷ MARTÍN, MANGAS Araceli/ NOGUERAS, LIÑÁN, Diego, *op. cit.*, p. 397.

¹⁶⁸ SIMAN, Michael/ SLAŠŤAN, Miroslav, *Právo Európskej Únie*, Bratislava 2012, p. 303.

Article 288 TFEU mentions two binding sources of secondary law which are Directives and Regulations. Regulations are binding in their entirety and directly applicable in all Member States. Binding in their entirety means that the Regulation determines not only the results that have to be achieved but also the means through which the results will be reached. Therefore, it is binding in its entirety, including the annexes. Member states do not have the freedom to decide not to apply part of it.

Direct applicability of Regulations means that they are direct source of rights and obligations. They have vertical and horizontal direct effect meaning that they can be enforced by physical or natural persons against the state¹⁶⁹ or against another individual.¹⁷⁰ This is because Regulations produce rights and obligations automatically from the moment of their entry into force for all the subjects in the Member States, irrespectively whether those are Member States themselves, physical or natural persons. Regulation has an *erga omnes* effect, encompassing subjects determined in a general and abstract way. It applies to “objectively defined situations and produce legal effects with respect to classes of persons envisaged in abstract terms.”¹⁷¹

¹⁶⁹ Or an emanation of the state, for example a nationalised or privatised industry. See e.g., Judgement of the Court of 10 October 1973, *Fratelli Variola S.p.A. v Amministrazione italiana delle Finanze*, 34-73, EU:C:1973:101, para. 8, p. 990.

¹⁷⁰ Judgement of the Court of 17 September 2002, *Antonio Muñoz y Cia SA and Superior Frutícola SA v Frumar Ltd and Redbridge Produce Marketing Ltd*, C-253/00, EU:C:2002:497, para. 27, p. I- 7320.

¹⁷¹ Judgement of the Court of 21 November 1989, *Usines coopératives de déshydratation du Vexin and others v Commission of the European Communities*, C-244/88, EU:C:1989:588, para. 13, p. 3830.

Moreover, there is no action needed by the Member States for Regulations to come into force and be legally binding. Member States do not have to transpose them into national regulations. It is not only unnecessary, but even forbidden to transpose them in their entirety.¹⁷² This is because the transposition could threaten uniform application of regulations in the Union by obscuring the Union's origin of rights and obligations contained in the Regulation and by raising doubts about the date of effectiveness of these rights and obligations.¹⁷³ Regulations can be implemented by the Member States only if Regulation expressly empowers them to do so. Legislative intervention of Member States is therefore only possible within the limits necessary to implement the Regulation.¹⁷⁴ Moreover, they have to be applied uniformly in all the Member States and produce uniform legal effects.¹⁷⁵ Member States have to abstain from adopting any acts that would be in conflict with the Regulation¹⁷⁶ nor can they allow exceptions from it the Regulation itself does not permit them.¹⁷⁷

¹⁷² SIMAN, Michael/ SLAŠŤAN, Miroslav, *op., cit.*, p. 332. However, the Court of Justice of the European Union allowed on exceptions the transposition of some parts of the Regulations if it was necessary for ensuring its better understanding. See Judgment of the Court of 28 March 1985, *Commission of the European Communities v Italian Republic*, C 272/83, EU:C:1985:147, para. 27, p. 1074.

¹⁷³ Which come into force 20th day from the publication of Regulation in the Official Journal of the European Union, unless otherwise stated.

¹⁷⁴ Judgement of the Court of 11 February 1971, *Norddeutsches Vieh- und Fleischkontor GmbH v Hauptzollamt Hamburg-St. Annen*, 39/70, EU:C:1971:16, para. 4, p. 58.

¹⁷⁵ Judgement of the Court of 14 January 1981, *Federal Republic of Germany v Commission of the European Communities*, 819/79, EU:C:1981:2, para. 10, p. 35.

¹⁷⁶ Judgement of the Court of 30 November 1978, *Francesco Bussone v Ministro dell'agricoltura e foreste*, 31/78, EU:C:1978:217, para. 31, p. 2444.

¹⁷⁷ Judgement of the Court of 13 February 1979, *Granaria BV v Hoofdprodukschap voor Akkerbouwprodukten*, 101/78, EU:C:1979:38, para. 8, p. 637.

Directives differ from Regulations in three essential aspects. First, they are binding as to the ends to be achieved. They set forth certain objectives that Member States must achieve and translate into their national legislation within a determined time frame. It is up to the Member States to decide how to transpose them into national laws and how to reach these goals. In addition, they can even adopt stricter requirements. Secondly, Directives don't have to be addressed to all Member States. They are binding only on the Member States to whom they are addressed. Thirdly, Directives can produce only vertical direct effect provided that certain conditions are met. These are the situations when the period for the transposition has expired¹⁷⁸ and the Member States have not achieved to transpose the Directive correctly¹⁷⁹ or "where the national measures correctly implementing the directive are not being applied in such a way as to achieve the result sought by it."¹⁸⁰

a) Directives and Regulations on farm animal welfare in general

The European Union started to regulate animal welfare in its secondary law from the 1970s. "The main motive was that disparities between national laws to protect animals could compromise fair competition within the

¹⁷⁸ See e.g., Judgement of the Court of 5 February 2004, *Rieser Internationale Transporte GmbH v Autobahnen- und Schnellstraßen-Finanzierungs- AG (Asfinag)*, C-157/02, EU:C:2004:76, para. 67, p. I-1538.

¹⁷⁹ When the Directive has not been transposed on time or the Member States has national laws in effect that are not in concordance with the Directive. See e.g., Judgement of the Court of 2 May 1996, *Commission of the European Communities v Federal Republic of Germany*, C-253/95, EU:C:1996:188, para. 13, p. I-2430.

¹⁸⁰ Judgement of the Court of 11 July 2002, *Marks & Spencer plc v Commissioners of Customs & Excise*, C-62/00, EU:C:2002:435, para. 27, p. I-6358.

common market (see introduction of Directive 78/923/EEC).¹⁸¹ EU legislation on animal welfare is nowadays considered as having highest regulatory standards globally. EU encompasses a wide variety of regulations that protect different animals. Concerning animals raised for meat, we can find five directives imposing minimum standards on welfare of farm animals, four of them are so-called species-specific legislations as they are dedicated to specific farm animal species. These are protecting laying hens: *Council Directive 1999/74/EC*;¹⁸² calves: *Council Directive 2008/119/EC*;¹⁸³ pigs: *Council Directive 2008/120/EC*;¹⁸⁴ and chickens kept for meat production: *Council Directive 2007/43/EC*.¹⁸⁵ One of them is general encompassing different farm animals: *Council Directive 98/58/EC*.¹⁸⁶ There is also one Regulation protecting animals during transport: *Council Regulation (EC) No 1/2005*.¹⁸⁷ And a Regulation on protection of animals during killing: *Council Regulation (EC) No 1099/2009*.¹⁸⁸ EU has also legislation regulating other animals such as

¹⁸¹ VEISSER, Isabelle/ BUTTERWORTH, Andrew/ BOCK, Bettina/ ROE, Emma, “European Approaches To Ensure Good Animal Welfare”, *Applied Animal Behaviour Science*, Vol. 279, (2008), p. 282.

¹⁸² Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens, *OJ L 203*, 3.8.1999.

¹⁸³ Council Directive 2008/119/EC of 18 December 2008 laying down minimum standards for the protection of calves (Codified version), *OJ L 10*, 15.1.2009.

¹⁸⁴ Council Directive 2008/120/EC of 18 December 2008 laying down minimum standards for the protection of pigs (Codified version), *OJ L 47*, 18.2.2009.

¹⁸⁵ Council Directive 2007/43/EC of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production, *OJ L 182*, 12.7.2007.

¹⁸⁶ Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes, *OJ L 221*, 8.8.1998.

¹⁸⁷ Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97, *OJ L 3*, 5.1.2005.

¹⁸⁸ Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing, *OJ L 303*, 18.11.2009.

pets,¹⁸⁹ animals used in experiments¹⁹⁰ with special emphasis on animals used in cosmetic testing,¹⁹¹ animals in zoos,¹⁹² animals used for fur,¹⁹³ fish and cetaceans.¹⁹⁴

With regards to farm animal welfare, EU secondary legislation represent first and foremost the reception of the *Council of Europe*' Conventions,¹⁹⁵

¹⁸⁹ Regulation (EU) No 576/2013 of the European Parliament and of the Council of 12 June 2013 on the non-commercial movement of pet animals and repealing Regulation (EC) No 998/2003, *OJ L 178*, 28.6.2013.

¹⁹⁰ Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes, *OJ L 276*, 20.10.2010, Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes, *OJ L 276*, 20.10.2010.

¹⁹¹ Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products (recast), *OJ L 342*, 22.12.2009.

¹⁹² Council Directive 1999/22/EC of 29 March 1999 relating to the keeping of wild animals in zoos, *OJ L 94/24*, 9. 4. 1999.

¹⁹³ Council Regulation (EEC) No 3254/91 of 4 November 1991 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of 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, *OJ L 308*, 09.11.1991; Council Directive 83/129/EEC of 28 March 1983 concerning the importation into Member States of skins of certain seal pups and products derived therefrom, *OJ L 91*, 09.04.1983; Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, *OJ L 286*, 31.10.2009; Regulation (EU) 2015/1775 of the European Parliament and of the Council of 6 October 2015 amending Regulation (EC) No 1007/2009 on trade in seal products and repealing Commission Regulation (EU) No 737/2010, *OJ L 262*, 7.10.2015; Regulation (EC) No 1523/2007 of the European Parliament and of the Council of 11 December 2007 banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur, *OJ L 343*, 27.12.2007.

¹⁹⁴ Regulation (EU) 2019/1241 of the European Parliament and of the Council of 20 June 2019 on the conservation of fisheries resources and the protection of marine ecosystems through technical measures, amending Council Regulations (EC) No 1967/2006, (EC) No 1224/2009 and Regulations (EU) No 1380/2013, (EU) 2016/1139, (EU) 2019/472 and (EU) No 2549/2000, (EC) No 2549/2000, (EC) No 254/2002, (EC) No 812/2004 and (EC) No 2187/2005, *OJ L 198*, 25.7.2019.

¹⁹⁵ Farming: European Convention for the Protection of Animals kept for Farming Purposes, (ETS No. 087), signed 10 March 1976, entry into force 10 September 1978. Protocol Amendment to the European Convention for the Protection of Animals

relating to the protection of animals during transport, the protection of animals at the time of killing, and protection of farm animals. The overall approach of the EU law with regards to farm animals is especially: the need to increase space allowance for animals; to provide livestock with enriched environment; to permit animals to interact with each other; to minimize painful action towards animals such as beak trimming, to take into account environmental impact of factory farming as well as health risks in form of animal spread diseases.

b) Directives and Regulations on farm animal welfare in particular

Here we will have a look at these different farm animal welfare Regulations and Directives. their main objectives and obligations of the Member States. We will also identify public interest norms contained in them. In this way, we will paint a comprehensive picture of EU's protection of animals reared for food. This will reinforce our understanding of EU's dominant position in this area and the level of animal welfare protection achieved so far.

i) Farming

1. Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes

kept for Farming purposes (ETS No. 145), signed 2 February 1992. Slaughter: European Convention for the Protection of Animals for Slaughter (ETS No. 102), signed 10 May 1979, entry into force 11 June 1982. Transport: European Convention for the Protection of Animals during International Transport (Revised). (ETS No. 193), signed 6 November 2006, entry into force 14 March 2006.

It lays down minimum standards for the protection of animals kept for farming purposes in order to ensure the rational development of production and to facilitate the organization of the market in animals, and, as it itself states in its preamble, account should also be taken of animal welfare measures. Although this Directive provides protection for a wide range of livestock,¹⁹⁶ it is formulated in a very general manner. It does not comprise many animals that deserve to be protected such as rabbits,¹⁹⁷ ducks,¹⁹⁸ and goats.¹⁹⁹

There are important obligations for farmers stemming from this Directive which can be regarded as public interest norms. First one is to ensure the freedom of movement of an animal, having regard to its species and in accordance with previous experience and scientific knowledge.²⁰⁰ The freedom of movement must not be restricted in such a way as to cause unnecessary suffering or injury to the animal.²⁰¹ Also, animals kept in buildings must not be left permanently in the dark or exposed to artificial lighting at all times.²⁰² If natural light is insufficient to meet the physiological and ethological needs of the animals, adequate artificial lighting must be provided.²⁰³ Further, animals must be

¹⁹⁶ Including fish, reptiles, or amphibians, kept, or kept for the production of food, wool, skin or fur or for other economic purposes.

¹⁹⁷ 340 million are kept as livestock in the European Union. European Commission, See “Facts and figures on organic agriculture in the European Union”, http://ec.europa.eu/agriculture/rica/pdf/Organic_2016_web_new.pdf.

¹⁹⁸ 170 million are kept as livestock in the European Union. *Ibid.*

¹⁹⁹ 10 million are kept as livestock in the European Union. *Ibid.*

²⁰⁰ Council Directive 98/58/EC, *op. cit.*

²⁰¹ *Ibid.*, Art. 7.

²⁰² *Ibid.*, Annex, para. 11.

²⁰³ *Ibid.*

provided with healthy food, adapted to their age and species, and provided in sufficient quantities to maintain their good health and meet their nutritional needs.²⁰⁴ All animals must have access to an adequate quantity of water of adequate quality or be able to meet their fluid replenishment needs by other means.²⁰⁵

This Directive is a direct result of previous advancements that took place on the level of *Council of Europe* and national animal welfare regulation in UK. The fact, that the Directive considers not only physical but also ethological animal needs²⁰⁶ can be credited to *Convention on the protection of animals kept for farming purposes*²⁰⁷ which in turn was inspired by the British *Brambell report*.²⁰⁸ This report is a “must know” in animal welfare movement as its importance it both theoretical and practical.²⁰⁹ “As concerns the theoretical importance, (...) this new development involved protecting animals against the adverse consequences of human activities even if the activities made food

²⁰⁴ *Ibid.*, para. 14.

²⁰⁵ *Ibid.*, para. 16.

²⁰⁶ Behavioral.

²⁰⁷ Council of Europe, *European Convention for the Protection of Animals kept for Farming Purposes*, (ETS No. 087), signed 10 March 1976, entry into force 10 September 1978.

²⁰⁸ BRAMBELL, Rogers, *Report of the Technical Committee to Enquire into the Welfare of Animals Kept under Intensive Livestock Husbandry Systems*, London 1965. This Report was a result of public pressure sparked by the book *Animal Machines* from Ruth Harrison describing the suffering of farm animals. This led the British Government to create a Brambell Committee that investigated and reported on the conditions of farm animal welfare in Britain.

²⁰⁹ SANDOE, Peter/ CHISTENSEN, Tove, “Farm Animal Welfare in Europe: From Legislation to Labelling”, p. 2. [https://dyreetik.ku.dk/dokumenter/forskningsprojekter/From legislation to labelling.pdf](https://dyreetik.ku.dk/dokumenter/forskningsprojekter/From%20legislation%20to%20labelling.pdf).

production more efficient.”²¹⁰ Moreover, the Report incorporated a new angle to understanding of animal suffering. “Until that point, suffering had been conceptualized in terms of persistent and significant pain. However, the Report introduced the idea that suffering could also follow from the frustration of “behavioural urges” in the form of discomfort, stress, and other negative mental states. This understanding of suffering made it possible, for example, to criticize the confinement of sows, not on the basis that confinement causes pain, but rather because confinement prevents from engaging in behaviours, they are highly motivated to perform.”²¹¹ As a result, basic requirements were formulated such as the freedom “to stand up, to lie down, turn around, groom themselves and stretch their limbs.”²¹² This is now known as *the five freedoms* which are the cornerstone of animal welfare in the legislation of *Council of Europe* and EU.

Practically, the Report was important because it influenced not only British but also European animal welfare regulation such as the conventions of Council of Europe and EU legislation.

2. Council Directive 1999/74/EC of July 1999 laying down minimum standards for the protection of laying hens

Concerning laying hens, *Council Directive 1999/74/EC of July 1999 laying down minimum standards for the protection of laying hens*, there are public interest norms such as the ban of the battery cages which is a reaction,

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² BRAMBELL, Rogers, *op. cit.*, p. 13.

as we have previously showed, to broad public concern for laying hens' welfare in confined spaces and scientific assessment on the matter confirming severe welfare issues with battery cages. The Directive divides rearing systems into three different types: into a "non-cage systems," "enriched cages systems"²¹³ and "non-enriched cage systems."²¹⁴ Non-enriched cage systems could not be constructed after January 2003 and were completely prohibited after January 2012.²¹⁵ To ban the battery cages was a pioneering decision thank to which "250 million hens have been freed from this cruel and indefensible method of egg production where they are denied the most basic natural behaviours such as perching and nesting."²¹⁶ As a result, battery cages were replaced by enriched cages. Moreover, this Directive has considerably enhanced the hen welfare via the rules on how they should be treated. For example, cage sizes are determined, the requirements of nests and perches have been established as well as other tolls that help hens to show their natural behaviour. Beak trimming is also banned because of its cruelty; however, Member States may authorise it to prevent cannibalism on chickens who are less than 10 days old.²¹⁷

3. Council Directive 2008/119 EC of 18 December 2008 laying down minimum standards for the protection of calves

²¹³ Laying hens have to have at least 750 cm² of cage area per hen. See Council Directive 1999/74/EC, *op. cit.*, Art. 6, para. 1, a).

²¹⁴ Battery cages where hens have at least 550 cm² of cage area per hen. *Ibid.*, Art. 5, para. 1.

²¹⁵ *Ibid.* Art. 5, para. 2.

²¹⁶ AnimalsAustralia, "Battery cages banned in Europe", <https://animalsaustralia.org/latest-news/eu-bans-battery-hen-cages/>.

²¹⁷ Council Directive 1999/74/EC, *op. cit.*, Annex, para. 8.

This Directive was adopted already in 1991 as *Directive 91/629/EEC* but then it was consolidated in the *Directive 2008/119 EC*. It establishes welfare minimums for veal raising. Veal calves may stay, until 8 months old, in individual pens, however they must be able to see and touch other calves via perforated walls and, they must be able to turn around.²¹⁸ After that they must be reared in groups.²¹⁹ This is one of the most essential obligations stemming for Member States from this Directive, representing public interest norm resulting not only from opinions of scientific groups but also from public preoccupation for calve welfare. The concern existed because before the Directive, calves could stay not only in individual stalls during all their life but also often in darkness and on limited diet to keep their meat as white as possible. Also, the cruel tethering and muzzling was abolished.²²⁰ Tethering consists in use of tethers in veal crates with the aim to prevent their movement. As a result, calves stay their life indoors, unable to move and deprived of any social, sensory, or exploratory experiences. Also, this type of housing produces high levels of stress for the animals. Their nutrition is also an important part of the Directive. Calves must be fed diet that allows their bodies to develop normally, and they must eat at least twice a day.²²¹

4. Council Directive 2008/120/EC laying down minimum standards for the protection of pigs

²¹⁸ Council Directive 2008/119/EC, *op. cit.*, Art. 3.

²¹⁹ *Ibid.*, Art. 3.

²²⁰ *Ibid.*, Annex I, para. 8.

²²¹ *Ibid.*, Annex I, para. 11.

Similar to the calve Directive, this one was also initially adopted in 1991 and later on consolidated into the present version. This Directive encompasses different questions, from proper housing to operational steps of production concerning for instance breeding sows or pig fattening. More specifically, the use of tethers for sows has been prohibited since January 2006.²²² Pregnant sows have to be kept in groups during certain periods of time. This means that the Directive prohibited the use of individual sow stalls, except for first four weeks of pregnancy.²²³ For pigs kept in groups, the available area for each individual must be at least 1.64 m² per gilt after service and 2.25 m² per sow.²²⁴

Hunger in sows is another important element of the Directive. This is because the “food provided for pregnant sows is usually much less than that which they would choose to consume so the animals are hungry throughout much of their lives.”²²⁵ Pregnant sows have not only hunger but also need to chew, therefore they must be given enough bulky or high-fibre food and high-energy food.²²⁶

The Directive also ensures the minimum requirements for lighting and noise levels. It also determines that pigs have permanent access to enrichment materials for chewing, rooting, and foraging²²⁷ which are

²²² Council Directive 2008/120/EC, *op. cit.*, Art. 3, para. 3.

²²³ *Ibid.*, Art. 3, para. 3.

²²⁴ *Ibid.*, Art. 2, b).

²²⁵ STEVSON, Peter, “European Union Legislation on the Welfare of Farm Animals”, p. 6, <https://www.ciwf.org.uk/media/3818623/eu-law-on-the-welfare-of-farm-animals.pdf>.

²²⁶ Council Directive 2008/120/EC, *op. cit.*, Art. 3, para. 7.

²²⁷ *Ibid.*, Annex I, Chapter I, para. 4.

important expressions of their natural behaviour that also prevent tail biting, a common problem that arises when pigs cannot behave according to their foraging impulses. Very importantly, the tail docking, a farming practice that prevents the tail biting, has been banned.²²⁸ Also the routine of teeth clipping, and grinding has been prohibited. It can only occur when injuries to sows' teats have happened.²²⁹ Furthermore, the Directive establishes quality of flooring in pig pens²³⁰ and aims at reducing unnecessary suffering of sick and injured pigs through proper hospital management techniques. These are the fundamental obligations imposed on the Member States by the Directive that represent public interest norms.

5. Council Directive 2007/43/EC of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production

Main aim of the so-called “Broiler Directive” and at the same time an example of public interest norm, is the reduction of the overcrowding of chicken holdings by determining a maximum stocking density and ensuring higher animal welfare by establishing rules on lighting, ventilation, heating, feeding and litter. It also requires training for persons in charge of broilers,²³¹ they have to be inspected twice a day²³² and have permanent access to dry litter and drinking water.²³³ Also a

²²⁸ *Ibid.*, Annex I, Chapter I, para. 8. Although not completely. Tail-docking can be performed if despite taking all the preventive measures, tail-biting occurs. It cannot, however, be done routinely.

²²⁹ *Ibid.*, Annex I, Chapter I, para. 8.

²³⁰ *Ibid.*, Art. 3, para. 9.

²³¹ Council Directive 2007/43/EC, *op. cit.*, Art. 4.

²³² *Ibid.*, Annex I.

²³³ *Ibid.*, Annex I.

very important advancement is the duty to monitor on-farm mortality data and post-mortem condition data when broilers are slaughtered. In case there are seriously injured chickens, they must be immediately culled. National authorities must also carry out inspections to make sure that farmers comply with the Directive.

ii) Slaughter: Council Regulation (EC) No. 1099/2009 of 24 September 2009 on the protection of animals at the time of killing

The Regulation concerns the killing and related operations of animals bred or kept for food production, fur, wool, skin and the killing of animals for the purpose of disease control.²³⁴ The principal objective of this Regulation is to spare animals any avoidable pain, suffering or distress during killing and related operations.²³⁵ It establishes that the killing and related operations may be performed only by persons that have competence to do so without causing any avoidable pain, suffering or distress.²³⁶ Training courses have to be provided by Member States and in this way ensuring the competence of the workers.²³⁷

According to the Regulation, all animals must be stunned before slaughter, including poultry.²³⁸ However, a religious exception has been included according to which animals can be killed by for example cutting their throats while fully conscious.²³⁹ The Regulation also

²³⁴ Council Regulation (EC) No 1099/2009, *op. cit.*, Art. 1.

²³⁵ *Ibid.*, Art. 3.

²³⁶ *Ibid.*, Art. 7.

²³⁷ *Ibid.*, Art. 21 and Annex IV.

²³⁸ *Ibid.*, Art. 4.

²³⁹ *Ibid.*, Art. 4, para. 4.

regulates bleeding. This is because animals are killed by severing their throats. The stunning serves to make the animals unconscious for the act of killing, except for the situations when stun provoked instantaneous death. It is therefore important to bleed animals quickly after stunning as animals can regain consciousness during bleeding.²⁴⁰

All the above provisions are good examples of public interest norms as the public disagreement with cruel stunning practices is pervasive among EU citizens and humane slaughter is an important element for them. For example, 89% of EU citizens think that animals should be made unconscious before slaughter.²⁴¹

iii) Transport: Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations

The “EU Transport Regulation” sets forth a requirement in form of public interest norm according to which transporters cannot transport any animal nor cause any animals during their transport, in a way which is likely to cause undue suffering or injury.²⁴² The transporters have to comply with three requirements of certification which are the necessity to obtain the authorisation for the transport companies,²⁴³ the necessity

²⁴⁰ EUROPEAN FOOD SAFETY AUTHORITY, “Opinion of the Scientific Panel on Animal Health and Welfare on a request from the Commission related to welfare aspects of animal stunning and killing the main commercial species of animals”, *The EFSA Journal*, No. 45, (2004), p. 17.

²⁴¹ EUROGROUPFORANIMALS, “9 OUT OF 10 Europeans want mandatory stunning before slaughter and call on the EU to preserve the right of Member States to protect animal welfare”, <https://www.eurogroupforanimals.org/news/9-out-10-europeans-want-mandatory-stunning-slaughter-and-call-eu-preserve-right-member-states>.

²⁴² Council Regulation (EC) No 1/2005, *op. cit.*, Art. 3.

²⁴³ *Ibid.*, Art. 10 and 11.

to undertake training for drivers on journeys longer than 65 km as well as to pass the exam and hold a certificate of competence,²⁴⁴ and necessity to obtain a certificate for the livestock vehicles for long journeys.

Another important element of the Regulation and public interest norms are the journey logs for journeys longer than eight hours and animals are transported between Member States or are traded to third countries, the transporter must keep a journey log with the place of departure and destination, resting places and estimated time of the transport. This information is submitted to the competent authority which can approve it or reject it.²⁴⁵ This serves to eliminate transports carried out in very short time without proper resting pauses which causes animals stress, suffering and susceptibility to illnesses. Furthermore, the maximum limits for the journeys have been set. After eight hours animals must be unloaded and rest for at least 24 hours, they must be fed and given water.²⁴⁶ There are however possibilities to transport animal for much longer periods if additional requirements are met.²⁴⁷

Moreover, the Regulation prohibits to transport animals which are not fit to undergo the journey.²⁴⁸ During the journey, including the loading and unloading, animals must not be handled by mechanical means, nor dragged or lifted by their ears, head, horns, tail, legs, or fleece.²⁴⁹ This is

²⁴⁴ *Ibid.*, Art. 6, para. 5 and 17.

²⁴⁵ *Ibid.*, Art. 5 para. 4 and Annex II.

²⁴⁶ *Ibid.*, Annex 1, Chapter V, para. 1.2 and 1.5.

²⁴⁷ *Ibid.*, Annex 1, Chapter V, para. 1.3 and 1.4.

²⁴⁸ *Ibid.*, Art. 3, and Annex 1.

²⁴⁹ *Ibid.*, Annex 1, Chapter III, para. 1.8.

to minimize any harm and pain caused to transported animals, which is in the interest of their welfare. This is yet another example of public interest norm in farm animal welfare.

iv) Regulations and Directives: public interest norms on animal welfare

Previously we have established that Art. 13 TFEU, Directives and Regulations on animal welfare represent public interest norms, although only on the regional level. We reinforced this conclusion by studying the reasons for the adoption of EU animal welfare legislation and their interconnection with universal values, global public interests, and common concern of humankind. As a result, we have learnt that the EU adopts Directives and Regulations on animal welfare in order to protect important values of the EU citizens which are in turn part of greater global public interest of international community. And the protection of values is the first element of public interest norms. In general, entire legislation on farm AW is influenced by the fact that the “EU citizens are increasingly concerned about farming’s effects on animal welfare, and the interrelated impact on public and animal health”²⁵⁰ and by the fact that animal welfare is an important value for EU citizens as we have seen in the Eurobarometer surveys,²⁵¹ European

²⁵⁰ European Court of Auditors, *Animal welfare in the EU: closing the gap between ambitious goals and practical implementation*, Special report No 31, 2018, p. 4.

²⁵¹ European Commission, *Attitudes of consumers towards the welfare of farmed animals*, 2005, *op. cit.*, p. 72, and European Commission, *Attitudes of Europeans towards Animal Welfare*, 2016, *op. cit.*, p. 1.

citizens' initiative²⁵² and online consultation process.²⁵³

More specifically, the *Regulation (EC) No 1/2005*²⁵⁴ was adopted mainly because “transport is one of the most controversial areas of animal welfare and has been receiving increased political and policy attention at EU level over the last few years”²⁵⁵ and “moral and ethical principles associated with animal welfare should be taken into consideration.”²⁵⁶ Also “[p]rotection of animals during transport has always been one of the major areas of concern in animal welfare”²⁵⁷ and “has always been under particularly close public scrutiny.”²⁵⁸ Next, the justifications for adoptions of *Council Directive 2007/43/EC*,²⁵⁹ submits that “the EU public is increasingly alive to animal welfare concerns in intensive production systems. This is, among other things, clearly reflected in a 2005 Eurobarometer study.”²⁶⁰ Then, the *Council Regulation (EC) No*

²⁵² European Commission, Communication from the Commission on the European Citizens' Initiative (ECI) “End the cage age”, *op. cit.*, Art. 2.

²⁵³ Kantar public, *Online Consultation on the Future of Europe*, *op. cit.*, p. 6.

²⁵⁴ Council Regulation (EC) No 1/2005, *op. cit.*

²⁵⁵ European Economic and Social Committee, *European Economic and Social Committee on 'the proposal for a Council Regulation on protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC'*, (COM(2003) 425 final-2003/0171(CNS)), (2004/C 110/23), Art. 1.

²⁵⁶ *Ibid.*, Art. 3, para. 1.

²⁵⁷ Commission of the European Communities, *Report from the Commission to the Council and the European Parliament on the experience acquired by Member States since the implementation of Council Directive 95/29/EC amending Directive 91/628/EEC concerning the protection of animals during transport*, COM(2000) 809 final, p. 4.

²⁵⁸ *Ibid.*, p. 6.

²⁵⁹ Council Directive 2007/43/EC, *op. cit.*

²⁶⁰ European Economic and Social Committee, *Opinion of the European Economic and Social Committee on the 'Proposal for a Council Directive laying down minimum rules for the protection of chickens kept for meat production'*, (COM(2005)221 final-2005/0099 CNS), (2006/C 28/05), Art. 2, para. 1.

1099/2009²⁶¹ was necessary to adopt because “[a]nimal welfare considerations have increased in importance in the EU and this is significant in a society that claims to be an advanced civilised one.”²⁶² Further, the *Council Directive 2008/119 EC*²⁶³ has been adopted partly as a reaction to animal welfare groups and public that “have complained about both the individual pens and the diet of veal calves arguing that they do not constitute a natural environment or facilitate normal physiological development of calves.”²⁶⁴ Public and political pressure towards higher calve welfare was so strong, that the Council of Agriculture Ministers agreed to start acting. The *Council Directive 2008/120/EC*²⁶⁵ also reacted to consumer demands. “Pig production in the EU will be increasingly affected by global trade and by the changing of consumers values. Producers will have to take into account more and more than before consumers’ concerns and their preferences”²⁶⁶ and “[t]here is and increasing awareness among consumers and producers about the effects that breeding and farming

²⁶¹ Council Regulation (EC) No 1099/2009, *op. cit.*

²⁶² European Economic and Social Committee, *Opinion of the European Economic and Social Committee on the Proposal for a Council Regulation on the protection of animals at the time of killing*, (COM(2008) 553 final-2008/0189 CNS), (2009/C 218/14), Art. 1, para. 1.

²⁶³ Council Directive 2008/119 EC, *op. cit.*

²⁶⁴ European Commission, “Commission proposes to ban veal crates”, https://ec.europa.eu/commission/presscorner/detail/en/IP_96_79.

²⁶⁵ Council Directive 2008/120/EC laying down minimum standards for the protection of pigs, *op. cit.*

²⁶⁶ European Commission, *Communication from the Commission to the Council and the European Parliament on the welfare of intensively kept pigs in particularly taking into account the welfare of sows reared in varying degrees of confinement and in groups*, COM(2001, 20 final, 2001/0021 (CNS), p. 15.

techniques may have on animals, on their health and welfare and, not least, the environment.”²⁶⁷

Recent developments in farm animal welfare such as the phasing out of battery cages by 2027 were also directly influenced by the values of EU citizens and their perception on animal welfare as we have seen earlier.²⁶⁸

Another element of public interest norms is vocation of universality. However, in our case study we are limited to the region of EU, therefore we repeatedly highlight the regional character of analysed norms. Nevertheless, EU animal welfare norms influence global vision of animal protection by helping to spread the OIE standards²⁶⁹ that are already adopted by 180 countries in the world, by trade agreements, by cooperation with international organizations and by simply being an example and inspiration for other countries.²⁷⁰

Lastly, the Directives and Regulations on AW regulation are binding and as such must be respected by the Member States. Therefore, the element of integral structure of public interest norms is also present. This is important because in this way we see that the backbone of Directives and Regulations is in sync with the theory of public interest norms. Therefore, they can play an essential role in development of

²⁶⁷ *Ibid.*

²⁶⁸ European Parliament, European Parliament resolution of 10 June 2021 on the European Citizens’ Initiative “End the cage age”, *op. cit.*, Art. 3, para. 2.

²⁶⁹ OIE, *Terrestrial Animal Health Code*, Vol. 29, Paris, 2021. See also BROOM, Donald, *op. cit.*, p. 28.

²⁷⁰ See more in the chapter no. IX.

international animal law. Their regional character can be upgraded to international level and international community can comfortably use them as an example for international regulation.

2) EU POLICIES ON FARM ANIMAL WELFARE

In our analysis we will not restrain ourselves only to legally binding acts. Article 288 paragraph 5 TFEU mentions Opinions and Recommendations as non-binding acts adopted by Council, Commission, European Parliament, or European Central Bank.²⁷¹ However, there is myriad of other acts that have non-binding nature which are not mentioned in the Founding Treaties. These are for example resolutions, declarations, action programmes, opinions, EC communications, EC reports and working papers, white papers, green papers, guidelines, surveys, and others which are classified as no-named, non-binding acts.²⁷² The quantity of these acts corresponds to the development of EU and its necessities.

a) Expert groups' and European Economic and Social Committee's opinions

As we could see in the previous subchapter, these are the sources that often mention animal welfare and that are important for our understanding of EU's position towards this topic. Especially important are the reports and scientific opinions of Commission's expert groups such as *The Scientific Committee on Animal Health and Welfare* that advises the Commission on different policies relative to the topic.

²⁷¹ See Art. 292 TFEU.

²⁷² BORCHARDT, Klaus-Dieter, *op. cit.*, p. 91.

Commission relies on these independent reports as they provide sound scientific advice.²⁷³

Opinions of *Agriculture, rural development and the environment* (NAT section) of *European Economic and Social Committee*²⁷⁴ also play an important role in the formation of future AW policies. The EESC is an EU body that represents organised civil society. It gathers myriad of interest groups.²⁷⁵ European Parliament, Commission and Council are obliged to consult the EESC when adopting new legislation on a variety of topics. The EESC receives the legislative proposals, or issues opinions on its own initiative. Once the opinion is adopted, it is sent to the Parliament and the Council enriching the law-making process as it reflects the problems, needs and interests of EU citizens. There are different sections focusing on different aspects.²⁷⁶

²⁷³ European Commission, “Food Safety“, https://ec.europa.eu/food/horizontal-topics/expert-groups/scientific-committees_en. See, for example: European Commission, Health and Consumer Protection Directorate-General, *The welfare of animals during transport (details for horses, pigs, sheep and cattle)*, 2002; European Commission, Health and Consumer Protection Directorate-General, *Report on Chronic Wasting in Cattle*, 2001; European Commission, Health and Consumer Protection Directorate-General, *The Welfare of Cattle kept for Beef Production*, 2001, etc.

²⁷⁴ Hereinafter the EESC.

²⁷⁵ For example, farmers, employers, workers, consumers, professional associations, NGOs, ...

²⁷⁶ See, for example: European Economic and Social Committee, *Opinion of the European Economic and Social Committee on the Proposal for a Council Regulation on the protection of animals at the time of killing*, (COM/2008, 2009/c 218/14); European Economic and Social Committee, *Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the European Union Strategy for the Protection and Welfare of Animals 2012-2015*, COM(2012) 6 final, (2012/C 229/20); European Economic and Social Committee, *Opinion of the European Economic and Social Committee on the proposal for a Council Regulation on protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC*. (COM(2003) 425 final- 2003/0171 (CNS)), etc.

Then there are reports requested by the Commission analysing online consultation processes,²⁷⁷ and the Eurobarometer surveys used by *European Commission*, the *European Parliament*, other institutions and agencies “to monitor regularly the state of public opinion in Europe on issues related to the European Union as well as attitudes on subjects of political or social nature.”²⁷⁸ As we have seen, two Eurobarometer surveys concerning animal welfare took place, both of them with important implications towards the need to ameliorate animal welfare. In this way, public opinion finds its way to EU institutions and voice of citizens can be heard. These surveys played an important role in farm AW advancement. Their results contributed to placing AW at the top of the agenda, in the EGD²⁷⁹ or F2F strategy.²⁸⁰

b) European Parliament’s and Commission’s publications

Resolutions of the *European Parliament* are also source of animal welfare development. In them, the *Parliament* summarizes for instance experiences acquired by the EU and the Member States by the implementation of specific AW Directives.²⁸¹

²⁷⁷ European Commission, “Online Consultation on the Future of Europe, Interim report”, Report requested by European Commission, 2018, https://ec.europa.eu/info/sites/default/files/online-consultation-interim-report-111218_en_0.pdf.

²⁷⁸ EUROPA.EU, “About Eurobarometer”, <https://europa.eu/eurobarometer/about/eurobarometer>.

²⁷⁹ European Parliament, *European Parliament resolution of 15 January 2020 on the European Green Deal*, *op. cit.*

²⁸⁰ European Commission, *A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system*, *op. cit.*

²⁸¹ European Parliament, *European Parliament resolution on the experience acquired by Member States since the implementation of Council Directive 95/29/EEC concerning the protection of animals during transport*, *op. cit.*; European Parliament,

Another important source are publications of the Commission such as studies²⁸² and reports,²⁸³ communications,²⁸⁴ and actions plans. Concerning farm animal welfare of land animals, action plans are of a special importance. Currently, there is a *European Green Deal*²⁸⁵ action plan that includes animal welfare and animal health objectives. It was announced in 2019, as a package of measures that form the Commission's plan for the green transformation of the EU's economy for a sustainable future. For our purposes the important objective is to support the organic production, restore degraded ecosystems, reduce the deforestation-related products on the EU market, focus on better animal welfare and lower the environmental pressure of current food system.

In May 2020, Commission presented a *Fork to Farm strategy*²⁸⁶ which is a part of the EGD.²⁸⁷ From practical point of view, F2F requires

European Parliament resolution on the implementation report on on-farm animal welfare, (2010/2085(INI)), A9-0296/2021; European Parliament, European Parliament resolution on a Community Action Plan on the Protection and Welfare of Animals 2006-2010 (2006/2046(INI)).

²⁸² European Commission, Directorate-General for Health and Food Safety, *Study on the impact of animal welfare international activities*, *op. cit.*

²⁸³ See, e.g., European Commission, *Study to support the evaluation of the European Union Strategy for the Protection and Welfare of Animals 2012-2015*, final report, Publications Office 2020.

²⁸⁴ See e.g., European Commission, *Communication from the Commission to the Council and the European Parliament on Animal Welfare Legislation on farmed animals in Third Countries and the Implications for the EU*, COM(2002) 626 final.

²⁸⁵ European Parliament, *European Parliament resolution of 15 January 2020 on the European Green Deal*, *op. cit.*

²⁸⁶ European Commission, *A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system*, *op. cit.*

²⁸⁷ Within the framework of the EGD was also adopted already mentioned *Biodiversity strategy*: European Commission, *EU Biodiversity Strategy for 2030*, *op. cit.*, Also a *Circular Economy action plan*: European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social*

alignment of the EU legislation with the latest scientific evidence, broadening its scope and allowing better enforcement, all that leading to higher animal welfare. In order for that to happen, an evaluation and revision of current animal welfare legislation is in place until the end of 2023.²⁸⁸

The ten-year plan of F2F is to change the way the whole food chain works: from farmers, through food producers, restaurants to consumers. The ambition of the strategy is not only to ensure that there is enough affordable food in the EU, but that its production leaves as little footprint on the environment and climate as possible. It contains a number of measures to address the welfare of livestock, food waste or the growing incidence of obesity. As part of the promotion of more sustainable food consumption, it wants to create the conditions for Europeans to gradually move from animal food to vegetarian food.²⁸⁹ In this context, for example, the food labeling should be changed to include information on their nutritional value, but also on the environmental and climate footprint.²⁹⁰ However, the strategy fails to actively promote reduction of quantities of confined farm animals or limit subsidies that are given to factory farms.

Committee and the Committee of the Regions, A new Circular Economy Action Plan For a cleaner and more competitive Europe, COM(2020)98 final. And a Proposal for new Climate Law: European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law)*, COM/2020/80 final.

²⁸⁸ European Commission, *A Farm to Fork Strategy for a fair, healthy and environmentally friendly food system*, *op. cit.*, p. 8.

²⁸⁹ *Ibid.*, p. 13.

²⁹⁰ *Ibid.*, p. 8.

3) COMMON AGRICULTURAL POLICY

Common Agricultural Policy is composed of Regulations²⁹¹ and actions that belong to both binding and non-binding secondary law where animal welfare is not a primary objective, however it indirectly promotes the welfare of animals. By dedicating a specific section to CAP we highlight its difference with legislation dedicated specifically to animal welfare, in for example, species-specific directives and other legislation where key concern is animal welfare.

CAP represents one of the oldest and most important EU policies.²⁹² It is a set of regulations and policies on the EU agricultural sector. It has

²⁹¹ New CAP is composed of three Regulations. They will generally apply from 1 January 2023: Regulation (EU) 2021/2116 of the European Parliament and of the Council of 2 December 2021 on the financing, management and monitoring of the common agricultural policy and repealing Regulation (EU) No 1306/2013, *OJ L 435*, 6.12.2021; Regulation (EU) 2021/2115 of the European Parliament and the Council of 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No 1305/2013 and (EU) 1307/2013, *OJ L 435M* 6.12.2021; Regulation (EU) 2021/2117 of the European Parliament and of the Council of 2 December 2021 amending Regulations (EU) No 1308/2013 establishing a common organization of the markets in agricultural products, (EU) No 1151/2012 on quality schemes for agricultural products and foodstuffs, (EU) No 251/2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatized wine products and (EU) No 228/2013 laying down specific measures for agriculture in the outermost regions of the Union, *OJ L 435*, 6.12.2021. There is also a transition regulation for years 2021-2022, which is already in force: Regulation (EU) 2020/2220 of the European Parliament and of the Council of 23 December 2020 laying down certain transitional provisions for support from the European Agricultural Fund for Rural Development (EAFRD) and from the European Agricultural Guarantee Fund (EAGF) in the years 2021 and 2022 and amending Regulations (EU) No 1305/2013, (EU) No 1305/2013, (EU) No 1306/2013 and (EU) No 1307/2013 as regards resources and applications in the years 2021 and 2022 and Regulations (EU) No 1308/2013 as regards resources and the distribution of such support in respect of the years 2021 and 2022, *OJ L 437*, 28.12.2020.

²⁹² It is proposed by European Commission, agreed by the ministers of agriculture of member states and reviewed by the European Parliament.

been created to “support European farmers and ensure Europe’s food security” in 1962. The objectives of Common Agricultural Policy are the increase of agricultural productivity, stable food supplies and stabilization of markets. CAP has undergone various important revisions since its creation, adding to its objectives for instance the income stability of the farmers, development of rural communities, climate change mitigation and recently also animal welfare advancement. The concept of “greening” has definitely entered the EU agricultural sector.

This can be seen especially in the newly adopted CAP. After months of negotiations,²⁹³ EU member states (the *Council*) and the *European Parliament* provisionally agreed in June 2021 on the 270 billion EU common Agricultural Policy for the period 2023-2027. It was formally signed on December 2nd, 2021. Stronger climate and environmental aspirations will be implemented from January 2023. The new CAP is labelled as “a fairer, more animal friendly and [more] flexible” CAP. The aim of this policy is to execute the *European Green Deal*²⁹⁴ including the *Farm to Fork strategy*²⁹⁵ and *Biodiversity strategy*²⁹⁶ by demanding the EU

²⁹³ 25 trilogues (trilogues are held between the Parliament, the Council and the Commission on legislative proposals), 3 super trilogues, one jumbo triologue, more than 100 formal meetings during last three years.

²⁹⁴ European Parliament, *European Parliament resolution of 15 January 2020 on the European Green Deal*, *op. cit.*

²⁹⁵ European Commission, *A Farm to Fork Strategy for a fair, healthy and environmentally friendly food system*, *op. cit.*

²⁹⁶ We see how interconnected the CAP, EGD and F2F are. European Parliament adopted a Resolution on the European Green Deal, requesting the Commission to analyse the CAP’s contribution to the climate, biodiversity and environmental protection commitments and how will be the CAP aligned to EGD, *See* European Parliament, *European Parliament resolution of 15 January 2020 on the European Green Deal (2019/2956(RSP))*.

member states to determine in their “Strategic Plans” how they will comply with common goals and incentivise their farmers to implement high environmental requirements via “Eco-schemes” such as organic farming, carbon farming, agro-forestry, precision agriculture and crop rotation. One fourth of the budget is allocated to EU member states for direct payments for farmers within aforementioned schemes that also include animal welfare measures. Moreover, the new CAP reinforced the application of EU health, environmental, and animal welfare standards to imported agro products. More specifically, the passage to a more climate-friendly and sustainable farming was agreed which will go hand in hand with EU climate and environmental legislation and the European Green Deal²⁹⁷ including “targets for 2030 set out in the Farm to Fork Strategy and the EU Biodiversity Strategy.”²⁹⁸

The impact of the new CAP and especially the “Eco-schemes” for millions of animals should not be underrated. First time in the CAP history animal welfare can be encouraged via direct payments. “Eco-schemes, which ultimately must be used, have already been identified as a key mechanism to enable farmers, for instance, to transition to cage-free systems.”²⁹⁹ This enables the member states to use the funding to make effective changes that ameliorate animal welfare.

²⁹⁷ European Parliament, *European Parliament resolution of 15 January 2020 on the European Green Deal*, *op. cit.*

²⁹⁸ EU MONITOR, “Considerations on COM(2018)392”, https://www.eumonitor.eu/9353000/1/j4nvhdlglbmvdzx_j9vvik7m1c3gyxp/vkouh15jzgyt.

²⁹⁹ EUROPGROUP FOR ANIMALS, “The New Common Agricultural Policy: One Small Step For Agriculture Policy, One Giant Leap for Animal Welfare”, <https://www.eurogroupforanimals.org/news/new-common-agricultural-policy-one-small-step-agriculture-policy-one-giant-leap-animal-welfare>.

4) TRADE AGREEMENTS MENTIONING ANIMAL WELFARE

The EU “is one of the major players on the international arena that both holds a significant power in trade and exercises power through trade. Over the history of its trade policy, the EU has continuously used its power through trade to achieve development and normative objectives abroad.”³⁰⁰

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The recognition of international legal personality and the attribution of external competences to the Union allows it to conclude international agreements.³⁰¹ “Trade outside the EU is an exclusive responsibility of the EU, rather than the national governments of member countries. This means the EU institutions make laws on trade matters, negotiate and conclude international trade agreements.”³⁰² International agreements between EU and non-EU countries or international organizations represent a *sui generis* category, *i.e.* they do not belong to primary or secondary EU law and operate under the public international law.³⁰³ They are not adopted by a “legislative procedure or a sole will of an institution.”³⁰⁴ EU can celebrate trade agreements with third states or international organizations in the area of common commercial policy, including trade with services, commercial aspects of intellectual

³⁰⁰ RABINOVYCH, Maryna, *EU Regional Trade Agreements*, Abingdon 2021, p. 1.

³⁰¹ EU

³⁰² European Commission, “What is trade policy?”, <https://ec.europa.eu/trade/policy/policy-making/>.

³⁰³ PUBLICATIONS.EUROPA.EU, “International agreements and the EU’s external competences”, http://publications.europa.eu/resource/cellar/0bb808cd-f2cd-4df4-91cb-20419602eac3.0005.03/DOC_1.

³⁰⁴ EUR-LEX, “International agreements and the EU’s external competences”, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:ai0034>.

property and direct foreign investments.³⁰⁵

We also need to mention association agreements, as some of them mention animal welfare as well. EU can celebrate them with third states or international organizations.³⁰⁶ They prepare, for instance, future membership of associated state in the EU or they create Custom Unions. They are adopted in accordance with the Art. 218 TFEU.

a) Animal welfare as a condition in trade agreements

The existence of EU trade agreements mentioning AW is on the rise. This is because in the last decade, trade in animal products has nearly doubled in Europe.³⁰⁷ Trade has massive and often detrimental influence on animals and their welfare. Without securing conformity of imports with EU animal welfare standards, sub-standard products are promoted, impacting the competitiveness of EU farmers and producers, and exposing EU customers to subpar animal produce. Furthermore, consumers do not have sufficient information about the welfare conditions of imported animal products and therefore make informed decisions.

Therefore, the EU, especially Commission developed international activities “to raise animal welfare awareness and to promote the EU

³⁰⁵ See, Art. 207 TFEU.

³⁰⁶ See, Art. 217 TFEU.

³⁰⁷ EUROSTAT, “Extra-EU Trade in Agricultural Goods”, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Extra-EU_trade_in_agricultural_goods.

model and principles worldwide.”³⁰⁸ “So far the inclusion of AW standards in the provisions of bilateral trade agreements has always been at the EU request and ways had to be found in subsequent negotiations to overcome partner Countries’ resistances to make commitments on these items.”³⁰⁹

First animal welfare-based condition appears in the *Mercosur trade agreement*³¹⁰ according to which EU welfare standards have to be applied to preferential imports of shelled eggs coming from Mercosur. This is the first time that the tariffs elimination is conditional upon respecting concrete AW standard. As a result, if their farmers want to benefit from the duty-free access to the EU market, they must certify that they apply rules equivalent to the EU concerning laying hen welfare. Just Argentina alone exports 1,825 tonnes of eggs which represents 7.4% of EU imports.³¹¹ The inclusion of animal welfare condition in FTA is considered as an important precedent for future treaty negotiations and it confirms the increasing focus on AW in the EU. Furthermore, the agreement establishes a structured dialogue between the parties on

³⁰⁸ European Commission, “International activities”, https://ec.europa.eu/food/animals/animal-welfare/international-activities_en.

³⁰⁹ European Commission, Directorate-General for Health and Food Safety, *Study on the impact of animal welfare international activities*, *op. cit.*, p. 1.

³¹⁰ New EU-Mercosur trade agreement, The agreement in principle, signed 1 July 2019, Trade part of the EU-Mercosur Association Agreement, Annex 2-A. “The texts will be final upon signature. The agreement will become binding upon the Parties under international law only after completion by each Party of its internal legal procedures necessary for the entry into force of the Agreement (or its provisional application).”

³¹¹ FOOTE, Natasha, “EU Implements First Animal Welfare-Based Condition in Trade Agreement”, <https://www.cnr-bea.fr/en/2021/07/28/eu-first-animal-welfare-condition-trade-agreement/>.

animal welfare and cooperation between the Commission and Mercosur authorities on questions relating to AW.

We can also mention *Cariforum-EC Economic Agreement*³¹² that requires sustainable fishing and agricultural resource management, proper farming training and promotion of organic farming. This leads to progress in farm animal welfare and conservation of biodiversity. EU considered this as “pioneering agreement in the international trading system”³¹³ because of provisions on sustainable development, focus on regional market and animal welfare.

b) Animal welfare mentioned in the SPS requirements

AW measures can be also found in several other trade agreements, more specifically in their SPS³¹⁴ requirements, for example in the EU-Central America Association Agreement³¹⁵ according to which “[c]ooperation in this field shall be geared with the aim of strengthening the Parties capacities on sanitary and phytosanitary and animal welfare matters, in order to improve access to the other Party’s market whilst safeguarding

³¹² Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, signed 15 November 2008, entry into force 15 November 2008, *OJ L 289*.

³¹³ European Commission, European Commission Press Release, “The Cariforum-EC Economic Partnership Agreement,” MEMO/08/624. https://ec.europa.eu/commission/presscorner/detail/en/MEMO_08_624.

³¹⁴ Sanitary and phytosanitary requirements to protect human, animal or plant life or health according to the Article 2 of the WTO Agreement on Sanitary and Phytosanitary Measures

³¹⁵ Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, signed 15 December 2012, *OJ L 346*.

the level of protection of humans, animals and plants as well as animal welfare.”³¹⁶

EU-South Korea Free Trade Agreement³¹⁷ establishes “(...) this Chapter aims to enhance cooperation between the Parties on animal welfare issues, taking into consideration various factors such as livestock industry conditions of the Parties,”³¹⁸ or “Parties shall: exchange information, expertise and experiences in the field of animal welfare and adopt a working plan for such activities”³¹⁹ and “cooperate in the development of animal welfare standards in international fore, in particular with respect to the stunning and slaughter of animals.”³²⁰

EU- Mexico Agreement³²¹ provides says that “The Parties recognize that animals are sentient beings”³²² and that they “undertake to cooperate in international fora with the aim to promote the further development of good animal welfare practices and their implementation. The Parties recognize the value of increased research collaboration in the area of animal welfare.”³²³

³¹⁶ *Ibid.*, Art. 62.

³¹⁷ Free trade Agreement, between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, signed 14 May 2011, entry into force 13 December 2015, *OJ L 127*.

³¹⁸ *Ibid.*, Art. 5, para. 1.

³¹⁹ *Ibid.*, Art. 5, para. 9, a).

³²⁰ *Ibid.*, Art. 5, para. 9, b).

³²¹ Modernisation of the Trade Part of the EU-Mexico Global Agreement. 21 April 2018.

³²² *Ibid.*, Art. XX, para. 1.

³²³ *Ibid.*, Art. XX, para. 3.

EU-Colombia and Peru Trade Agreement³²⁴ establishes the SPS Subcommittee with the aim to “promote collaboration on animal welfare matters between the Parties.”³²⁵

The EU-Chile Association Agreement³²⁶ was the first one to expressly mention animal welfare. This was done by the incorporation of the annex named “Agreement on sanitary and phytosanitary measures applicable to trade in animals and animal products, plants, plant products and other goods and animal welfare.”³²⁷ The objective in this agreement was to create a mechanism of transparency and recognition of equivalence with protection of public, animal, and plant health. Furthermore, it specifically mentions the need to reach “a common understanding between the Parties concerning animal welfare standards”³²⁸ and it highlights the importance of AW and its further development.³²⁹

In the EU-Swiss Confederation Agreement on trade in agricultural products³³⁰ cooperation on AW has not been yet formalized, however

³²⁴ Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, signed 21 December 2012, entry into force July 6 2013, *OJ L 354*.

³²⁵ *Ibid.* Art. 102.

³²⁶ Agreement establishing an Association between the European Community and its member States, of the one part, and the Republic of Chile, of the other part, signed on 18 November 2002, entry into force on 1 March 2005, *OJ EU 2002 L 352*.

³²⁷ *Ibid.*, Annex IV.

³²⁸ *Ibid.*, Annex IV, Art. 1.

³²⁹ *Ibid.*, Annex IV, preamble.

³³⁰ Agreement between the European Community and the Swiss Confederation on trade in agricultural products, signed on 30 April 2002, entry into force 1 June 2002, *OJ L 114*.

annual exchanges take place.

The EU-Ukraine Association Agreement also includes AW measures. For example, “Ukraine shall approximate its sanitary and phytosanitary and animal welfare legislation to that of the EU (...)”³³¹ or “[u]on request by a Party, consultations regarding animal welfare shall take place as soon as possible and, in any case, within 20 working days of notification.”³³² Similar provisions can be also found in Association Agreement between EU and Georgia³³³ and Moldova.³³⁴

c) Animal welfare mentioned in the condition to respect the OIE standards

Furthermore, as we presented in the chapter no. VI, EU included in some of its trade and association agreements the condition to respect the OIE’s animal welfare standards.³³⁵ This is the case of already mentioned EU-Mexico Trade Agreement, Association Agreement between the EU and Ukraine, EU-Chile Agreement, Association Agreement between EU and Georgia, Association Agreement between EU and Moldova but also EU-Brazil Memorandum of 2013.³³⁶ This

³³¹ *Ibid.*, Art. 64.

³³² *Ibid.*, Art. 68, para. 4.

³³³ Association Agreement between the European Union and their member States, of the one part, and Georgia, of the other part of 27 June 2014, entry into force 1 July 2016, *OJ L 261*, Art. 53, para. 13.

³³⁴ Association Agreement between the European Union and their member States, of the one part, and the Republic of Moldova, of the other part of 27 June 2014, entry into force 1 July 2016, *OJ L 260*, Art. 56.

³³⁵ For more on OIE, *see* chapter no. IV. For more on EU’s influence on dissemination of OIE standards *see* chapter no. VIII.

³³⁶ Administrative Memorandum of Understanding on Technical Cooperation in the Area of Animal Welfare Between the Ministry of Agriculture, Livestock And Food Supply of The Federative Republic of Brazil and the Directorate General of Health and Consumers of the European Commission of 24 January 2013.

reassures at least some level of farm animal protection. EU therefore has a “pivotal role in promoting and supporting OIE activities, help with the AW standard setting process and with the standard dissemination and implementation (...)”³³⁷

All this also confirms that EU has a positive impact on strengthening the AW standards. There is an “evidence the EU AW standards have played a lighthouse effect and often represented a source of inspiration for the various pilot and voluntary industry initiatives that have been proliferating on AW standards (...)”³³⁸

We will not go deeper into the description of current EU animal welfare norms. Our aim was merely to acquaint ourselves with the basic EU regulatory framework on farm animal welfare protection. As it is easy to get lost in the EU system of farm animal welfare, we reckoned that it was important to make an introduction so it will be easier to proceed to the analysis and not to overwhelm and confuse the reader. As a result, we have learnt that farm animals are protected in the EU especially via the Directives and Regulations of EU Institutions, CAP and trade agreements. This creates a wholesome mosaic of instruments concerned with animals raised for food for ethical, environmental, social and health reasons.

To summarize this chapter, we have established the overall synchronization of EU farm animal welfare instruments with notions of universal values, global public interests, common concern of

³³⁷ European Commission, Directorate-General for Health and Food Safety, *Study on the impact of animal welfare international activities, op. cit.*, p. 1.

³³⁸ *Ibid.*

humankind and public interest norms, on a regional level. We have, therefore, made a first step in demonstrating how EU farm animal welfare could advance international animal law. By connecting the abovementioned notions to EU farm AW, we see that the current EU regulation of farm animals is justified and constructed upon the same instruments as those proposed for international animal law. How exactly could the EU help to develop international animal law, will be shown in the next chapters. First, however, we need to delve into the analysis of EU farm animal welfare by identifying gaps and limitations in current legislation that will lead us to the proposal for new reforms ameliorating lives of farmland animals.

CHAPTER VIII

A CRITICAL ANALYSIS OF EU FARM ANIMAL WELFARE SYSTEM

In this chapter we will proceed to the analysis of EU farm animal welfare legislation. We will look at the gaps, the shortages, the problems that are impeding the EU welfarism to gain its full traction. These are, namely, the conflict between granting animals the status of sentient beings and at the same time using them as tradable goods; vague language used in Directives and Regulations on farm AW; and lastly the insufficient enforcement and poor compliance of farm AW legislation. Subsequently, we will identify steps that need to be taken in order to provide farmed animals better lives without cruel, painful practices that would be more in line with their natural behaviour. Specifically, we will look at issues with animal transportation and animal mutilations. Finally, we will present reforms focused on the transformation of the current food system such as the animal welfare labeling and the meat tax. These could help with the transition of our food production and consumption towards more animal and environmentally friendly system. This is particularly important as we are facing the climate and other environmental crisis as well as possible food shortages predicted by the scientists. As a result, we will learn what are the biggest weaknesses of EU farm animal welfare, what are the crucial steps to ameliorate painful lives of farmed animals and changes that need to be taken to change the course of climate emergency, food scarcity and animal suffering.

A) LIMITATIONS OF EU FARM ANIMAL WELFARE

In the EU¹ animal welfare has achieved its normative status, together with growing ethical concerns of civil society and EU citizens in relation to protection of farm animals. Even so, there are important gaps in the legislation that are hindering EU welfarism to reach its full potential.² More specifically, we have identified three main obstructions. First, there is a mismatch between granting animals their sentience and treating them as tradable goods. This highlights the dual status of animals in the EU created by the tension between economic incentives and welfarist efforts. Second, the vague, imprecise language of the animal welfare legislation leading to high elasticity in its interpretation by the Member States and, together with other elements, to insufficient enforcement and poor compliance which is third main problem of EU animal welfare framework. In the following sections we will proceed to their analysis and explain why it is so crucial to address and correct them.

1) ANIMALS AS SENTIENT BEINGS VS. TRADABLE GOODS

As we have learnt, animals are considered as sentient beings under the *Treaty of the functioning of the European Union*,³ Art. 13. However, at the same time, they are also considered as agricultural products and tradable goods. Because there is no general definition of goods in the founding

¹ European Union.

² BROOM, Donald, *Animal Welfare in the European Union*, Commissioned by Directorate-General for Internal Policies, European Policy Department, Citizen's Rights and Constitutional Affairs, Petitions (PE 583.114), 2017, p. 54.

³ Consolidated version of the Treaty on the Functioning of the European Union, *OJ C 326*, 26.10.2012. Hereinafter also the TFEU.

treaties, we need to look at the case law. The Court has said that goods are “products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions.”⁴ In another case it was decided that “goods for the purposes of the Treaty must be taken to include any movable physical object to which property rights or obligations attach (and which can therefore be valued in monetary terms, whether positive or negative.”⁵ And lastly it was added that “[t]hat definition includes animals.”⁶

As a result, there is a paradox that “manifests itself in the Union’s constitutional architecture: the dual status attributed to animals as both “products” and “sentient beings”.”⁷ Subsequently, “[t]his duality creates an inherent tension because the marketability seeks the maximum usage of the animal while its sentience places limits on this usage.”⁸ So, we see a clear progress in understanding animals as beings that can feel pain and suffering that as such they deserve to be spared from such experiences which was a “fundamental normative shift in thinking about animals and their welfare at the Union level.”⁹ Behind this progress were, as we saw in the previous chapter, first and foremost,

⁴ Judgement of the Court of 10 December 1968, *Commission of the European Communities v Italian Republic*, C-7/68, EU:C:1968:51, B. 1, p. 428.

⁵ Opinion of Advocate General Jacobs delivered on 19 September 1991, *Commission of the European Communities v Kingdom of Belgium*, C-2/90, EU:C:1991:344, para. 16 and 18.

⁶ Judgement of the Court of 3 December 2015, *Pfotenhilfe-Ungarn e.V. v Ministry of Energy Transition, Agriculture, Environment and Rural Areas of the Land Schleswig-Holstein*, C-301/14, EU:C:2015:793, para. 47.

⁷ SOWERY, Katy, “Sentient beings and tradable products: the curious constitutional status of animals under Union law”, *Common Market Law Review*, Vol. 55., No. 1, (2018), p. 1.

⁸ PETERS, Anne, *Animals in International Law*, Hague 2021, p. 208.

⁹ SOWERY, Katy, *op. cit.*, p. 2.

moral concerns for farm animal welfare. On the other hand, however, the EU is intensifying use of farm animals for human use. For example, EU is the world's biggest live animal exporter with more than 1.6 billion cattle, sheep, goats and chickens exported in 2019 alone.¹⁰

The status of animals in the EU law is not straightforward as it reflects different interests at stake: “animals as “products” with an extrinsic value for the benefit of humans, and animals as “sentient beings” with an intrinsic value of their own.”¹¹ The consequences of this tension can be seen in the EU secondary law in which economic objectives and welfare considerations collide. For instance, we can mention the existence of many cruel practices in factory farms that despite progress on the EU level still occur, such as different painful mutilations,¹² allowance of certain slaughter methods that are detrimental for animal welfare, increasing transport of live animals, cage systems, lack of legislation on different farm animals such as rabbits, dairy cows, turkeys, pullets, quails, parent birds of broiler chickens and laying hens, ducks, geese, farmed fish and others.¹³ These are still in place because sentientist ethics is not the only interest connected to farm animals. Its reach is limited by market needs and economic reasons. As Anne Peters says, this duality is not typical only for animal welfare. “It is also peculiar to human rights and policies as established and perused by the EU.”¹⁴

¹⁰ European Parliament, *Protection of animals during transport. Data on live animals*, Summary, PE 690.708, 2021.

¹¹ SOWERY, Katy, *op. cit.*, p. 13.

¹² Cutting off beaks of hens, castration of piglets without anaesthesia, shredding of live male chicks, ...

¹³ We will react to these problems in the next subchapter.

¹⁴ PETERS, Anne, *op. cit.*, p. 220.

How can be these two opposite interests brought in harmony? Peters outlines possibility of levelling the playing field for economic operators within and outside the EU towards higher or weaker animal welfare standards.¹⁵ Of course, the desired outcome would be levelling up. In the third chapter we have extensively analyzed the WTO *EC-Seal Product case* which is an example of such progress resulting in more stringent rules on seal hunting by adapting EU exceptions to a stricter regime.¹⁶ However, this scenario is not easy to replicate to farm animals as “any regulation of ordinary agricultural animals faces extremely powerful vested interests and must deal with the well-organised agricultural lobby in Europe, both on the level of Union politics and in each member state.”¹⁷ State of animal welfare is however developing thanks to the increasing scientific dedication to the interconnections between animal welfare and environmental emergencies and human and animal health, animal welfare is getting more attention. As a result, animal welfare is taking part in “other policy concerns all of which stimulate a “levelling up” of animal welfare standards such as the options for valorising the added market value of animal-friendly products, food safety and consumers’ health.”¹⁸ What is also desirable is “to downgrade the economic rationale in the interpretation and application of legal acts when the ethical welfare argument becomes stronger.”¹⁹

2) VAGUE LANGUAGE IN EU FARM ANIMAL WELFARE LEGISLATION

¹⁵ *Ibid.*, p. 218.

¹⁶ See chapter no. III., B), 4).

¹⁷ PETERS, Anne, *op. cit.*, p. 218.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, p. 220.

When reading Regulations and Directives on farm animal welfare, one thing that catches your attention is frequent use of vague language. For example, words such as “unnecessary” and “proportionate” are often used; however, they lack more detailed specification of their meaning. What is the line between necessary and unnecessary and what is proportionate? It is then on the Member States to draw the line, which leads to uneven application of the rules and to poor enforcement. For instance, the owners and keepers of farm animals must ensure that “those animals are not caused any *unnecessary* pain, suffering or injury,”²⁰ freedom of movement “must not be restricted in such a way as to cause *unnecessary* suffering of injury,”²¹ “[a]nimals must not be lifted by the head, horns, ears, feet, tail of fleece in such a ways as to cause them *unnecessary* pain or suffering. When *necessary*, they must be led individually,”²² “[s]uch action shall not be likely to cause *unnecessary* or *additional* suffering to the animals and shall be *proportionate* to the seriousness of the risks involved”²³ or “[t]hose penalties must be effective, proportionate and dissuasive.”²⁴

²⁰ Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes, *OJ L 221*, 8.8.1998, Art. 3.

²¹ *Ibid.*, Annex, Art. 7.

²² Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing, *OJ L 303*, 18.11.2009, Annex A, II, para. 2.

²³ Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97, *OJ L 3*, 5.1.2005, Art. 23.

²⁴ *Ibid.*, Preamble, para 22 and Council Directive 2007/43/EC of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production, *OJ L 182*, 12.7.2007, Art. 9.

Another unclear word in “appropriate”. For example, “each cage must have a drinking system *appropriate* to the size of the group,”²⁵ “open runs must be: of an area *appropriate* to the stocking density and to the nature of the ground (...),”²⁶ “*appropriate* steps must be taken to safeguard the health and well-being of the calves until the defect has been rectified,”²⁷ “[a]*ppropriate* bedding must be provided for all calves less than two weeks old,”²⁸ “[w]en pigs are kept in groups, *appropriate* management measures for their protection should be taken to improve their welfare,”²⁹ “[c]hickens that are seriously injured (...) shall receive *appropriate* treatment (...),”³⁰ “Animals which are kept for 12 hours or more at a slaughterhouse must be lairaged and, where *appropriate*, tethered (...),”³¹

Also, the word “harmful” causes ambiguities, for instance “[m]aterials used for the construction of calf accomodation (...) *must not be harmful* to the calves,”³² “(...) temperature, relative air humidity and gas concentrations are kept within are *not harmful* to the calves,”³³ and frasses containing words such as “avoidable” and “as far as possible”, for

²⁵ Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens, *OJ L 203*, 3.8.1999, Art. 6, 1, (d).

²⁶ *Ibid.*, Art. IV, (b), (ii).

²⁷ Council Directive 2008/119/EC of 18 December 2008 laying down minimum standards for the protection of calves (Codified version), *OJ L 10*, 15.1.2009, Annex I, para. 4.

²⁸ *Ibid.*, Annex I, para. 10.

²⁹ *Ibid.*, Preamble, para. 9.

³⁰ Council Directive 2007/43/EC, *op. cit.*, Annex I, para. 9.

³¹ Council Regulation (EC) No 1099/2009, *op. cit.*, Annex A, II, para. 10.

³² Council Directive 2008/119/EC, *op. cit.*, Annex I, para. 1.

³³ *Ibid.*, Annex I, para. 3.

example, “[w]hereas at the time of slaughter or killing animals should be spared any *avoidable* pain or suffering,”³⁴ “animals shall be spared any *avoidable* excitement, pain or suffering during movement, lairaging, restraint, stunning, slaughter or killing,”³⁵ “[a]nimals must be restrained in a *appropriate* manner in such a way as to spare them any avoidable pain, suffering, agitation, injury or contusions”³⁶ and “[f]or reasons of animal welfare the transport of animals over long journeys, including animals for slaughter, should be limited *as far as possible*,”³⁷ “[t]he use of instruments which administer electric shocks shall be avoided *as far as possible*.”³⁸

In these cases, no precise and quantifiable specifications are given and therefore, Member States have vast possibilities for their own interpretations. As a result, infringement of rules is difficult to identify.³⁹ “The phrases amount to blanket permissions without any real normative power that could influence and change the animal handlers’ and killers’ behaviour.”⁴⁰ Without any clarifications, each Member State considers by itself what is necessary, avoidable, or harmful. Moreover, these terms are often measured against economic reasons such as saving costs.⁴¹ Consequently many practices are necessary to save costs even

³⁴ Council Regulation (EC) No 1099/2009, *op. cit.*, Preamble.

³⁵ *Ibid.*, Art. 3

³⁶ *Ibid.*, Annex B, para. 1.

³⁷ Council Regulation (EC) No 1/2005, *op. cit.*, Preamble para. 4.

³⁸ *Ibid.*, Art. 35.

³⁹ PETERS, Anne, *op. cit.*, p. 233.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, p. 234.

though they are harmful for the animals. For instance, lower German administrative tribunal ruled that shredding male chicks is reasonable because it is not profitable to raise male chicks.⁴² This is one of the most inhumane practices where male chicks are sorted from the females and then dropped into metal grinding machine which grinds them while they are still alive. Many other practices are carried out on the same grounds such as dim artificial lights in factory farms, perforated lying areas, (too) low voltages for swift electrocution, high-speed production chains in the slaughterhouse, etc.⁴³

Vague language giving too much discretion to Member States results in discrepancies between levels of animal welfare in different countries and ultimately it contributes to poor compliance with EU rules and to enforcement problems. In cases in which States do not have clear benchmarks set on the EU level, same vagueness can happen (and happens) on national level when creating national AW strategies and when performing audits and assessing the data from these audits. This, however, is the topic of the next section.

3) INSUFFICIENT ENFORCEMENT AND POOR COMPLIANCE

The successful realization of EU policies rests on the Member States putting EU legislation into practice within their jurisdictions. The sole existence of rules on animal welfare does not automatically lead to better lives for animals. “The actual effect of legislation on the welfare

⁴² *Ibid.*

⁴³ *Ibid.*

of animals depends upon the responses of those owning and managing the animals. This response, in turn, depends upon the nature of any enforcement.”⁴⁴ Poor enforcement is thusly one of the most serious problems that EU farm animal welfare has to face. In this section we will see that on national level, there are frequent violations of rules which lead to persistence of banned practices such as routine tail docking, use of battery cages or inhumane treatment of animals during transportation. We will also look at the actions of the Commission and its role in ensuring correct compliance with animal welfare laws.

a) Role of the Member States

It is the role of the Member States to secure daily implementation of the EU legislation. Whether it is Regulation or Directive, Member States provide legal and technical instructions and training to the personal. Also, they have in place a reporting system to monitor progress in the implementation. It is the authorities of Member States that have the primary responsibility for executing checks and allocating financial and human resources for that purpose. They organize inspections in accordance with *Regulation 2017/625 on official controls*.⁴⁵ “The Member States’ official control systems are a key factor in ensuring that animal welfare standards are properly enforced.”⁴⁶ After audits, Member States must report to the Commission on their findings. In addition, data must

⁴⁴ BROOM, Donald, *op. cit.*, p. 42.

⁴⁵ Regulation 2017/625 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products of 15 March 2017, *OJ L 95*, 7.4.2017.

⁴⁶ European Court of Auditors, *Animal welfare in the EU: closing the gap between ambitious goals and practical implementation*, Special report No 31, 2018, p. 6.

be provided to the Commission on the implementation of particular laws, such as the ban of battery cages. Enforcement has, therefore, a broad meaning, “covering all activities of state structures (or structures delegated by the state) aimed at promoting compliance and reaching regulations’ objectives.”⁴⁷ However, there are several problems with enforcement on the state level. Problems concern the lack of training of official inspectors, insufficient audits, and failure to send annual reports to the Commission on performed checks, failure to apply sanctions. As a result, “the data reported is not complete, consistent, reliable or sufficiently detailed to draw conclusions on compliance at EU level”⁴⁸ and consequently, it is very difficult to understand the compliance level of Member States with animal welfare legislation.

In more detail, one of the main issues is lack of data and evidence regarding welfare problems and their causes. Most states have problems to determine specific control objectives against which to monitor compliance.⁴⁹ “As in any other area of management, the competent authorities would need to define clear objectives, specific success criteria and baselines (points of comparisons) in order to monitor progress.”⁵⁰ Often, the goals are generic such as “to maintain the level of animal welfare” or “to ensure compliance” and are not measurable

⁴⁷ European Commission, Directorate-general Health and Food Safety, *The use of indicators for animal welfare at farm level*, Overview Report, DG(SANTE) 2021-7319, Publications Office 2022, p. 7.

⁴⁸ European Court of Auditors, *op. cit.*, p. 22.

⁴⁹ European Commission, Directorate-general Health and Food Safety, DG(SANTE) 2021-7319, *op. cit.*, p. 9.

⁵⁰ *Ibid.*

nor they are able to provide any clear data.⁵¹ This problem exists because already on the EU level, there is a vague language in farm AW rules which allow the Member States to use unclear and general objectives without precise meaning in their national strategies. Therefore, long-term, and well-defined priorities on national level based upon clear and precise rules on the EU level⁵² would be beneficial together with engaging stakeholders in different actions for improvement of animal welfare.

Even if states do have their own well-defined national animal welfare strategies, often they are not aligned with official controls. In these cases, national authorities “have generally failed to plan their official controls according to their national strategies and most local authorities see official controls as “business as usual” activities”⁵³ Next issue is what is controlled during the audits. Usually, parameters are compared with legal provisions, omitting animal-based requirements, and focusing only on resources.⁵⁴ For instance, for broilers they control mortality numbers and maximum stocking density, which are legal requirements. However, animal welfare indicators could be very beneficial, such as the existence of beak trimming or feather pecking.⁵⁵ Further issue is that after the audits, states often do not use the information gained from their visits to effectively ameliorate their management of welfare

⁵¹ *Ibid.*

⁵² Here we see the necessity of the elimination of vague language in the EU legislation.

⁵³ European Commission, Directorate-general Health and Food Safety, DG(SANTE) 2021-7319, *op. cit.*, p. 8.

⁵⁴ *Ibid.*, 12.

⁵⁵ *Ibid.*

policies.⁵⁶ Also, enforcement regimes are not harmonized between the Member States and enforcement on national level is, in general, not sufficiently strong.

As we can see, on national level, there is enough room for improvement of farm animal welfare enforcement. Several steps could contribute to better results such as performing audits based on sound and quantitative data and animal welfare objectives in order to measure the correct implementation of EU legislation. Stronger penalties for non-compliance and overall harmonization of national enforcement procedures would lead to higher level of alignment with EU legislation. This is important because a “well-formulated enforcement strategy, providing correct incentives for regulated subjects can help reduce monitoring efforts and thus the costs for both business and the public sector, while increasing the efficiency and achieving better regulatory goals.”⁵⁷ It is, however the task of the EU to create a better system of enforcement, that Member states would have to apply. This is already one of priorities in the current revision of existing animal welfare legislation.⁵⁸

b) Role of the European Commission

⁵⁶ European Court of Auditors, *op. cit.*, p. 6.

⁵⁷ OECD, “Best Practice Principles for Regulatory Policy”, 2014, https://read.oecd-ilibrary.org/governance/regulatory-enforcement-and-inspections_9789264208117-en#page3.

⁵⁸ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system*, COM(2020)381 final, p. 8.

Under the Art. 17, par. 1 of the Treaty on European Union,⁵⁹ the Commission has an obligation to oversee the implementation and application (“compliance”) of the EU law by the Member States. It’s role as a “guardian of the Treaties” is crucial for safeguarding the EU’s general accountability and performance. The main aim of its enforcement activities is to prevent, find and rectify non-compliance of the Member States with EU law. This is done via oversight activities such as checking whether the obligations of notification, transposition and conformity have been met; investigation of complaints received from organizations or individuals, or it can also act upon its own initiative. In case of infringements, the Commission can launch, in accordance with Art. 258 TFEU an infringement procedure which means that the Member States will be taken to the Court of Justice of the European Union which can result in financial sanctions according to the Art. 260 TFEU.

With regards to animal welfare, a system of regular audits is often applied. Audits are carried out by experts from the *Food and Veterinary Office* which is responsible to control also aspects related to food safety and animal and plant health. Audits find out whether Member States have done everything necessary to implement the EU legislation. If there are omissions, a follow up actions take place to address the problems via a dialogue and Commission can also adopt recommendations. If states neglect their obligations under the relevant legislation, Commission can take steps against Member States such as,

⁵⁹ Consolidated version of the Treaty on European Union, *OJ C 326*, 26.10.2012.

infringement procedures.⁶⁰ Since 2012, 18 procedures have been launched concerning for instance the ban on cages for laying hens or sows' housing.⁶¹ "According to the Commission, these procedures were successful in achieving compliance with the rules."⁶² In addition, Commission applied so-called "EU pilot scheme", involving informal dialogue with authorities of Member States on correct application of EU legislation. 18 pilots have been launched in areas of pig and laying hens' welfare and 5 pilots on other issues, mostly animal transport.⁶³ Furthermore, the Commission also carries out guidance actions such as adopting guidelines, organizing study visits or even training events for inspectors and business operators of Member States. Since 2012, there have been 34 training events concerning animal welfare via "Better Training for Safer Food programme" in presential and online module.⁶⁴ Another platform to help with the implementation is EU Platform on Animal Welfare⁶⁵ that promotes dialogue on animal welfare problems among competent authorities, businesses, scientists and civil society.⁶⁶ The aim is to create coordinated approach on AW, especially with regards better implementation of EU rules via exchanges of

⁶⁰ Art. 258 TFEU.

⁶¹ European Court of Auditors, *op. cit.*, p. 15.

⁶² *Ibid.*, p. 25.

⁶³ *Ibid.*, p. 26. See also, European Commission, Directorate-general Health and Food Safety, *Pilot Project on best practices for animal transport*, Final report, Publication Office 2019.

⁶⁴ *Ibid.*, p. 24.

⁶⁵ European Commission, Commission Decision of 29 November 2019 amending Decision 2017/C 31/12 establishing the Commission Expert Group Platform on Animal Welfare, 2019/C 405/05, *OJ C 405*, 2.12.2019.

⁶⁶ European Commission, "EU Platform on Animal Welfare", https://ec.europa.eu/food/animals/animal-welfare/eu-platform-animal-welfare_en.

information, best practices and direct involvement of stakeholders.⁶⁷ Commission also established EU Reference Centers for Animal Welfare.⁶⁸ Their main aim is to “support the activities of the Commission and of the Member States in relation to the application of the rules.”⁶⁹ This is done by “providing scientific and technical expertise, carrying out studies and developing methods for improving and assessing the welfare level of animals.”⁷⁰

Clearly, Commission has developed system to ensure higher implementation on national level. “At this point, the Commission’s priority is to ensure the EU existing rules are fully implemented. Indeed, there is no point adopting new requirements if the current ones still need to be better applied.”⁷¹ This was noted in 2017 and for longer time there were no legal developments in farm animal welfare. Nevertheless, as we explained in the previous chapter, currently there is a wave of changes awaiting us in form of reappraisal of all the existing EU farm AW laws and the expected ban on the “cage age”. Integral part of this revision is also a proposal for effective enforcement system that will lead to compliance and finally to better lives for farm animals. This is necessary because current system of enforcement is, despite its

⁶⁷ *Ibid.*

⁶⁸ Regulation 2017/625 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products of 15 March 2017, *OJ L 95*, 7.4.2017, Art. 95-96.

⁶⁹ *Ibid.*, Art. 95.

⁷⁰ European Commission, “Food Safety”, https://ec.europa.eu/food/animals/animal-welfare/eu-reference-centres-animal-welfare_en.

⁷¹ European Commission, *Launch of the EU Platform on Animal Welfare: Q&A on Animal Welfare Policy*, Memo, 2017, p. 2.

developments, still not sufficient and therefore the EU is working on creating a stronger and less complicated enforcement structure.

c) Concrete animal welfare problems caused by poor enforcement

Lack of enforcement is one of “the main common drivers affecting the welfare status of animals in the Union.”⁷² It contributes directly to compliance issues with the legislation. Independent checks carried out by the NGOs showed that “a number of EU legislative provisions have not been fully applied and have not delivered the intended effects on the welfare of animals.”⁷³ Inspections found out that the animals are routinely mutilated without anesthesia, including teeth culling and castration.⁷⁴ Audits carried out by the Commission also identified vast problems with tail docking. A two-year work programme on pig welfare looked into the practices of routine tail docking, where serious and uniform enforcement remains a big challenge.⁷⁵ Around 90% of pigs are

⁷² European Commission, *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the European Union Strategy for the Protection and Welfare of Animals 2012-2015*, {SEC(2012) 55 FINAL}, {SEC(2012) 56 final}, p. 4.

⁷³ *Ibid.*

⁷⁴ See e.g., CIWF “Lack of compliance with the Pigs Directive continues: Urgent need for change”, 2014, <https://www.ciwf.org.uk/research/species-pigs/lack-of-compliance-with-the-pigs-directive-continues-urgent-need-for-change/>; CIWF, “Pig investigations”, <https://www.ciwf.org.uk/our-campaigns/other-campaigns/investigations/pig-investigations/>.

⁷⁵ European Commission, Directorate-General for Health and Food Safety, *Final Report of an Audit carried out in Italy from 13 November 2017 to 17 November 2017 in order to evaluate member state activities to prevent tail-biting and avoid routine tail-docking of pigs*, DG (SANTE) 2017-6257; European Parliament, Directorate-General for internal policies, Policy department citizens’ rights and constitutional affairs, *Routine Tail-Docking*, PE 509.997, 2014; European Commission, Health and Food Safety Directorate-General, *Study Visits on Rearing pigs with Intact Tails*, Overview Report, Publication Office 2016.

still undergoing this painful procedure, despite the ban.⁷⁶ This is very concerning as tail docking on little piglets as young as three to four days without anesthesia is causing pain and acute trauma, lasting discomfort and it also triggers infections.⁷⁷

Another problem is that factory farms have bare areas with hard floors without any enrichment in form of materials appropriate for digging and other natural behavioral actions typical for pigs, which are their integral part of their instincts. Such an environment causes extreme discomfort and injuries. It is estimated that 35% pigs per country are not given sufficient enrichment materials.⁷⁸ Furthermore, pregnant sows were found in narrow cages that didn't allow them any possibility for movement.⁷⁹

In its evaluation, Commission also revealed non-compliance with maximum stocking densities for chickens raised for meat.⁸⁰ Among other infringements we can mention inhumane treatment of animals that were documented laying in their own feces or as a result of extreme

⁷⁶ NALON, Elena/DE BRIYNE, Nancy, "Efforts to Ban the Routine Tail Docking of Pigs and to Give Pigs Enrichment Materials via EU Law: Where Do We stand a Quarter of a Century on?", *Animals*, Vol. 9, No. 132, (2019), p. 6.

⁷⁷ NANNONI, Eleonora/ VALSAMI, Tsampika/SARDI, Luca/ MARTELLI, Giovanna, "Tail Docking in Pigs: A Review on its Short- And Long-Term Consequences and Effectiveness in Preventing Tail Biting", *Italian Journal of Animal Science*, Vol. 13, No. 1, (2014), p. 100.

⁷⁸ DULLAGHAN, Neil, "Do countries comply with EU animal welfare laws?", <https://forum.effectivealtruism.org/posts/4rtnBHaxHYsEofWH3/do-countries-comply-with-eu-animal-welfare-laws>.

⁷⁹ "CIWF, "Pig investigations", *op. cit.*

⁸⁰ European Commission, Directorate-General for Health and Food Safety, *Study on the application of the Broiler directive D1E 2007/43/EC and development of welfare indicators: final report*, Publications Office, 2017, p. 9.

stress and boredom, they developed cannibalistic behavior and hurt themselves and others. Injured animals with broken wings and crushed legs left without any help laying on the floor and bins full of carcasses are also, unfortunately, practices that happen in EU farms.⁸¹

With regards the live animal transport, undercover actions showed how EU cattle suffers in importing countries: “animals were tied up, forced to fall down, and then had their necks sliced open, back and forth, with a knife.”⁸² Often cattle from one EU country are sent to for example, Spain for fattening, and from there to Africa. “A tractor will have to drag the paralysed and screaming animal into a lorry. Heading for the slaughterhouse. By law, it should have been euthanized on the spot, but in this case, it would be impossible to profit from his meat.”⁸³ All of this

⁸¹ See e.g., CIWF, “Lack of compliance with the Pigs Directive continues: Urgent need for change”, 2014, <https://www.ciwf.org.uk/research/species-pigs/lack-of-compliance-with-the-pigs-directive-continues-urgent-need-for-change/>; EUROGROUPFORANIMALS, “New investigation exposes deformities, broken legs and crushed birds at chicken farm”, <https://www.eurogroupforanimals.org/news/new-investigation-exposes-deformities-broken-legs-and-crushed-birds-chicken-farm>; EUROGROUPFORANIMALS, “Animals Equality exposes the true cost of milk”, <https://www.eurogroupforanimals.org/news/animal-equality-exposes-true-cost-milk>;

⁸² EUROGROUPFORANIMALS, “Dutch cattle documented going for slaughter in Lebanon and Libya”, <https://www.eurogroupforanimals.org/news/dutch-cattle-documented-going-slaughter-lebanon-and-libya>; WELFARM, “Battus, Ligotés, egorgés”, <https://action-transport.fr>; See also e.g., EUROGROUPFORANIMALS, “How much is enough? New evidence shows the suffering of animals exported from Spain to Middle East for slaughter”, <https://www.eurogroupforanimals.org/news/how-much-enough-new-evidence-shows-suffering-animals-exported-spain-middle-east-slaughter>; EUROGROUPFORANIMALS, “Unpublished and shocking images inside the ships transporting live animals from Portugal to Israel”, <https://www.eurogroupforanimals.org/news/unpublished-and-shocking-images-inside-ships-transporting-live-animals-portugal-israel>.

⁸³ EUROGROUPFORANIMALS, “Welfarm to release three shocking videos to call for a long-overdue end to the export of live animals”,

is banned under the EU animal welfare legislation, and it represents blatant ignorance of EU Directives and Regulations. Commission's findings are also disturbing. In its document Commission concludes that "[t]here are still big challenges regarding monitoring and enforcing EU rules for the non-EU part of the journeys. There are no systems to check the actual route followed by livestock trucks and Member States have no means to check the availability and adequacy of resting points along the route outside the EU."⁸⁴ Moreover, for the sea transport, there are no systems in place to receive information regarding the animal welfare during journey at sea and at arrival. Consequently, it is impossible to determine the quality of animal welfare during these journeys.⁸⁵ Especially concerning is live animal transport outside the EU. Their transport by sea to third countries "is an area where efficient control of Member States involved and the European Commission, and data on the welfare of animals are lacking."⁸⁶ Current system is incapable of safeguarding animal welfare according to the EU rules. Multiple shortcomings and loopholes often lead to animal suffering and blatant violations of animal welfare. "Competent authorities from Member States involved in exporting live animals by sea confirm that

<https://www.eurogroupforanimals.org/news/welfarm-release-three-shocking-videos-call-long-overdue-end-export-live-animals>.

⁸⁴ European Commission, *Report from the Commission to the European Parliament and the Council On the overall operation of official controls performed in Member States (2017-2018) to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products*, Commission Staff Working Document, {COM(2020) 756 final}, p. 12.

⁸⁵ *Ibid.*

⁸⁶ European Parliament, Policy Department for Structural and Cohesion Policies, Directorate-General for Internal Policies, *Animal welfare on sea vessels and criteria for approval of livestock authorisation*, Study requested by the ANIT Committee, PE 690:876, 2021, p. 11.

difficulties in enforcing *Regulation No. 1/2005* exist, and that there are doubts regarding how to enforce parts of it. They identified several enforcement challenges, extreme temperatures, and lack of communication between Member States and third countries being most important ones.”⁸⁷

To conclude, even though EU has developed an advanced legal framework on farm animal welfare, there are serious gaps in its implementation. We have seen that some of the worst horrors of factory farming are still occurring despite their ban by the EU rules. This is possible because of insufficient enforcement methods of the Member States. EU is aware of this situation. As a reaction to poor compliance, the Commission focuses on different ways to ensure proper application of the rules. However, poor enforcement cannot be solved only via guidance and different platforms as long as the legislation is open to various interpretations because of weak language and because AW objectives are not clearly defined.⁸⁸ With the awaiting revision of the animal welfare legislation, enforcement will be one of important topics that will “ultimately ensure a higher level of animal welfare.”⁸⁹ This could be, for example, harmonization of enforcement rules on national level, setting up the penalties for non-compliance with AW standards, and use of clear objectives with regards the animal welfare in the legislation.

⁸⁷ *Ibid.*, p. 13.

⁸⁸ Council of the European Union, Council conclusions, *Council conclusions on animal welfare- an integral part of sustainable animal production*, 14975/19, 2019, Annex, para. 10.

⁸⁹ European Commission, “Food Safety”, https://ec.europa.eu/food/animals/animal-welfare/evaluations-and-impact-assessment/revision-animal-welfare-legislation_en.

B) REFORMS CONCERNING ANIMAL SUFFERING

For the EU animal welfare framework to advance, it is essential to focus on ways in which it could be effectively improved. In the preceding subchapter we have identified most important gaps and limitations of current rules. In this one we will focus on one concrete aspect of farm animal welfare: the suffering of farm animals. This is because there are many lagoons in the legislation which omit important elements of animal welfare and maintain cruel and unnecessary practices mainly for economic reasons and practicality of farmers. Particularly we will focus on two pressing issues: the predominance of live animal transport over meat and carcass only trade and the problematics of painful and unnecessary mutilations. These two actions expose animals to horrific conditions which they must endure. Why they are unnecessary and how to reform them will be shown next.

1) LIVE ANIMAL TRANSPORT REPLACED BY MEAT AND CARCASS-ONLY TRADE

“The Commission will foster a dialogue to explore possible tools for shifting towards trade in meat, when feasible, as well as the facilitation of trade in animal products.”⁹⁰

European Commission

⁹⁰ European Commission, Committee on Agriculture and Rural Development (AGRI), *Follow-up to the European Parliament non-legislative resolution on the protection of animals during transport within and outside the EU*, 2018/2110 (INI)/A8-0057/2019/P8_TA-PROV(2019)0132.

In Europe more than 2 billion animals are transported in one year by air, road, and sea during several weeks on exhausting journeys.⁹¹ Current state of animal transport exceeds limits of human treatment of animals and has serious consequences for animal welfare, animal and human health and the environment. It is not just the NGOs that have been calling for phasing out live animal transport. Organizations like The Food and Agriculture Organization of the United Nations,⁹² the World Organization for Animal Health,⁹³ The European Food Safety Authority⁹⁴ or the Federation of Veterinarians of Europe⁹⁵ have also been concerned about live animal transport and suggesting ending this practice. The need to shift to meat and carcass trade only trade was also endorsed by the European Parliament⁹⁶ and Commission.⁹⁷ They emphasize potential structural, financial and policy changes and elimination of the drivers of live animal trade, which will be looked at later on. “However, despite the scientific advice, an increase in the transport of live cattle, sheep/goats and pigs was registered both intra-

⁹¹ European Parliament, Policy Department for Structural and Cohesion Policies, Directorate-General for Internal Policies, Study requested by the ANIT Committee, *The practices of animal welfare during transport in third countries: an overview*, PE 690:877, 2021, p. 9.

⁹² FAO. *See e.g.*, FAO, “Livestock’s long shadow, environmental issues and options”, 2016, <https://www.fao.org/3/a0701e/a0701e.pdf>.

⁹³ OIE. *See e.g.*, OIE, “OIE Regional seminar on animal welfare during long distance transport by land”, <https://awp.oie.int/index.php?id=194&I=0>.

⁹⁴ Hereinafter EFSA.

⁹⁵ Hereinafter FVE.

⁹⁶ European Parliament, Committee on Agriculture and Rural Development, *Report on the implementation of Council Regulation No 1/2005 on the protection of animals during transport within and outside the EU*, (2018/2110(INI)), A-0057/2019.

⁹⁷ European Commission, Committee on Agriculture and Rural Development (AGRI), *Follow-up to the European Parliament non-legislative resolution on the protection of animals during transport within and outside the EU*, 2018/2110 (INI)/A8-0057/2019/P8_TA-PROV(2019)0132.

EU and extra-EU since 2005. Indeed, between 2014-2017 the transport of these species across the EU increased by 14,2%⁹⁸ So, on hand we perceive strong public opinion against live animal trade, scientific studies confirming devastating consequences of this practice and international organizations as well as EU institutions calling for a change and on the other hand, we see an increase in the trade and intensification of animal suffering.

a) Current state of affairs

In the EU, legislation regulating animal welfare during transport has existed since 1977.⁹⁹ Maximum travelling times and stocking densities were introduced by *Council Directive 95/29/EC*¹⁰⁰ and in 2007 live animal transport has been governed by *Council Regulation 1/2005*.¹⁰¹ “Indeed, the EU judged it to be more appropriate to set out the community rules governing live transport in a Regulation.”¹⁰² We have introduced the main elements of the *Council Regulation 1/2005* in the previous chapter. However now it is important to highlight that the broad number of

⁹⁸ EUROGROUPFORANIMALS, “A Strategy to reduce and replace live animals transport. Towards a meat and carcasses only trade”, p. 5, https://www.eurogroupforanimals.org/files/eurogroupforanimals/2020-12/Eurogroup-for-Animals_A-strategy-to-reduce-and-replace-live-animal-transport.pdf.

⁹⁹ Council Directive 77/489/EEC of 18 July 1977 on the protection of animals during international transport, *OJ L 200*, 8.8.1977. No longer in force. Date of end of validity: 1/1/1993. Repealed by 391L0628.

¹⁰⁰ Council Directive 95/29/EC of 29 June 1995 amending Directive 91/628/EEC concerning the protection of animals during transport, *OJ L 148*, 30.6.1995. No longer in force. Date of end of validity: 4/1/2008. Implicitly repealed by 32005R0001.

¹⁰¹ Council Regulation (EC) No 1/2005, *op. cit.*

¹⁰² EUROGROUPFORANIMALS, “A Strategy to reduce and replace live animals transport. Towards a meat and carcasses only trade”, *op. cit.*, p. 7.

derogations allow transport of animal for long periods of time within and outside EU. Moreover, the enforcement is very poor and control by national authorities is rare. “Twelve years after the Regulation came into force, its main aim- the protection of animals during transport-is not being met.”¹⁰³

As a result of the above, *European Parliament* adopted a *Resolution on the implementation of the Transport Regulation*¹⁰⁴ in which it called for phasing out live animal transport and switching to meat and carcass trade only. This has been backed up by the scientific advice. In addition, Germany, the Netherlands and Luxembourg had already expressed their wished to ban live animal exports to third countries.¹⁰⁵ However, the European Parliaments’ plenary did not use the opportunity, when it voted on the *Recommendation of the Committee of Inquiry on the Protection of Animals during Transport*¹⁰⁶ as it did not address important elements of live exports, nor did they ban long haul sea transports of animals to third countries and long transports within the EU. Ban of transport of heavily pregnant animals and animals younger than five weeks has been also rejected.¹⁰⁷

¹⁰³ *Ibid.*

¹⁰⁴ European Parliament, *European Parliament resolution of 14 February 2019 on the implementation of Council Regulation (EC) No 1/2005 on the protection of animals during transport within and outside the EU*, (2018/2110(INI)), C 449/157, P8 TA(2019)0132.

¹⁰⁵ DW, “What SPD, Green Party, FDP have agreed on”, <https://www.dw.com/en/full-text-what-spd-green-party-fdp-have-agreed-on/a-59548008>.

¹⁰⁶ European Parliament, Committee of Inquiry on the Protection of Animals during Transport, *Draft 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)).

¹⁰⁷ They approved (with exceptions) limitation of transport times to eight hours by road and for animals exported for slaughter. They agreed to ban the transport of very young calves. See, European Parliament, *Protection of animals during transport, European Parliament recommendation of 20 January 2022 to the Council and the Commission following the*

In this situation, the conditions of livestock during transport are deplorable. Therefore, we will present main problems with live animal trade by sea and road through which we will understand the pressing need to end this practice and substitute it completely with meat and carcass trade only.

b) Sea transport

Movement of livestock at sea is a topic of great concern, and not only for animal welfare reasons. Public health and environmental disasters are direct consequences of these journeys. European Union exports big quantities of live animals by sea, mainly to North Africa and Middle East.¹⁰⁸ This includes animals for slaughter, for breeding and for fattening. 2,018 2868,570 sheep and cattle were exported by sea from Romania, Slovenia, Spain, France, Croatia and Ireland¹⁰⁹ and 4,504,992 ovines, bovines and pigs in 2019.¹¹⁰ Animals endure weeks, sometimes even months of transportation on vessels and ferries in catastrophic conditions. There are many problems on the sea transport, from approving vessels on which animals will be carried, documenting state of their welfare during the journey, to ensuring their welfare in 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)), P9_TA(2022)0015.

¹⁰⁸ European Parliament, *Animal welfare on sea vessels and criteria for approval of livestock authorisation, op. cit.*, p. 15.

¹⁰⁹ *Ibid.*, p. 16.

¹¹⁰ *Ibid.*

importing country.¹¹¹ We will see that there is an unimaginable suffering that animals have to undergo just to be slaughtered, often without stunning, at the destination point.

i) Livestock vessels

With regards the vessels, “[m]ost of the exported animals are transported in inadequate livestock vehicles: only 6% of 78 EU-approved livestock vessels were purpose-built to transport animals, (...) and 69% fly substandard flags (most black-listed). In the years 2019-2020, 2504 deficiencies were found in EU-approved livestock vessels, many posing a threat to animal welfare, health and safety. Since 2017, livestock vessels worldwide have remained the No. 1 vessel category for number of detentions (as a result of serious deficiencies).”¹¹² Despite bad condition of vessels they continue to be approved to carry animals to third countries. This is risk not only for the animals, but also for the environment and the crew.¹¹³ “The biggest threat to the global live export industry is old ships. They have inferior standards and livestock services and they are more prone to accidents and breakdowns.”¹¹⁴ For example, “[n]on-purpose built vessels are likely to have sharp

¹¹¹ European Commission, “Report finds most Member States’ controls on livestock vessels are insufficient to minimise the risk to animal welfare”, https://ec.europa.eu/food/audits-analysis/news_detail.cfm?id=124.

¹¹² European Parliament, *Animal welfare on sea vessels and criteria for approval of livestock authorisation op. cit.*, p. 11.

¹¹³ *Ibid.*

¹¹⁴ LARSSON, Naomi/ LEVITT, Tom, “Floating feedlots’: animals spending weeks at sea on ships not fit for purpose”, <https://www.theguardian.com/environment/2020/jan/26/floating-feedlots-animals-spending-weeks-at-sea-on-ships-not-fit-for-purpose>.

protrusions and edges that can injure sheep and cattle during loading.”¹¹⁵ Ventilation is another problem. Closed vessels on which animals are confined below deck have insufficient ventilation that often break down which results to temperatures skyrocketing to fatal levels.¹¹⁶

There is no harmonized system between the Member States on the vessel approval procedures. “Detailed procedures should be drafted to help with inspections, and sufficient resources are necessary to guarantee proper inspection quality.”¹¹⁷ Also, there are deficiencies in documenting the vessels before the journey, such as the information on the transporter. This is very serious because in case of identified issues, no one could be held responsible for them. Authorities also often do not take into account weather during the journey. As a result, they “approve transport with incomplete or incorrect documentation, putting animal welfare at risk, for example due to heat stress.”¹¹⁸ Romania, for example, has been transporting animals during hot months which led to cruel death of thousands of them on their way to Jordan.¹¹⁹ On the vessels there are no EU representatives that would oversee treatment of animals in accordance with EU laws and usually there are no veterinaries either that could help sick animals.

¹¹⁵ BAKER, JOE, “Suffering at sea: the debate over the livestock export industry”, <https://www.ship-technology.com/analysis/livestock-at-sea/>.

¹¹⁶ *Ibid.*

¹¹⁷ European Parliament, *Animal welfare on sea vessels and criteria for approval of livestock authorisation op. cit.*, p. 12.

¹¹⁸ *Ibid.*

¹¹⁹ FRANCE24, “Sheep on ships: Suez jam spotlights livestock sea transport”, <https://www.france24.com/en/live-news/20210330-sheep-on-ships-suez-jam-spotlights-livestock-sea-transport>.

ii) Animal welfare during loading and journey

Whistleblowers and NGOs are sources of evidence of disastrous conditions that animals have to endure during sea transports. Issues with animal welfare however do not start at the vessels. Problems arise already before loading them onto the ships. Animals must be first transported by road to the port. They must stay on trucks for long periods before they are loaded onto the ships.¹²⁰ From the truck, they are transferred to vessels. Here infringements happen as the staff often ignores EU rules. Animals are kicked, hit and stressed. Electric prods are used so they move faster.¹²¹ Also, the infrastructure for loading is insufficient with poor facilities and dangerous for animals. Moreover, the fitness of animal for their sea transport is not always checked.

On the vessels, it is not surprising that welfare of animals is compromised when thousands, sometimes even more than ten thousand animals are carried on sea for weeks. Animals suffer from fatigue, heat, overcrowding and related injuries as well as different infectious diseases. Animals are “forced to stand on hard floors for weeks on end, sick, injured animals (are) left to die, and sheep (are) literally cooking from the inside with their fat melted like a translucent jelly”¹²² and “[s]ome animals are held on decks for as long as 40 days, living on hard decking of concrete and metal. They are not built to cope

¹²⁰ ANIMAL WELFARE FOUNDATION, “Live exports to no -EU countries by sea”, <https://www.animal-welfare-foundation.org/en/projects/animal-transport/live-exports-by-sea>.

¹²¹ TIER SCHUTZ BUNDZURICH, “Animal Welfare Overboard”, <https://www.tierschutzbund-zuerich.ch/service/dossier/animal-welfare-overboard>.

¹²² LARSSON, Naomi/ LEVITT, Tom, *op. cit.*

with these environments.”¹²³ Dr Lynn Simpson describes the hoof deck syndrome which stands for injuries and abrasions suffered by animals while standing on harsh ship decks.¹²⁴ All of this is aggravated by high stock densities. Cattle and sheep are placed in such a proximity that they have no room to sit down, for weeks they have to remain in same the position.

There are also problems with insufficient nutrition. Thousands of animals die because of failure to provide enough water and nutrition. In 2015, for example, Jordan rejected 13,000 sheep from Romania because 40% of them were already dead. Cause of death was inadequate nutrition and insufficient water provided.¹²⁵ Furthermore, extreme conditions that animals must survive during their journey are endangering not only them, but also us and the environment. The combination of hot weather, humidity, overcrowding, dirt, poor nutrition, and lack of water can lead to spread of diseases. Animals also suffer from motion sickness and shipping fever. Because of accumulation of manure and excrements, there are high levels of ammonia. Carcasses are disposed to sea, causing ecological problems in marine protected zones, such as the Mediterranean Sea.

¹²³ *Ibid.*

¹²⁴ SIMPSON, LYNN, “AseI Submission”, https://www.rspca.org.au/sites/default/files/website/Campaigns/Live-export/Live-export-facts/Dr_Lynn_Simpson-Submission_to_ASEL_Review_RS.pdf.

¹²⁵ LARSSON, Naomi/ LEVITT, Tom, *op. cit.*

Because of poor documentation, conditions in which animals are transported are usually unknown¹²⁶ and data on mortalities is also lacking. In the importing country, animal welfare is not guaranteed and difficult to verify. Under current system and non-existent data, investigations are difficult to organize, and prosecution of offenders is not realistic. Sea transportation is simply not controlled. Studies and reports especially from the NGOs show that operators do not respect OIE standards, nor veterinary or public health standards. Innocent creatures endure unimaginable suffering during long periods of time which represents structural animal abuse. And then, at the destination, animals are slaughtered usually without stunning. “They are stabbing the eyes, cutting the eyes so they can’t see. They are slashing the tendons to put the big animals down, and then stabbing the neck (...) and then multiple throat cuts. Sometimes it takes 30 to 40 minutes to kill a single big bull.”¹²⁷

c) Road transport

Thousands of animals are transported by road every day within the EU.¹²⁸ Some of them are sent for slaughter, some for further fattening. “Many of these journeys, which involve extensive suffering, take over

¹²⁶ *Ibid.*

¹²⁷ PAUN, Gabriel, “EU parliament restricts live animal transports”, <https://www.dw.com/en/eu-parliament-restricts-live-animal-transport/a-60488383>.

¹²⁸ DE LORENZO, Daniela, European Rule On Live Animal Transport Are Stuck On The Road”, <https://www.forbes.com/sites/danieladelorenzo/2022/01/31/european-regulations-on-live-animal-transport-are-stuck-on-the-road/?sh=119c30ad6ba2>.

30 hours, the worse take over 70 hours.”¹²⁹ Current EU rules on animal transport are not sufficient as multitude of assessments, reports and investigations showed important shortcomings. There is a conflict between scientific opinions and the Regulation. Even though “animals should be reared as close as possible to the premises on which they are born and slaughtered as close as possible to the point of production”, animals travel days and weeks in trucks to get to their destination.

The reason for live animal transport within the EU is an increasing fragmentation of farming systems which allows producers to take advantage of cost variations in different countries.¹³⁰ For instance, the Danes can produce piglets cheaply than the Poles, but the Poles can rear them more cheaply due to lower labor cost. As a result, five million piglets were transported from one country to another in 2018 to become Polish sausage.¹³¹ Another reason is the transition towards bigger but fewer slaughterhouses. Therefore, animals have to travel to reach their destination for slaughter.

i) Animal welfare during road journeys

Different animals have different behavioral and physiological needs, which are not addressed in the “Transport Regulation”.¹³² For example,

¹²⁹ CIWF, “Long distance animal transport in Europe: A cruel and unnecessary trade”, p. 5, <https://www.ciwf.org.uk/media/3818249/transport-in-europe-report.pdf>.

¹³⁰ Van der Zee, Bibi, “Something is wrong: why the live animal trade is booming in Europe”, <https://www.theguardian.com/environment/2020/jan/24/something-is-wrong-meps-say-eu-is-failing-to-regulate-live-animal-exports>.

¹³¹ *Ibid.*

¹³² Council Regulation (EC) No 1/2005, *op. cit.*

poultry travelling more the four hours is susceptible to increased probability of increased mortality, yet the rules do not take it into consideration. Different animal species also react differently to temperatures. For instance, pigs and poultry are especially sensitive to changes in the temperature as well as to high temperatures and humidity, however, the Regulation does not contain any species-specific provisions on these aspects. The travel of very young animals is another big problem as long journeys are detrimental for them and should be avoided any time it is possible as they are not able to cope well with the transport. This leads to high levels of mortality and morbidity not only during the journey but also afterwards.¹³³ We tend to forget that these young animals are dependent of their mothers, and therefore unweaned animals are absolutely unfitting for transport.¹³⁴ Their immune system is still not developed and because of that they are prone to diseases and less likely to withstand grueling transport conditions. Also, unweaned animals are dependent of mother's milk, which makes it complicated to feed them regularly. Currently, animals as young as 10 days can already travel. Unfortunately, the Parliament did not vote for this practice to end when it had chance.

Another problem is the maximum journey times for live animal transport. Current rules allow in case of fish, minks, or pets unlimited time journeys. Pigs or chickens can spend up to 24 hours travelling. There should be a limit of maximum 8 hours irrespective of

¹³³ KNOWLES, T.G., "A review of post transport mortality among younger calves", *Veterinary record*, No. 137, (1995), pp. 406-407.

¹³⁴ GREENS/EFA, "How to end cruel animal transports: the Greens/Efa's fight for animal welfare", <https://www.greens-efa.eu/opinions/how-to-end-cruel-animal-transport-the-greens-efas-fight-for-animal-welfare/>.

transportation means until total ban is reached. This is because long journeys are not “only cruel, but journeys of this distance are completely unnecessary. Slaughter should be carried out as locally as possible and meat transported on the hook, rather than on the hoof. It’s time we ended the outdated and totally needless suffering” said Chairmen of the European Parliament’s Agriculture and Rural Development Committee, Neil Parish. The FVE stated that “FVE has always been of the opinion that fattening of animals should take place within or near the place of birth- Animal should also be slaughtered as near the point of production as possible. The journey time for slaughter animals should never exceed the physiological needs of the animals for food, water or rest.”¹³⁵ EFSA sharing similar view concluded that “[a] variety of stressors involved in transport are key factors that strongly contribute to poor welfare in transported animals, and they also increase the susceptibility to infection of transported animals and the shedding of infectious agents in already infected animals. (...) Transport should therefore be avoided wherever possible, and journeys should be as short as possible.”¹³⁶ In continuation “[w]ith increasing duration of journeys, the welfare of animals generally gets worse because they become more fatigued, incur a steadily increasing energy deficit if they do not get sufficient food, become more susceptible to existing infections, and may become diseased because they encounter new pathogens.”¹³⁷

¹³⁵ FVE, *Transport of live animals: FVE position paper*. Federation of Veterinarians in Europe, FVE/01/043, 2001, p. 1.

¹³⁶ European Food Safety Authority, “Opinion of the Scientific Panel on Animal Health and Welfare on a request from the Commission related to welfare of animals during transport”, *The EFSA Journal*, No. 44, (2004), p. 1.

¹³⁷ *Ibid.*, p. 10.

Long journeys inherently involve high level of animal suffering. “The stress factors involved in transport include the mixing of unfamiliar animals, deprivation of food and water, lack of rest, extreme temperature and humidity, improper handling by humans, exposure to a novel environment, overcrowding, insufficient headroom and noise and vibration.”¹³⁸ Animals are placed in overcrowded trucks, and because of lack of controls, often they are not given sufficient water and food. Fast they become exhausted, stressed, and dehydrated. Many of them get injured, having their legs, horns, pelvises, or wings broken. “Due to exhaustion or poor driving (sudden braking or acceleration or over-rapid cornering, some animals collapse on to the floor of the truck where they are in danger of being trampled by their companions.”¹³⁹

When travelling during hot months, overcrowded trucks with insufficient ventilation together with lack of hydration leads to animals feeling extremely tired and triggering behaviors such as gasping for air or panting. Many also die.

Moreover, studies have shown that the personal is not sufficiently trained and has “doubts regarding the fitness for transport of specific cows at least frequently”¹⁴⁰ and does not have knowledge on the legal questions regarding fitness of animals for travelling. This causes serious issues, as animals that are not fit to endure long journeys are frequently let to be loaded. This is the case of wounded animals, pregnant animals

¹³⁸ CIWF, “Long distance animal transport in Europe: A cruel and unnecessary trade”, *op. cit.*, p. 5.

¹³⁹ *Ibid.*

¹⁴⁰ European Parliament, European Parliamentary Research Service, *Regulation (EC) No 1/2005 on the protection of animals during transport and related operations, European Implementation Assessment*, Study, PE 621.853, 2018, p. 19.

which can give birth during the transport, downers which are animals with pathological condition or physiological weakness.¹⁴¹

ii) Non-compliance and enforcement problems

As we can see the conditions of live animal transport are disastrous. They are unacceptable as animals feel pain and fear¹⁴² and suffer from transport-related stress leading to illnesses and in many cases to death.¹⁴³ Current *Regulation No. 1/2005* does not go far enough in its provisions, especially because it allows number of exceptions that allow the extensions of journey lengths. And even the important developments achieved by it, such as the obligatory resting periods and... are frequently violated as there are insufficient road inspection controls by the national authorities. This is especially problematic if the journeys continue to non-EU country. “There are huge differences between Member States in the progress they have made in implementing the Regulation and in how they are implementing it. In particular, there are differences in the degree of enforcement and on the penalties for infringements.”¹⁴⁴ This has a negative effect on animal welfare as operators avoid more stringent states.

¹⁴¹ *Ibid.*, p. 7.

¹⁴² See e.g., chapter no. I.

¹⁴³ DAMTEWM Ashenafi/EREGA, Yidersal/EBRAHIM, Hussen/TSEGAYE, Solomon/MSIGIEE, Desiye, “The Effect of Long Distance Transportation Stress on Cattle: a Review”, *Journal of Scientific & Technical Research*, Vol. 3, No. 3, (2018), pp. 3304-3308.

¹⁴⁴ European Commission, Directorate-General for Health and Consumers, *Study on the impact of Regulation (EC) No 1/2005 on the protection of animals during transport*, SANCO/2010/D5/S12.574298, Draft Final Report, p. 11.

Other examples of systematic non-compliance with the Regulation are for instance, lack of headroom, transport in extreme heat and cold, journeys longer than allowed, skipping the resting periods, overcrowding and incorrect handling during loading and unloading involving violence.¹⁴⁵ Further, the vague language of the Regulation triggers variations in its interpretations by different Member States and contributes to uneven enforcement of the Regulation in different Member States.

One of the most frequent violations consist in the use of inappropriate vehicles even though state have, in general, national guidelines for approval of vehicles. However, they are often not applied during the approval procedures.¹⁴⁶ Many vehicles do not provide safety nor comfort for the livestock. Until total ban of live animal transport, innovative solutions for ensuring better feeding and watering systems are necessary to incorporate. This is because “in a high number of vehicles drinking facilities are not adapted to the specific drinking behaviour or size of the transported animals: are out of reach for the animals or are not available in sufficient number or with adequate distribution.”¹⁴⁷ Problems with water supply is also due to lack of precise indications on the watering devices in the Regulation.

d) Solutions

¹⁴⁵ European Parliament, *The practices of animal welfare during transport in third countries: an overview op. cit.*, p. 7.

¹⁴⁶ *Ibid.*, p. 8.

¹⁴⁷ *Ibid.*

For both sea and road transport as well as other means of transportation the most obvious solution would be a general ban on long transports and transports to third countries of live animals. Proposals for progressive reduction in live trade flows need to be drafted. However, is it even feasible to think about the restriction or complete elimination of live animal trade? Is there a possibility, in the global market with animals where economic interest play the main role, to decrease this activity? Below, we illustrate various examples that achieved considerable reduction or complete ban of live animal trade. We reckon that given the level of animal suffering, public health issue and environmental consequences, it is not only possible but also inevitable. Until complete prohibition is achieved, EU needs to ameliorate the current rules on transport such as the elimination of vague language of the Regulation, creation of a harmonized system of penalties, increase in the frequency of inspections, reduction of allowed transport duration, etc.

A great example of achieving reduction of live animal trade in calves is the UK. Before their decision to ban live exports, they focused on developing local markets for animals that were exported in large numbers. As a result, live exports became economically disadvantageous. They involved all the actors in this process, from NGOs, academics, producers, processors, retailers that helped with the expansion of the British supply chain. They achieved 90% decline in calve live export. This was possible through the development of domestic demand for male dairy calves which have been before exported. McDonald's for example decided to obtain 10% of its beef supply from domestic male cows. Tesco and other important players

also invested in products from male dairy calves. Developing a local market is therefore important in order to switch from live exports towards placing these animals to the domestic chains.¹⁴⁸ Recently the UK also unveiled its decision to join the list of countries banning live export. The ban is part of the second Animal Welfare bill and currently it is at the stage of House of Commons, before its 3rd reading.¹⁴⁹

Best practice in form of a total ban of live animal exports has been introduced by New Zealand, as we pointed out previously. Before this total ban, they banned export of live sheep in 2003. This was a reaction to catastrophe during which thousands of sheep died on the vessels because Saudi Arabia rejected a shipment of more than fifty thousand animals. Sheep had to remain on the vessel for very long time in horrible conditions. Few years later, the ban included also live cattle intended for slaughter. New Zealand approach is different than the UK one as it was based upon a specific animal welfare disaster. In 2019 they confirmed a radical step banning live animal transport. “At the heart of our decision is upholding New Zealand’s reputation for high standards of animal welfare. We must stay ahead of the curve in a world where animal welfare is under increasing scrutiny.”¹⁵⁰ This is a significant decision that could inspire other countries. Behind this decision was not only the protection of animals, but also reputation of New Zealand as a country with high animal welfare standards. This is a rationale that could be

¹⁴⁸ EUROGROUPFORANIMALS, “A Strategy to reduce and replace live animals transport. Towards a meat and carcasses only trade”, *op. cit.*, p. 23.

¹⁴⁹ UK PARLIAMENT, “Animal Welfare (Kept Animals) Bill”, <https://bills.parliament.uk/bills/2880>.

¹⁵⁰ O’CONNOR, Hon Damien, “Government to phase out live exports by sea”, <https://www.beehive.govt.nz/release/government-phase-out-live-exports-sea>.

attractive for European Union as well. Essential in New Zealand's success were, however, negotiations with the Halal boards and their acceptance of meat from animals stunned and then killed in New Zealand. This allowed them to trade meat and carcasses instead of live livestock.¹⁵¹

Putting an end to the live animal exports is feasible as important exporters have already taken this step, prioritizing animal welfare, animal and human health and the environment. EU could adopt one or the other example, or the combination of both. As we have mentioned, European Parliament adopted a set of recommendations that did not call for a general ban of live trade nor for specific ban of all sea live animal transport. It however, urges “for measures enabling a shift to a meat, carcasses and generic material trade, where appropriate, that could replace the need for sea transport.”¹⁵² This means that they still advocate a shift to a more ethical system, based mainly on transport of embryos and semen than live breeding livestock and meat over animals transported for slaughter. They ask the Commission to include in the revision of the “Transport Regulation”¹⁵³ an action plan to bring this transition into life. This is nevertheless disappointing, as the recommendations will be the basis for revision of “Transport Regulation” announced by the Commission for 2023. Even though

¹⁵¹ EUROGROUPFORANIMALS, “A Strategy to reduce and replace live animal transport. Towards a meat and carcasses only trade”, p. 23.

¹⁵² European Parliament, *European Parliament recommendation of 20 January 2022 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. 117.

¹⁵³ Council Regulation (EC) No 1/2005, *op. cit.*

general ban on live transport has not been voted by the MPEs, there is hope that the Commission will be more daring and that it will put animal welfare, human and public health and the environmental interests at the top of its priorities in form of gradual end of long live transports by road, sea but also air and rail. This would be in line with *Farm to Fork strategy's* suggestion of banning export of live animals to third countries.¹⁵⁴ Not only that. As long-term transport has significant environmental impact. Therefore, phasing it out would contribute to achievement of aims of F2F an *EU Green Deal*. Until a general ban is adopted, steps leading to proper compliance with the Regulations are necessary to be taken as well as adoption of new, stricter, and precise rules in line with Parliament's recommendations and hopefully even beyond them, as the MPs were very conservative and soft in their votes and backed up the interest of meat industry rather than animal welfare and health arguments.

With regards the sea transfer, the Commission should create clearer rules and eliminate vague language in the "Transport Regulation". More specifically, these provisions should cover more detailed and harmonized procedures for livestock vessel approval; require the presence of veterinary during the entire duration of sea journey; demand reporting and data collection on animal health, welfare, and mortalities; require certification of crew competences, adopt obligatory 24-hour rest before sea journey. Moreover, having in mind the environment, the EU should prevent uncontrolled disposal of sick and dead animals into the

¹⁵⁴ European Commission, Animal Health Advisory Committee, *Animal welfare activities under the Farm to Fork Strategy*, DG SANTE/G5, 2020.

sea as well as their manure and feces. EU should also strictly sanction Member States that do not enforce the rules. At the same time, system of national penalties should be harmonized.

Concerning the road transfer, the number of inspections should increase considerably. Police officers should be trained in specific provisions of the Regulation, and they should be accompanied by veterinaries that could professionally assess welfare of carried animals.¹⁵⁵ Requiring better solutions in the trucks for proper hydration of animals is necessary. Also, the Regulation should encompass all animals, including fish and other animals not covered by it. Reducing time of transport is another important recommendation. Lastly, improving the vague language of the Regulation will lead to less margin for interpretations and to easier performance of audits and consequent study of the results. Harmonized system of penalties would help with the higher compliance and better enforcement as well.

2) PHASE OUT THE MUTILATIONS

“The painful mutilations of sentient farm animals to prop-up poor factory farming procedures is indefensible.”¹⁵⁶

Jacqui Mills

¹⁵⁵ PALADINO, Barbara/ MENCHETTI, Laura/ MININI, Valentina./ TULLIO, Daniele/ NANNI COSTA, Leonardo, “Transport certifications of cattle moved from France to Southern Italy and Greece: do they comply with Reg. EC 1/2005?”, *Italian Animal Science*, Vol. 20, No. 1, (2021), pp. 1870-1881.

¹⁵⁶ MILLS, Jacqui, World Animal Protection, “Agriculture Ministers Call to Strengthen Farm Animal Welfare Laws in Europe”, <https://www.worldanimalprotection.org/news/agriculture-ministers-call-strengthen-farm-animal-welfare-laws-europe>.

Animal welfare and economic interests of big intensive production systems are not always aligned.¹⁵⁷ With hundreds, even thousands of animals stocked in one giant platform, it is difficult to attend each animal and meet their specific needs. “Intensive systems can therefore lead to aberrant behaviour in laying hens such as feather pecking and cannibalism, aggression and tail biting in pigs and aggression in calves. To control this undesirable behaviour, it is common practice to perform painful physical alterations on animals, in particular beak trimming, tail docking, castration and teeth clipping.”¹⁵⁸ These are the so-called mutilations. Mutilations can be understood as “a physical intervention in an animal in which the natural integrity of living tissues is broken.”¹⁵⁹ Conventional rearing systems use these painful management procedures to identify animals, to prevent them from harming each other, to eliminate the risk of injuries to people and animals, to make the livestock management quicker and easier, ... By nature, these practices are painful. The fact that they have to be cheap, quick and effective intensifies the cruelty and improper handling of animals.

Art. 13 TFUE determines that animals are sentient beings, hence they feel pain and they can suffer, and the “Farming Directive”¹⁶⁰ includes a general prohibition on the animal mutilations. However, it also allows exemptions to this principle that can be adopted in the species-specific

¹⁵⁷ See, e.g., European Court of Auditors, *op. cit.*

¹⁵⁸ *Ibid.*, p. 15.

¹⁵⁹ SPOOLDER, Hand/ SCHÖNE, Maria/ BRACKE, Marc, “Initiatives to Reduce Mutilations in EU Livestock Production”, p. 10, <https://edepot.wur.nl/374964>.

¹⁶⁰ Council Directive 98/58/EC, *op. cit.*

Regulations and Directives. These allow painful procedures if they can be sufficiently justified. As we learnt, without clear provisions the margin for interpretation of what is necessary and proportionate and hence justifiable, is very broad. Instead of confronting the causes for the undesirable animal behavior, such as the artificial environment that stresses the animals and makes them hurt themselves and others, the industry prefers to cut their body parts, so they have nothing to chew and harm. In this way, the stressors are still present causing harm to animals in different ways. Coupled with the pain they have to undergo during the mutilations and consequences such as infections and even more pain afterwards, these practices are helping the industry, not the animals. Here, the economic interests trump any welfare considerations. The revision of animal welfare legislation, which is due in 2023, will address this problem as well. Some of the practices that could be encompassed in the revision will be presented in the next sections.

a) Cattle

There are around 12 million beef cattle and 23.5 million dairy cows reared in the EU.¹⁶¹ No specific legislation exists on mutilations in cattle. Although part of the EU's *acquis* are the recommendations of *Council of Europe* adopted by the Standing Committee of the European Convention for the Protection of Animals kept for farming purposes. There, “[p]rocedures resulting in the loss of a significant amount of tissue, or the modification of bone structure of cattle shall be

¹⁶¹ SPOOLDER, Hand/ SCHÖNE, Maria/ BRACKE, *op. cit.*, p. 27.

forbidden.”¹⁶² However, many different mutilations performed within the EU were identified. These are hot and freeze branding for identification purposes. “The majority of the 28 member states allow both hot and freeze branding (...).”¹⁶³ Here, “a red-hot iron is applied directly to the animal’s skin. This is a traditional branding method for cows, horses, mules, and buffaloes, although it has also been used on sheep and goats.”¹⁶⁴ Calves are branded very young, before being weaned at approximately three to five months of age. This practice has been banned in for example United Kingdom, Austria and Germany because of the pain that it causes. Freezing is considered less painful, even though dry ice is used at -70 C and liquid nitrogen at -190 C. “Prolonged contact with this material produced the destruction of melanocytes (cells that produce skin pigment). The skin freezes an edema (swollen section of the skin) is formed, and in the following weeks the skin and hair in the area will fall off.”¹⁶⁵ Another very cruel branding method is the earmarking performed with razors or pincers. It can “cause necrosis, parasitic infections, or torn ears.”¹⁶⁶ It is banned in Hungary, Austria, Germany, Sweden, and The Netherlands. Alternative to this practice is chipping which is allowed in all the EU Member States.

¹⁶² Council of Europe, Recommendation Concerning Cattle Adopted by the Standing Committee on 21 October 1988, Art. 17.

¹⁶³ SPOOLDER, Hand/ SCHÖNE, Maria/ BRACKE, *op. cit.*, p. 14.

¹⁶⁴ ANIMALETHICS, “Animal Branding”, <https://www.animal-ethics.org/animal-branding/>.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

Another common practice is dehorning which is the removal of the horns. Usually done without any pain relieve and anesthetics, it causes severe acute pain as they have to cut though the horn tissue and bone. “Dehorning in mature cattle usually requires the amputation of the horn, which has already attached itself to the skull. Tools used for this procedure include saws, sharp wires, and gruesome guillotine dehorner, which also cut off the surrounding skin. Horn removal in older animals can lead to postoperative problems of hemorrhages, tissue necrosis, bone fractured, sinusitis, and even death.”¹⁶⁷ EFSA has categorized this method as one of the cruelest, causing high levels of discomfort if done without anesthetics. So far, no Member State has banned it.

The reason for this practice is to eliminate injuries to farm personnel and between animals themselves. These injuries are results of the stress that cattle must undergo while living in big quantities, in confined spaces, under artificial lights unable to express their natural behavior. If we think about it, the dehorning of dairy cows influences the way we perceive them. Dairy cows are presented in the media often without horns and many people really think that they simply do not have them by nature. Our view of farm animals is flawed and controlled by the commercials paid by the meat industry.

b) Sheep and goats

¹⁶⁷ PETA, “Dehorning: Dairy’s Dark Secret”, <https://www.peta.org/issues/animals-used-for-food/factory-farming/cows/dairy-industry/dehorning/>.

Sheep and goats are not protected by a specific legislation and as a result many cruel practices are still used on them, such as dehorning, castration without anesthesia, vasectomies, ear notching, mulesing, disbudding, tail docking, etc. “It appears accepted that even the most painful procedures such as castration and dehorning are essential in commercial sheep and goat farming.”¹⁶⁸ Mulesing is especially cruel. It “involves cutting a crescent-shaped slice of skin from each side of the buttock area. (...) Skin is also stripped from the sides and the end of the tail stump.”¹⁶⁹ It is usually carried without any anesthetics. It is routinely done in Slovakia and Northern Ireland.

Another frequent practice is the tail docking of sheep. It consists in the removal of the entire tail or part of it, in order to keep the area around vulva clean and thus eliminating the myiasis. Myiasis is a disease resulting from the presence of larvae of fly species. According to studies “tail docking is often performed out of tradition rather than necessity and, at best, may only be partially effective in reducing flystrike. Furthermore, it is a difficult ethical judgment as to whether to perform a painful procedure on large numbers of animals for the potential benefit of a small minority.”¹⁷⁰ There are other management techniques

¹⁶⁸ SPOOLDER, Hand/ SCHÖNE, Maria/ BRACKE, *op. cit.*, p. 7.

¹⁶⁹ ENCYCLOPEDIA BRITANNICA, “Mulesing in Wool Production: A Disturbing and Painful Practice”, <https://www.britannica.com/explore/savingearth/11295-2>.

¹⁷⁰ FAWC, “FAWC Report on the Implications of Castration and Tail Docking for the Welfare of Lambs”, Art. 51, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/325125/FAWC_report_on_the_implications_of_castration_and_tail_docking_for_the_welfare_of_lambs.pdf.

that can prevent the disease without the necessity for painful procedures.¹⁷¹

c) Pigs

Around 250 million pigs are reared for slaughter in the EU per year. As we already know, pigs are protected by a species-specific legislation in form of a *Council Directive 2008/120/EC*. Despite having been protected by it, there are still procedures causing them great deal of suffering. These are nose ringing, ear notching, castration, chipping, tattooing and vasectomies. Controversial tail docking and teeth cutting are allowed, however they cannot be performed routinely. After understanding the problems with compliance, it will not surprise us that docking and needle teeth cutting are carried out on a significant number of pigs. “It appears that the enforces of national legislation agree that the advantages of tail docking and teeth cutting still outweigh their disadvantages.”¹⁷²

Furthermore 80% of male piglets are castrated until the age of 7 days, to eliminate their aggression, sexual behaviour and boar taint.¹⁷³ Boar taint is unpleasant and strong combination of odour, flavour and taste occurring in heated pork meat, caused by the naturally occurring elements of androsterone and skatole in male pigs once they reach

¹⁷¹ See e.g., PHILLIPS, C.J.C., “A review of mulesing and other methods to control flystrike (Cutaneous myiasis) in sheep, *Animal Welfare*, Vol. 18, (2009), pp. 113-121.

¹⁷² SPOOLDER, Hand/ SCHÖNE, Maria/ BRACKE, *op. cit.*, p. 7.

¹⁷³ COPA-COGECA, at all, *European Declaration on alternatives to surgical castration of pigs*, 2010.

sexual maturity. Castration is extremely painful, leading to high levels of cortisol, high heart rate and also changes in behaviour.¹⁷⁴ Already in 2010 the EU has called to phase out this practice, which unfortunately did not happen. There is still castration performed in the cruelest way, without any pain relief.

One way to solve this problem would be performing castration with anesthesia and analgesia resulting in pain reduction. This would however mean higher costs for farmers which is usually the reason for not respecting animal welfare and a justification for inflicting pain on farm animals. NGOs are fighting for a total ban of castration and therefore rearing entire male pigs. Welfare concern that implies this method resulted in many EU countries to take action. For example, France and Germany banned castration without anesthesia and Spain produces entire male pigs. “Over the last ten years, the number of entire males has been gradually increasing in Europe. (...) Social pressure suggest that the production of entire male pigs will continue to develop.”¹⁷⁵

d) Poultry and ducks

Broiler chickens are not legally protected against any concrete mutilations. Laying hens are covered by the *Council Directive*

¹⁷⁴ See e.g., PRUNIER, Armelle/BONNEAU, Michel/ BORELL, EH, “A review of the welfare consequences of surgical castration in piglets and the evaluation of non-surgical methods, *Animal Welfare*, Vol. 15. (2006), pp. 277-289.

¹⁷⁵ Van Ferneij, Jan-Peter, “The pig castration situation in the European Union”, https://www.pig333.com/articles/the-pig-castration-situation-in-the-european-union_18100/.

1999/74/EC, nevertheless its dedication to mutilations is very limited and only refers to beak trimming which Member States can authorize if they wish so. As a result, beak trimming is allowed in almost all the Member States.¹⁷⁶ Beak trimming is used to eliminate the feather pecking which means that one bird pulls the feathers of another. “Research demonstrates that infra-red beak trimming causes pain, and results in chicks eating and drinking less in the days following the treatment. The tip of the beak, being sensitive organ, contains nerves and these are damaged by beak-trimming.” Making birds’ nutrition rich in aminoacids reduces the risk of cannibalism and feather pecking as they are not forced to look for proteins. This should be accompanied with elimination of stressors such as high densities and bed ventilation, inappropriate lighting, etc.

Very controversial aspect of meat industry is the production of foie gras. Foie gras has a very special position given that it is banned according to the Art. 3 of European Convention for the protection of animals kept for farming purposes. Some EU countries expressly banned it. such as Germany, Italy and Czech Republic. However, there are countries that have a derogation because they perceive this practice as their regional heritage.¹⁷⁷

¹⁷⁶ SPOOLDER, Hand/ SCHÖNE, Maria/ BRACKE, *op. cit.*, p. 8.

¹⁷⁷ Art. 13 TFUE allows exceptions for legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

This practice which is generally considered as very cruel. FAO has pronounced that force feeding raises “serious animal welfare issues.”¹⁷⁸ *European Parliament* has also called for a ban of force feeding in its report on Farm to Fork Strategy. It called the Commission “to put forward proposals to ban the cruel and unnecessary force-feeding of ducks and geese for the production of *foie gras*.”¹⁷⁹ Unfortunately, *Parliament* has radically changed its position in its recent report according to which foie gras is in concordance with animal welfare requirements as 90% of ducks live in family farms, where they spend almost all day outside.¹⁸⁰ But “how is it possible to state that force-feeding animals by forcing tubes down their throats to pump in undesired amounts of feed are “procedures that respect animal welfare” and “their biological parameters?”¹⁸¹ Here we see the inconsistency in the position as well as a complete disregard to scientific evidence and public opinion. We hope that the Commission will take it into consideration while revising the animal welfare legislation.

e) Solutions

¹⁷⁸ FAO, “Fatty Liver or Foie Gras Production”, <https://www.fao.org/3/y4359e/y4359e0d.htm>.

¹⁷⁹ European Parliament, *European Parliament resolution of 10 June 2021 on the European Citizens’ Initiative “End the cage age”*, (2021/2633(RSP)), Art. 19.

¹⁸⁰ European Parliament, *Implementation report on on-farm animal welfare*, (2020/2085(INI)), Art. 31.

¹⁸¹ GUERREIRO, Francisco, EURACTIVE, “From Backing Bans to Foie Gras Fans: The Story Behind the European Parliament’s U-turn”, <https://www.euractiv.com/section/agriculture-food/news/from-backing-bans-to-foie-gras-fans-the-story-behind-the-european-parliaments-u-turn/>,

We can see that the mutilations performed to reduce or to eliminate undesirable behaviors of farm animals such as feather pecking, castration or tail docking reflect the inadequacies of current system of animal agriculture. These undesirable behaviors are triggered by the environment of factory farms that do not allow animals to behave naturally. There, their physical and etymological needs are not fulfilled. Problems in animal behavior created by current *modus operandi* of big commercial rearing systems are solved by painful procedures. This highlights the conflict between the welfarist and economic interests. Furthermore, there are also other reasons to mutilate, such as disease control or protection of personnel from harm. These reasons, as we have seen, are also provoked by the design of animal agriculture systems.

The Commission has announced that in its revisions of AW legislation focus will be also on the animal mutilations as the EU is aware that there are alternatives already in use in different Member States. It will be important however to adopt a very clear provisions, technical and financial support to farmers to ensure their willingness to implement these new restrictions. What will be proposed by the Commission in 2023 is unknown for now, but the examples provided above represent the most pressing issues in the area of cruel animal mutilations and likely they will be included in the reform. Specific steps that would help eliminate mutilations have been included in each particular section dedicated to specific farm animals. Overall, they include the reduction of quantities of animals in factory farms, a more natural lighting, use of anesthetics in case of inevitable procedures, improvement of their nutrition and ventilation, etc. In this way animals could express

themselves more naturally and the triggers leading to undesirable behaviors would be reduced. The ban on mutilations is therefore depended upon bigger reform of factory farming system, which will be discussed by the Commission in the revision of animal welfare legislation.

3) END THE CAGE AGE

In the previous chapter we have already written about the initiative “End the Cage Age” and its consequences for AW advancement. As a result of strong pressure from EU citizens, the EU has decided to proceed towards a total ban of cages used on farm animals, in particular laying hens, rabbits, broiler breeders, layer breeders, pullets, quail, geese, duck, farrowing crates for sows, sow stalls, individual calf pens.¹⁸² This is an unprecedented decision as it will require substantial changes in current factory farming system. However, with the foreseen safety net for the farmers in form of financial aids and technical support change is possible. The legislation should be adopted in 2027. Before that an online consultation process has been started with the EU public and the impact assessment will be made by the end of this year. There, a transition period will be determined as well as concrete support measures. This legislation will be based also upon scientific findings of the EFSA.

¹⁸² European Commission, “Questions and Answers: Commission’s Response to the European Citizens’ Initiative on ”End the Cage Age”, https://ec.europa.eu/commission/presscorner/detail/en/QANDA_21_3298.

The decision to ban the use of cages is a result of a pervasive public disagreement with current system of factory farming. The European Citizens' Initiative has been signed by more than 1,4 million EU citizens. The reason for this strong position is the fact that more than 300 million farm animals have to suffer in cages in the EU. According to the ECI, "this is cruel, unnecessary and has no place in Europe (...)." ¹⁸³ There is no need to describe in detail why are the cages considered cruel. Animals as same as humans have innate instincts irrespectively of where they are born and raised. "In addition to the physical suffering-muscle pain, skeletal deformities, respiratory illnesses, and other chronic ailments-caused by intensive confinement, being prevented from performing the most basic instinctual behaviors causes tremendous mental anguish." ¹⁸⁴ Impossibility to move, to stretch the wings or limbs, to groom themselves or to exercise prevent them from their natural behaviors. Studies have shown that when confined animals are freed, they immediately start to express their innate instincts such as dust-bathing or nest building in case of chickens. Also, it is easy to forget that farm animals are social animals, that live in their structured societies, where they know each other, where the hierarchy is established. In factory farms, confined animals are deprived of this important element which causes them stress and triggers undesirable tail dockings, plum pulling, etc.

¹⁸³ ENDTHECAGEAGE, "End the Cage Age", <https://www.endthecageage.eu>.

¹⁸⁴ PETA, "Animals in cages on factory farms or in laboratories don't suffer that much because they've never known anything else", <https://www.peta.org/about-peta/animals-in-cages-on-factory-farms-or-in-laboratories-dont-suffer-that-much-because-theyve-never-known-anything-else/>.

The future ban of cages represents an important development in farm AW confirming that the animal sentience is recognized in the EU and that economic consequences of higher AW standards can be tackled if there is a will. It also constitutes a transition towards more sustainable and ethical farming processes. An important aspect of this change is to make sure that this obligation will be applied to imported animal products. The Commission assesses the labelling system that would inform EU consumers whether or not the products proceed from cage systems and conditionalities in trade agreements demanding cage-free products. For this to happen, the Commission counts with technical and financial help to the exporters.¹⁸⁵

C) TOWARDS NEW FOOD SYSTEM

“The production of animal-based food is a threat to the climate, a cause of serious human diseases, a cause of suffering and killing animals.”¹⁸⁶

Sylwia Spurekm

Another set of reforms concerning farm animal welfare is the overall transformation of our food system. This change is necessary not only because of the ethical concerns for animal welfare, but also because of the environmental reasons, food security and global health. This reform needs to be international as its issues are intertwined and universal by nature. However, it is the EU that leads the change. Its strategies for a

¹⁸⁵ European Commission, *Communications from the Commission on the European Citizens' Initiative (ECI) "End the Cage Age"*, C(2021) 4747 final, 2021.

¹⁸⁶ SPUREK M Sylwia, TAPPC, “European Parliament Members Support Pricing Meat in Europe”, <https://www.tappcoalition.eu/nieuws/13149/european-parliament-members-support-pricing-meat-in-europe>.

more sustainable system count with a re-design of the model of how we grow our food and rear animals. As we know, the *EU Green Deal and Farm to fork strategy* accentuate the need for local, small-family farming, organic farming and inclusion of more plants into our diets. EU's position has been influenced by alarming scientific data.

For instance, the UN climate panel IPCC in its latest reports urged countries to fundamentally change current systems of land use and food patterns. The panel calls upon the decision makers to adopt reforms leading to plant-based diets and overall reduction of meat consumption. This transformation is necessary to effectively fight the climate emergency, protect biodiversity and prevent food shortages in the future. Scientific studies alarm us by stating that western countries have to cut pork and beef intake by alarming 90% if we want to survive next century.¹⁸⁷ Moreover, the environmental costs of current food production systems and the emissions caused by it will be double by 2050 due to the increase of population and adoption of western diet by developing countries.

Next, we will present strategies through which EU can achieve the transformation of food system: meat tax, subsidies to plant-based

¹⁸⁷ SPRINGMANN, Marco/ CLARK, Michael/ Mason- D' Croz, Daniel/ WIEBE. Kieth/ BODIRSKY, Benjamin Leon/ LASSALEETTA, Luis/ VERMUELEN. Sonja/ HERRERO, Mario/ CARLSON, Kimberly/ JONELL, Malin/ TROELL, Max/ DEEClerck, Fabrice/ GORDON, Line/ ZURAYK, Rami/ SCARBOROUGH, Peteer/ RAYNER, Mike/ LOKEN, Brent/ FANZO, Jess/ GODFRAY, H. Charsles, J./ TILMAN, David/ ROSCKSTROM, Johan/ WILLETT, Walter, "Options for keeping food system within environmental limits", *Nature*, Vol. 562, (2018), pp. 519-525.

sectors and to farmers making the AW and environmental adjustments and nutritional and animal welfare labeling. They furnish consumers with relevant information, increase transparency, protect domestic farmers, support the switch to a more plant-based diet and correct prices to reflect true costs of meat production.

1) FOOD LABELING

Under food labeling we can imagine nutritional information on the products, which help the consumers to make conscious choice and select healthier options is that is important for them. Labels can also reflect animal welfare standards applied on the animals from which the product was made. These labels allow consumers to direct their purchasing behaviour to ethically and environmentally friendly produce.

a) Nutritional values

One of the initiatives of *Farm to Fork strategy* is a revision of EU legislation on front-of-pack labelling. This is part of a mosaic that F2F aims to achieve: sustainable food system and consumption and reduction of food waste. The adoption of a harmonized labeling system is one of the most compelling regulatory initiatives with the objective to promote healthy choices by the consumers. By the end of 2022, the revision of *Regulation 1169/2011 on the provision of food information to consumer*¹⁸⁸ should be ready. Until now, according to the Regulation,

¹⁸⁸ Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive

nutrition labeling has been mandatory on pre-packed foods. However, there were no harmonized rules on the labelling format. This was a conscious decision of the legislators that wanted to see how different states would do it. After 6 years, it is time to assess the experience and impose harmonized front-of-pack information. There has been a public consultation where anyone could express their opinions on different labeling schemes and vote for the ones they liked. For now, it remains to be determined which scheme will be picked and what will be the responses of different food sectors.

b) Animal welfare information

Another element of food labels within the *Farm to Fork strategy* is the inclusion of AW information. This aims to “better transmit the value through the food chain,”¹⁸⁹ increase the transparency and give the consumer all the necessary knowledge on the methods of production.

In the EU, there are mandatory AW labels for table eggs that inform us on the type of housing, enrichment materials and space allowances. We can learn whether the laying hens were reared in cages, barn, cages, or in organic systems. This can be regarded as somewhat a precedent to global EU mandatory AW labels rollout. After this system has been

87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004, *OJ L 304*, 22.11.2011.

¹⁸⁹ European Commission, “Animal welfare labelling”, https://ec.europa.eu/food/animals/animal-welfare/other-aspects-animal-welfare/animal-welfare-labelling_en.

introduced, there was a considerable increase in consumer demands for cage-free eggs and as a result cage-free egg production grew.¹⁹⁰ There are also voluntary marketing standards applied to poultry meat and EU organic farming rules which “encourage a high standard of animal welfare and require farmers to meet the specific behavioural needs of animals.”¹⁹¹

In order to develop AW labels applied to all farmed animals, the EU Platform on Animal Welfare, a sub-group on AW labelling will provide technical assessment on this topic. In 2021, first conclusions were adopted. There, they confirm a growing interest of EU citizens in farm AW and their desire for higher transparency. As we have previously established, these attitudes are reflected in the purchasing choices. Directly connected with the purchase situation is the labeling which reflects the fact, that AW is an important value in the EU and that the citizens need better information in order to express their purchasing preferences. At the moment, AW labels “are unevenly developed in the Member States (...) However, the number of brands or labels using animal welfare claims has increased.”¹⁹² The multitude of different schemes and labels in different Member States leads to confusion and uncertainty. Therefore, a harmonized system is necessary. This is also

¹⁹⁰ FOODNAVIGATOR, “Animal welfare a la francaise: What Europe Can Learn From France’s Voluntary Labelling Scheme”, <https://www.foodnavigator.com/Article/2021/10/26/Etiquette-Bien-etre-Animal-What-can-Europe-learn-from-France-s-animal-welfare-labelling>.

¹⁹¹ European Commission, “Organics at a Glance”, https://ec.europa.eu/info/food-farming-fisheries/farming/organic-farming/organics-glance_en.

¹⁹² European Commission, *Conclusions of the animal welfare labelling subgroup of the EU Animal Welfare Platform*, DOC.2021.07202, Subgroup on animal welfare labeling, Art. 3.

confirmed by EU citizens as 47% of them “do not believe there is currently a sufficient choice of animal welfare friendly food products in shops and supermarket.”¹⁹³

The Subgroup taken these requests seriously and concluded that “the establishment of an EU animal welfare label could ensure an equivalent information level for consumers across the EU. It could also increase transparency in the market and provide better protection to EU producers who apply high standards.”¹⁹⁴ This would also meet the consumers’ demand for reliable and clear information on how farm animals are reared and give them the possibility to choose products aligned with their preferences. The proposition is to develop labels that reflect the quality of animal life during its entire existence, *i.e.*, including transport and slaughter. At the same time, the Subgroup stresses the importance to offer the farmers incentives to increase their AW standards.

The Subgroup foresees the labeling system to begin as voluntary as they see it as more achievable goal, with the commitment to evaluate mandatory labels later. NGOs regard this approach as conservative as voluntary labels could be adopted only by producers that are already committed to high AW standards. Logically, this label would not be used by producers with poor standards. Thusly, the impact of voluntary label could be very limited. At the same time, mandatory labeling is

¹⁹³ TNS Opinion & Social, Special Eurobarometer 442: November-December 2015, *Attitudes of Europeans towards Animal Welfare*, requested by Directorate General Health and Consumer Protection, European Commission, March 2016.

¹⁹⁴ *Ibid.*, Art 10.

getting more and more interest, for instance, Germany announced its plan to adopt it. Their Federal agricultural minister stated that “improving animal welfare cannot be achieved with zero costs” and that “I won’t continue to accept the exploitative system.”¹⁹⁵

Concrete proposals for animal welfare labeling are yet to be seen. Will the Commission take more daring step towards mandatory AW labels, or will it stay more conservative and suggest voluntary schemes? From our perspective, in concordance with recent developments, such as general cage ban there is hope for more stringent approach to labeling.

2) CONSUMPTION TAX ON ENVIRONMENTAL BASIS

EU citizens eat around 68 kg meat per year, which is considerably more than the dietary guidelines recommendations.¹⁹⁶ The EU represents 6,8 % of the world’s population, nonetheless it counts for 16 % of the total world’s meat consumption.¹⁹⁷ The EU citizens create averagely a food footprint of 1070 kg of CO₂ equivalent per year. “Emissions here account for the direct food consumption and the feed used in the

¹⁹⁵ FOODNAVIGATOR, “Labelling and the Farm to Fork Strategy: The Commission is Moving Towards Mandatory Front-of-Pack Nutrition Labels”, <https://www.foodnavigator.com/Article/2022/02/16/labelling-and-the-farm-to-fork-strategy-the-commission-is-moving-towards-mandatory-front-of-pack-nutrition-labels>.

¹⁹⁶ Conference on the Future of Europe, “Taxes on Meat to Improve Health & Reduced VAT on healthy Food”, <https://futureu.europa.eu/processes/Health/f/3/proposals/3697>. A healthy and sustainable diet would consist of 10 to 16 kg meat per capita per year. See e.g., WILLER, Walter, at all, “Food in the Anthropocene: the EAT_ LANCET Commission on healthy diets from sustainable food systems”, *The Lancet Commissions*, Vol. 393, No. 10170, (2019), pp. 447-492.

¹⁹⁷ TAPPC, “Aligning Food Pricing Policies with the European Green Deal”, 2020, p. 34, <https://drive.google.com/file/d/1TuFb2z75vacNpLR97Nx-Gb15PnxEvQKH/view>.

production of the animal products that were consumed.”¹⁹⁸ In addition, the global meat production is estimated to increase by large 25% in 2030.¹⁹⁹ High meat consumption in EU contributes not only to climate emergency but also to animal and human health problems. The consequences of current rearing agro-system are well documented and because of all the negative implications, the proposals for actions on carbon-intensive products in form of increased levies have emerged. The intelligent meat tax is a chance to put the prices of meat in alignment with the *European Green Deal*. This action is supported by experts, scientists, and health professionals²⁰⁰ and it is expected to reduce the meat consumption by a 50% by 2030.²⁰¹

The meat tax or consumption tax on environmental basis has been suggested to the EU by a Dutch NGO named TAPP, that proposes the “polluter pays principle” according to which if we order steak at the restaurant, or we buy at the store, this should come with a premium because of the damage that is causing to the environment. There are, however, several questions associated with this step, such as how big the financial burden for poorer families would be, what tax level would be appropriate and what would be the impact on the farmers. The TAPP answers to these worries by a prepared taxation system, that takes

¹⁹⁸ SANDSTROM, VILMA, VALIN, Hugo, Havlík, Petr, KASTNER, Thomas, “The Role of Trade in the Greenhouse Gas Footprints of EU Diets”, *Global Food Security*, Vol. 19, (2018), p. 51.

¹⁹⁹ FAO, “Livestock Production”, <https://www.fao.org/3/y4252e/y4252e07.htm>.

²⁰⁰ See e.g., UK Health Alliance on Climate Change, All-Consuming: Building a Healthier Food System for People and Planet”, <http://www.ukhealthalliance.org/wp-content/uploads/2020/11/UKHACC-ALL-Consuming-Building-a-Healthier-Food-System-for-People-Planet.pdf>.

²⁰¹ TAPPC, *op. cit.*, p. 16.

into account the true costs of meat production and consumption such as the healthcare and environmental costs. The tax revenues are planned to be used as compensations for farmers for their contribution to sustainability and higher AW standards. Also, they would be used for tax reductions on fruits and vegetables, making them more affordable. Reduced VAT tariffs on plant-based products, fruits and vegetables have been already applied in ten EU countries.²⁰² In the end this tax should not be understood as “a penalty on meat consumption. It is about an additional price that should have been in the fair meat price for long time, in order to pay for the real social costs of meat. Thus, revenues will go back to society in transparent manner: directly to farmers and consumers, but also indirectly to the environment, animal welfare and health.”²⁰³

In numbers, the fair meat prices in the EU could bring revenues up to 32 billion euros per year from which 10 to 15 billion per year could be used as payments to farmers in form of sustainability income support, 7 to 12 billion per year for subsidies, lower VAT on plant-based food and organic food and 6 billion could be used as compensations for low-income households to make animal-based products more affordable. Another 4 billion could go to developing countries to help them reduce greenhouse gasses and protect their nature.²⁰⁴ Fair EU meat prices are according to TPPI 17 to 47 eurocent per 100 gram of meat, and would

²⁰² EPHA, “Minimum VAT on fruit and vegetables”, <https://epha.org/living-environments-mapping-food-environments-vat/>. These countries are Cyprus, Ireland, Italy, Latvia, Liechtenstein, Luxembourg, Malta, Spain, Switzerland, United Kingdom.

²⁰³ TAPPC, *op. cit.*, p. 12.

²⁰⁴ *Ibid.*, p. 34.

lead to 30% less chicken consumption, 57% less pork and 67% less beef consumption in 2030.²⁰⁵

Meat tax is well received in the western countries, where 70% of the consumers in Germany, Netherlands and France representing 40% of the EU population support it, provided that the revenues are used to reduce the VAT on fruits and vegetables.²⁰⁶ We predict negative responses as well, when the meat tax can be perceived as moral imposition that punishes consumers for eating animal-based products. For this not to happen it is important to create educational marketing campaigns. The meat tax will be first presented in the Netherlands²⁰⁷ and the EU will be closely observing. Germany,²⁰⁸ and Spain²⁰⁹ are also considering it. Danish Parliament has presented a legislative agreement

²⁰⁵ *Ibid.*

²⁰⁶ TAPPC/FOUR PAWS/ DVJINSIGHTS, “European Consumers Support Higher Meat Prices”, <https://tappcoalitie.nl/images/TAPP-Coalition-Consumer-Research-Survey-Results-1606202904.pdf>.

²⁰⁷ RIJKSOVERHEID, “Beantwoording Kamervragen over geannoteerde agenda Landbouw- en Visserijraad februari 2021”, <https://www.rijksoverheid.nl/documenten/kamerstukken/2021/03/09/beantwoording-kamervragen-over-geannoteerde-agenda-landbouw--en-visserijraad-februari-2021>.

²⁰⁸ BUNDESMINISTERIUM FÜR ERNÄHRUNG UND LANDWIRTSCHAFT, “Politik für eine nachhaltigere Ernährung: Eine integrierte Ernährungspolitik entwickeln und faire Ernährungsumgebungen gestalten - WBAE-Gutachten”, 2020, https://www.bmel.de/SharedDocs/Downloads/DE/_Ministerium/Beiraete/agrarpolitik/wbae-gutachten-nachhaltige-ernaehrung.pdf?__blob=publicationFile&v=3.

²⁰⁹ In 2011, Spain increased VAT tariff imposed on meat from 8% to 10% and at the same time reduced VAT tariff on fruits and vegetables to 4%. See TAS-CONSULTORÍA, VAT rates in Spain”, <https://www.tas-consultoria.com/blog-en/rates-vat-spain/>. However, there is a recent campaign of Ministry of Consumer Affairs “Less meat, more lives” and proposes to increase the tax on meat. See e.g., GARZÓN, Alberto, EL DIARIO, “Menos carne, más vida”, https://www.eldiario.es/opinion/tribuna-abierta/carne-vida_129_8110291.html.

on CO2 tax applied to all sectors; agriculture included in 2023. Government will revisit this possibility.²¹⁰

Creation of a Pan-EU meat tax will face many difficulties due to high heterogeneity of farming sector and per capita meat consumption. “Farm sizes, pricing, production costs, farmer incomes, economic profitability vary vastly across borders, especially between the extreme corners of Europe.”²¹¹ Different climate and geographic conditions also complicate uniform meat taxes. It will be therefore fundamental to conduct an open dialogue with the Member States and all the actors involved. There will be clearly many obstacles in creating the EU meat tax. Despite that, the benefits of it are very broad and tackle such important topics as climate crisis, biodiversity, and food security. Meat tax could effectively lead to the reduction of emissions, biodiversity loss and land protection while protecting health of the Europeans as well as giving back to AW and environmentally friendly farmers. With lower prices for vegetables and fruits, the consumption of fresh produce is expected to raise. Ultimately, the adoption of meat tax by the EU as a global leader in climate-related policies, would set an important precedent for the creation of a sustainable livestock sector. Furthermore, the meat consumption reduction mechanisms should be first adopted by countries with high meat consumption which are the OECD and EU states.

²¹⁰ COCAP, “Danis Parliament secures “world’s most ambitious” climate law”, <https://www.copcap.com/news/danish-parliament-secures-worlds-most-ambitious-climate-law>.

²¹¹ STATECRAFT, “Should the EU Implement a Meat Tax?”, <https://www.statecraft.co.in/article/should-the-eu-implement-a-meat-tax>.

To conclude this subchapter, change of the global food system is inevitable as documented by scientific reports.²¹² The growth of dairy and meat products prevents to achieve the goals of Paris agreement, contributes to the climate catastrophe²¹³ as well as to health problems and plight to animals. Governmental policies are crucial for this change to happen. In our pragmatic view, most people will not change their eating habits because their steak contributes to climate change or because it causes unimaginable pain to animals. Even though all these consequences of animal-based products are known, especially for last ten years, most people will continue to eat meat because most people will continue to eat meat.²¹⁴ The need to conform is very strong in human society and not to stand out is more important for us than we might think. People “will change only when they are persuaded that it is healthier for them, or more convenient, or less expensive, or perhaps when so many people become vegan that they begin to worry about standing out from the mainstream and being publicly shamed for a diet that has come to be seen as barbaric.”²¹⁵ The correction in prices via meat taxes and spreading the knowledge via nutritional and AW labelling are effective tactics to lead the society towards healthier and environmentally friendly life in which animal suffering is eliminated as much as possible. And despite the fact that these reforms, achieved at

²¹² See, e.g., CLARK, Michael/ DOMINGO, Nina/ COLGAN, Kimberly/ THAKRAR, Sumil/ TILMAN, DAVID/ LYNCH, John/ AZEVEDO, Inés/ HILL, Jason, “Global food system emissions could preclude achieving the 1.5° and 2° climate change targets”, *Science*, Vol. 370, No. 6517, (2020), pp. 705-708.

²¹³ TAPPC, *op. cit.*, p. 35.

²¹⁴ LEENAERT, Tobias, *How to create a vegan world*, New York 2017, p. 16.

²¹⁵ SINGER, Peter, Preface in *Ibid.*, p. xvi.

the EU level will only represent regional victories, they have potential to inspire other countries to follow the lead.

To close this chapter, we can resume that although EU farm animal welfare framework is the most advanced in the world, it has serious gaps that maintain many of the cruel practices of factory farms alive. The underlying reason for these limitations is the fact that animals are still predominantly seen as goods to be traded and used rather than the sentient beings that can feel pain and suffer. Because of that, economic interests have a primacy over animal welfare considerations. This is however, slowly changing as seen in the example of ending the cage age. We hope that awaiting revision of AW legislation will be daring and push the animals at the forefront of EU's priorities.

CHAPTER IX

FUTURE OF INTERNATIONAL ANIMAL LAW

Closing chapter of our dissertation will be dedicated to ways in which international animal welfare protection can advance. First, we will present European Union as a normative power with global impact in animal welfare. Via the externalization of its norms, the EU¹ is expanding its advanced model of animal welfare beyond its borders, spreading higher standards to corners of the world that lack any meaningful laws on animals. In this way, EU contributes to the creation of better international animal welfare protection.

However, despite its positive role in the global amelioration of animal lives, we must critically acknowledge, in the second subchapter, the limits of any regional advancement. As we will see, international trade can easily circumvent any parochial achievements and thwart the efforts done so far via the relocation or outsourcing. Agricultural animals, as well as other animals, are part of a global businesses that thrive on global markets, in which economic interests have a decisive role. Powerful market forces hamper animal welfare efforts adopted on national or regional levels. Moreover, as has been previously shown, animal welfare issues are inherently interlaced with enormous environmental (ecological and climatic), ethical and social consequences encompassing the entire world. Consequently, global answers are inevitable in order to solve a global problem. This will be the focus of the last subchapter,

¹ European Union.

dedicated to possible future normative developments of international animal law: international multilateral treaty and soft law advancements.

A) EU: A MAJOR FORCE IN INTERNATIONAL DISSEMINATION OF ANIMAL WELFARE STANDARDS

*“The EU is widely respected in the world, not particularly because it is a large trading unit but because it has adopted many policies and much legislation for moral reasons. (...) Policies on the various components of sustainability, especially the global environment and animal welfare, are key contributors to the high reputation of the EU.”*²

Donald Broom

Previous chapters showed us that the EU has acquired global animal welfare leadership. This does not benefit only animals within the European Union as the EU has adopted decisive regulatory measures that impact animal welfare globally. As a result, EU is a player with vast regulatory effect on the diffusion of AW³ standards. Traces of this statements are visible already from the chapter no. VII when writing about the trade agreements and specifically the “Slaughter Directive’s”⁴

² BROOM, Donald, *Animal Welfare in the European Union*, Commissioned by Directorate-General for Internal Policies, European Policy Department, Citizen’s Rights and Constitutional Affairs, Petitions (PE 583.114), 2017, p. 28.

³ Animal welfare.

⁴ Council Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing, *OJ L 340*, 31.12.1993. Here we can talk about the multilateral cooperation through which EU’s animal welfare standards are being exported. In this case, the EU is actively promoting its animal welfare norms. Also, this could be seen as an example of selfless jurisdiction, or the exercise of jurisdiction in the common interest through which states safeguard important global values. The examples of this corrective cosmopolitan justice are the application of trade measures as conditions for entering their markets. This is very effective tool to eliminate the offshoring. *See more in the chapter no. II, C), 2).*

equivalence principle and their positive impact on third countries' animal welfare standards. exported. Also, our analysis of the "Seal case"⁵ in chapter no. III represents one of the examples where the EU influences animal welfare outside its borders, in this case via the import bans on the seal products. However, there are more examples witnessing the international influence of EU on AW activities, policies, and legislation.

On the following pages we will present three different mechanisms through which the EU's animal welfare standards reach foreign companies, governments, and international organizations. First, the "Brussels Effect" which is the EU's capacity to export norms *de facto* or *de jure*. To illustrate the "Brussels Effect" we will determine the EU's impact on corporate animal welfare policies and the impact on third countries' legislation. Second, we will determine the EU's bargaining power that can be seen in its influence on international organizations and third, its creation of capacity in thirds countries via animal welfare international actives. In this way we will understand the different ramifications of EU's influence on international animal welfare development. As a result, we will see that the EU is a powerful global actor with strong normative impact that is capable of externalizing its interests beyond its borders.⁶ Its regulatory clout in animal welfare area is unique on international level and represents one important way of advancing animal protection internationally.

⁵ Appellate Body Report, *European Communities- Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, (adopted Jun.16.2014).

⁶ BRADFORD, Anu, *The Brussels Effect: How the European Union Rules the World*, Oxford, New York 2019, p. x.

1) THE “BRUSSELS EFFECT”

First mechanism that refers to the “EU’s unilateral ability to regulate the global marketplace”⁷ is the so-called “Brussels Effect”. According to Anu Bradford, the “Brussels Effect” “refers to the EU’s unilateral power to regulate global markets.”⁸ It is a “phenomenon where the markets are transmitting the EU’s regulations to both market participants and regulators outside the EU. In these instances, the EU does not have to do anything except regulate its own market to exercise global regulatory power.”⁹ EU is capable of exercising the “Brussels Effect” given two conditions: first, EU is a large economy, a global player in the market. Market size is, however, not enough. EU has the capacity to spread its norms also because it “has built an institutional architecture that has converted its market size into a tangible regulatory influence.”¹⁰ Important thing to understand here is that it is the market forces that globalize some of the EU norms, EU does not decide by itself, under the “Brussels Effect”, which norms will be exported.¹¹

There are two types of “Brussels Effect”: *de jure* and *de facto*. The *de facto Brussels Effect* “explains how global corporations respond to EU regulations by adjusting their global conduct to EU rules”¹² while *de jure Brussels Effect* “refers to the adoption of EU-style regulations by foreign

⁷ *Ibid.*, p. 1.

⁸ *Ibid.*, p. xiv.

⁹ *Ibid.*, p. 2.

¹⁰ *Ibid.*, p. 24.

¹¹ *Ibid.*, p. 25.

¹² *Ibid.*

governments (...)"¹³ *Stricto sensu*, this happens “after multinational companies have adjusted their global conduct to conform to EU rules, they have the incentive to lobby EU-style regulations in their home jurisdictions.”¹⁴ However, foreign governments adopt EU-like norms usually as a result of complicated process with various factors involved, where *de facto Brussels Effect* is just one of them. EU transmits its regulations to other jurisdictions also via trade and political treaties and international organizations.¹⁵

a) De facto Brussels Effect: Impact on corporate policies

First, we will see the changes in the corporate policies around the world resulting from EU’s advancement in animal welfare protection. Here we will refer to the *de facto Brussels Effect* of the EU animal welfare policies.

De facto Brussels Effect in case of animal welfare can be seen via the *Directive 2008/119/EC*¹⁶ protecting calf welfare banning the veal crates that restrict their movements, not allowing any form of exercise or even possibility to scratch themselves and to groom. This Directive has had impact on the United States where different meat associations and producers reacted to the EU ban by converting the veal housing. For example, the company Strauss Veal & Lamb International said that it “is committed to raising veal calves in a more human manner. The

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Council Directive 2008/119/EC of 18 December 2008 laying down minimum standards for the protection of calves (Codified version), *OJ L 10*, 15.1.2009.

company's goal is to be 100-percent converted to raising calved by the European-style, group-raised method within the next two to three years.”¹⁷ “This quote suggests that the EU regulation has at least informed the change (...)”¹⁸

The *Directive 2007/43/EC*¹⁹ protecting broilers had a similar effect. It has impacted the standards of food companies in Thailand and Argentina in the chicken meat production field. Growing numbers of their products now comply with these food company standards influenced by the EU legislation.²⁰ More specifically, we refer to the minimum environmental conditions for maximum stocking densities such as ventilation, cooling, and heating systems, NH₃ and CO₂ concentrations and humidity. The *Directive 1999/74/EC*²¹ banning battery cages and setting minimum space per laying hen has had considerable impact around the world. Similar retail company standards are now in place in USA, India, New Zealand, Taiwan, and Australia.²²

¹⁷ THE HUMAN SOCIETY, “An HSUS Report: The Welfare of Animals in the Veal Industry”, p. 2, <https://www.humanesociety.org/sites/default/files/archive/assets/pdfs/farm/hsus-the-welfare-of-animals-in-the-veal-industry-b.pdf>.

¹⁸ BRADFORD, Anu, *op. cit.*, p. 218.

¹⁹ Council Directive 2007/43/EC of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production, *OJ L 182*, 12.7.2007.

²⁰ BOWELS, D./ PASKIN, R./ GUITÉRREZ, M./ KATERINE. A./, “Animal welfare and developing countries: opportunities for trade in high-welfare products from developing countries”, *Rev. sci. tech. Off. Int. Epiz.*, Vol. 24, No. 2, (2005), p. 783-790.

²¹ Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens, *OJ L 203*, 3.8.1999.

²² BROOM, David, *op. cit.*, p. 31.

Companies such as McDonald's,²³ Subway,²⁴ Starbucks,²⁵ Burger King,²⁶ Taco Bell,²⁷ KFC,²⁸ Pepsico,²⁹ Nestlé,³⁰ Unilever,³¹ Carrefour Taiwan,³² The Happy Hens Farm,³³ are adopting cage-free standards.

²³ Globally by 2025. *See e.g.*, McDonalds, “Sharing Progress on our Cage-Free Egg Commitment”, https://corporate.mcdonalds.com/corpmcd/en-us/our-stories/article/ourstories.cage_free_farmer.html.

²⁴ In Australia and Europe and by 2025 in North America. *See e.g.*, SUBWAY, “Sustainable Sourcing”, <https://www.subway.com/ES-CO/AboutUs/SocialResponsibility/SustainableSourcing>.

²⁵ In North America. *See e.g.*, STARBUCKS, “Animal Welfare-Friendly Practices”, <https://stories.starbucks.com/press/2018/animal-welfare-friendly-practices/>.

²⁶ In US and by 2025 globally. *See e.g.*, ALBERT SCHWEITZER FOUNDATIONS, “Burger King Says No to Cage Eggs Worldwide”, <https://albertschweitzerfoundation.org/news/burger-king-says-no-to-cage-eggs-worldwide>.

²⁷ In US. In Europe by 2025. *See e.g.*, THE POULTRY SITE, “Taco Bell to end the use of cage eggs in its European supply chain”, <https://www.thepoultrysite.com/news/2021/08/taco-bell-to-end-the-use-of-cage-eggs-in-its-european-supply-chain>.

²⁸ In Australia and by 2030 globally. *See e.g.*, YUM, “YUM! Brands Updates Global Cage-Free Egg Policy”, <https://www.yum.com/wps/portal/yumbrands/Yumbrands/news/press-releases/yum+brands+updates+global+cage+free+egg+policy>.

²⁹ In US and by 2025 globally. *See e.g.*, PEPSICO, “Animal Welfare”, <https://www.pepsico.com/esg-topics-a-z/animal-welfare>.

³⁰ In US and by 2025 globally. *See e.g.*, GREEN, Missy, “Nestlé urges EU animal welfare overhaul as it reaches cage-free egg targets”, <https://www.foodingredientsfirst.com/news/nestle-urges-eu-animal-welfare-overhaul-as-it-reaches-cage-free-egg-targets.html>.

³¹ Globally. *See, e.g.*, UNILEVER, “Farm animal welfare”, <https://www.unilever.com/planet-and-society/responsible-business/farm-animal-welfare/>.

³² POINTING, Charlotte, “Carrefour Taiwan is the First Supermarket in Asia to Commit to Cage-Free Eggs”, <https://www.livekindly.co/carrefour-taiwan-first-supermarket-asia-commit-cage-free-eggs/>.

³³ In India. *See e.g.*, THEHAPPYHENSFARM, “Farm to Home”, <https://www.thehappyhensfarm.com>.

Similarly, the EU pig welfare policies³⁴ have been followed by Australian supermarket chains that banned the close confinement of pregnant sows.³⁵ “In several other countries, including Brazil, the EU lead is likely to be followed.”³⁶ In Brazil, we can see the relevant impact of the EU on the shift in the approach of industries and farmers regarding the importance of AW. “Key players in the meat sector have released AW policy commitments, namely in what regards the transition from crates to collective gestation systems for breeding sows.”³⁷ This is the case of their first³⁸ and second largest pork producers.³⁹

*The Regulation No 1/2005*⁴⁰ on animal transport has also sparked changes in non-EU companies. Better said it was the ECJ’s decision based on

³⁴ Council Directive 2008/120/EC of 18 December laying down minimum standards for the protection of pigs (Codified version), *OJ L 47*, 18.2.2009.

³⁵ *Ibid.* See for example: KRUGER, PAULA, “Coles urged to extend sow stall ban”, <https://www.abc.net.au/news/2010-07-22/coles-urged-to-extend-sow-stall-ban/915952>; SMITH, Alexandra, “More piglets born free as producers voluntarily phase out sow stalls”, <https://www.smh.com.au/environment/conservation/more-piglets-born-free-as-producers-voluntarily-phase-out-sow-stalls-20120415-1x1n8.html>.

³⁶ *Ibid.*

³⁷ *Ibid.*, p. 67.

³⁸ WORLD ANIMAL PROTECTION, “Leading the way: global pig producers say no to sow stalls”, https://www.worldanimalprotection.org/sites/default/files/media/int_files/pigs_global_business_case_final_0.pdf.

³⁹ PERRETT, Michelle, “End of gestation crates for JBS SA” <https://www.foodnavigator-usa.com/Article/2015/06/09/End-of-gestation-crates-for-JBS-SA>.

⁴⁰ Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97, *OJ L 3*, 5.1.2005.

this Regulation that made the impact. In its decision *Zuchtviieb-Export*,⁴¹ the ECJ ruled that the conditions for the transport of livestock also apply to the part of the journey outside of the Union. In particular, in the case of journey which begins in the EU and continues outside of its territory, the transport company must present a logbook which is realistic in terms of the conditions that have to be met allows compliance with the Regulation. This applies also to the section of the journey carried out outside of the EU. “Here, the Brussels Effect is driven by technical non-divisibility-the non-divisibility of geographic distance in animal transport-which obliges the transport company to obey EU animal welfare regulations even with respect to the part of the journey that takes place outside the EU.”⁴²

b) De jure Brussels Effect: Impact on third countries' legislation

There is also a *de jure Brussels Effect* of EU AW activities, *i.e.*, their influence on the legislative changes in third countries.⁴³ “EU legislation on many animals has had influence on animal welfare policies, legislation and code of practice in other countries.”⁴⁴ This is because the EU AW policies are based on strong grounds that we have already analyzed. It is the combination of strong ethical reasoning and scientific evidence explained in reports, guidance documents and surveys preceding the adoption of directives and regulations that have influence

⁴¹ Judgment of the Court of 23 April 2015 (request for a preliminary ruling from the Bayerischer Verwaltungsgerichtshof-Germany)- *Zuchtviieb-Export GmbH v Stadt Kemten*, Case C-424/13, EU:C:2015:259.

⁴² BRADFORD, Anu, *op. cit.*, p. 199.

⁴³ *Ibid.*, p. 225.

⁴⁴ BROOM, David, *op. cit.*, p. 28.

on the third countries and their willingness to adopt AW regulation.⁴⁵ “Hence the policy in the EU of basing laws on scientific review and the results of Eurobarometer and other objective surveys is altering what happens in third countries.”⁴⁶

For example, the Directive phasing out the use of veal crates⁴⁷ improved considerably the calve welfare in the EU. “Since that Directive in the EU, many countries and states have initiated legislation ensuring that only conditions that lead to good welfare of calves is permitted.”⁴⁸ These are for example, Arizona, California, Colorado, Kentucky, Maine, Michigan, Massachusetts, Ohio, Rhode Island.⁴⁹

Similarly, the Directive banning battery cages for hens⁵⁰ “has had much influence around the world. Similar legislation (...) are now in place in New Zealand, India, Taiwan, an Australian state, and several states of the USA. (...) The EU legislation, rather than solely EU consumer attitudes, has been a major factor in this world-wide change, which is accelerating.”⁵¹

Furthermore, the EU ban on close confinement of pregnant sows⁵² has

⁴⁵ *Ibid.*, p. 29.

⁴⁶ *Ibid.*

⁴⁷ Council Directive 2008/119/EC, *op. cit.*

⁴⁸ BROOM, David, *op. cit.*, p. 31.

⁴⁹ CIWF, “US states banning veal crates”, <https://www.ciwf.com/farmed-animals/cows/veal-calves/higher-welfare/>.

⁵⁰ Council Directive 1999/74/EC, *op. cit.*

⁵¹ BROOM, David, *op. cit.*, p. 31.

⁵² Council Directive 2008/120/EC, *op. cit.*

inspired Australia, Canada, New Zealand and some states in the USA.⁵³ New Zealand in its report on pig welfare mentions “EU standards and legislation as point of comparison.”⁵⁴ For example, “[p]roducer compensation has been effective at retaining animal welfare friendly production in the European countries.”⁵⁵ Or “[l]egislation in the European Union allows for the use of farrowing crates at the present time due to the current lack of viable alternatives.”⁵⁶ “The EU legislation (...) will limit the time pigs are kept in sow stalls to a maximum of 4 weeks during each gestation. Australia will limit the use of sow stalls to a maximum of 6 weeks from 2018.”⁵⁷ This implies that “foreign governments also refer to EU laws in their government reports and other legislative documents, suggesting that they are at least partially emulating the EU in their own legislative endeavors.”⁵⁸ Or in Canada “[a] review of the animal welfare standards and initiatives from eight European countries was performed to assess the scientific relevance of standards and their strengths and weakness with regards to protecting animal welfare.”⁵⁹

⁵³ BROOM, Donald, *op. cit.*, p. 31.

⁵⁴ BRADFORD, Anu, *op. cit.*, p. 226.

⁵⁵ Ministry for Primary Industries, New Zealand, “Animal welfare (pigs) code of welfare 2010”, Report, 2010, p. 29, <https://www.mpi.govt.nz/dmsdocument/46123-Pigs-Animal-Welfare-Code-of-Welfare-2010-Review-of-Submissions-and-Update>.

⁵⁶ *Ibid.*, p. 2.

⁵⁷ *Ibid.*, 29.

⁵⁸ BRADFORD, Anu, *op. cit.*, p. 226.

⁵⁹ National farm animal care council, “Five Year review summary report code of practice for the care and handling of pigs”, 2020, p. 57, National farm animal care council, “Five Year review summary report code of practice for the care and handling of pigs”, p. 57, https://www.nfacc.ca/pdfs/codes/public-comment-periods/pig/2019%20Pig%20code%20review%20CTP%20Summary%20Report_EN_final.pdf.

Similarly, the *Directive 93/119/EC* on requirements for stunning before slaughter and the scientific reports backing up the legislation influenced third countries. They have had a wide-ranging effect also thanks to the OIE standards on the matter that reflected the EU position. Moreover, as we already know, for third countries to export meat to the EU, they have to comply with equivalence principle of the Directive.⁶⁰ Given the mandatory nature of the equivalence condition, the Directive has significantly contributed to the amelioration of stunning practices abroad. The audits performed by the Commission showed high level of compliance however, there was a common practice of having dual procedures, one applying for EU exports, and another for the other markets.⁶¹ The audits showed that third countries benefited especially from the EU's technical assistance.⁶²

Consequently, we can confirm that the EU has exercised a very important and notable part in raising apprehension over animal welfare standards on a global level. The EU started a “policy dialogue on the subject and increase[ed] the standing of AW policy among Government institutions. It has also been successful in facilitating incorporation of AW standards in the legislation of many non-EU Countries across the globe.”⁶³ This realization reinforces our premise according to which EU farm animal welfare norms represent public interest norms (with regional character) with capacity to impact global agendas which in

⁶⁰ See Chapter no. VII, A).

⁶¹ European Commission, Directorate-General for Health and Food Safety, *Study on the impact of animal welfare international activities: executive summary: final report*, Publication Office 2017, p. 28.

⁶² *Ibid.*

⁶³ BROOM, Donald, *op. cit.*, p. 209.

addition represent an example of possible future international animal law norms.

2) IMPACT ON INTERNATIONAL ORGANIZATIONS

European Union, more specifically the Commission, exercises an important role in promoting animal welfare in multilateral arena via the cooperation with various international organizations such as the World Organization for Animal Health,⁶⁴ Food and Agriculture Organization,⁶⁵ The World Bank, Organization for Economic Co-operation and Development,⁶⁶ etc. The Commission understands that if EU animal welfare model aspires to be sustainable, it needs to be spread internationally via different organizations. “The overall objective of the Commission’s international activities on animal welfare is promoting EU values regarding animals, to raise awareness and encourage globally, particularly with EU-trading partners, high animal welfare standards, reflecting the EU model and principles.”⁶⁷ As a result, “[a]t multi-lateral level, the activities carried out with international organizations have promoted the EU model on animal welfare in a high number of non-EU countries.”⁶⁸

a) EU and OIE

⁶⁴ Hereinafter the OIE.

⁶⁵ Hereinafter the FAO.

⁶⁶ Hereinafter the OECD.

⁶⁷ *Ibid.*, p. 1.

⁶⁸ European Commission, *Report from the Commission to the European Parliament and the Council On the impact of animal welfare international activities on the competitiveness of European livestock producers in a globalized world*, COM(2018) 42 final, p. 9.

EU supported the OIE⁶⁹ in its activities as an important contributor to the creation and application of its standards on farm animal welfare. It has also been proactively fostering the participation in these standards of many non-EU countries.⁷⁰ “The EU has been the best commenter during the standards setting process, invariably providing meaningful comments before and during each OIE General Assembly.”⁷¹ This is because the OIE is science based and as we know, the EU legislation is also backed by multiple studies and research. This “ensures the Commission’s capacity to formulate sensible comments (as well as the conformity between the OIE standards and the EU requirements.”⁷² In fact, the OIE standards reflect to a large part, the EU principles on animal welfare and in this way the EU sets the tone on the international level. The Commission is involved in the standard setting process via its working groups. “The Commission indeed plays a key role in order to present EU common positions at each consultation step and at the moment of adoption of the standards by the OIE. It also provides financial support and co-organizes events that facilitate the application of these standards.⁷³ These activities help with the skills concerning animal welfare of authorities especially in non-EU countries. In addition, different events, such as conferences are important elements of awareness raising, contributing to the dissemination of animal welfare message to non-EU countries. International debate on the

⁶⁹ The World Organization for Animal Health.

⁷⁰ European Commission, COM(2018) 42 final, *op. cit.*, p. 9.

⁷¹ BROOM, Donald, *op. cit.*, p. 83.

⁷² *Ibid.*

⁷³ European Commission, COM(2018) 42 final, *op. cit.*, p. 3.

matter is essential for engaging professionals, NGOs and governments in the development of animal welfare.

b) EU and FAO

As we have seen in the chapter no. V, FAO has had concern for animal welfare, and it is taken into account in its activities. For FAO, AW “is treated as a global public good within the context of a responsible development of the livestock sector that contributes towards the achievement of FAO’s mandate.”⁷⁴ FAO is one of the main intergovernmental partners of the European Food Safety Authority, the European Social and Economic Committee and the European Commission on AW matters. FAO’s activities and policies are influenced by the EU animal welfare framework and *vice versa*. As a result, “an increasing number of FAO member countries have requested FAO to assist with the improvement of their animal welfare legislation and develop related capacities, in view of the trade implications that the EU’s animal welfare standards have on countries that export, or want to export, animal products to the UE.”⁷⁵ In this context, the FAO’s member states are committed to improve their AW standards inspired in EU legal framework.

In addition, the Commission has collaborated with FAO in preparation of different events focused on disseminating the idea of animal welfare as public good and element of sustainable food system. These were, for instance, “FAO Expert meeting on capacity building to implement

⁷⁴ BROOM, Donald, *op. cit.*, p. 30.

⁷⁵ FAO, “Review of animal welfare legislation in the beef, pork, and poultry industries”, 2014, p. V, <https://www.fao.org/3/i4002e/i4002e.pdf>.

good animal welfare practices” and the creation of “Gateway to Farm Animal Welfare”. In the expert meeting the Commission contributed with essential inputs regarding the implementation of AW standards in developing countries. Commission also helped to develop the “Gateway”, a website with access to national and international information on farm animal welfare providing latest news to governments and professionals, Commission is member of the Editorial Board and though this forum contributes to raising the awareness on AW related matters.

c) EU and the International Finance Corporation

The International Finance Corporation⁷⁶ forms part of the World Bank Group and it represents the “largest multilateral financial institutional investing in private enterprises in emerging markets.”⁷⁷ The IFC adopted documents related to animal welfare with the aim to invest in projects that involve the amelioration of AW and contribute to food security and sustainability. Its good practice note “Improving Animal Welfare in Livestock Operations”⁷⁸ on which collaborated the Commission, focuses on investments in businesses that enhance animal welfare as they “are likely to win or retain a competitive advantage in the global marketplace.”⁷⁹ The aim is to support clients “in a responsible and forward-looking approach to traditional livestock production

⁷⁶ Hereinafter the IFC.

⁷⁷ BROOM, Donald, *op. cit.*, p. 30.

⁷⁸ IFC, “Good Practice Note. Improving Animal Welfare in Livestock Operations”, 2014, <https://www.ifc.org/wps/wcm/connect/c39e4771-d5ae-441a-9942-dfa4add8b679/IFC+Good+Practice+Note+Animal+Welfare+2014.pdf?MOD=AJPERES&CVID=kGxNx5m>.

⁷⁹ *Ibid.*, p. 1.

(...).”⁸⁰ The good practice note includes the IFC’s approach to AW and due diligence as well as the particular details of good AW practice. The IFC has also adopted guidelines “Creating Business Opportunity through Improved Animal Welfare”⁸¹ according to which better AW leads to higher productivity and less losses. In the guidelines the increasing global interest in AW has been confirmed as the need to adapt businesses to higher standards in this sector was highlighted. Both documents are inspired by the EU legislation, for example when determining the dietary needs of livestock such as the feed and water quantity and composition; stockmanship concerning the proper training of staff or animal health.

3) INTERNATIONAL ANIMAL WELFARE ACTIVITIES

European Union financed and supported many projects supporting animal welfare in non-EU countries. More precisely, the Commission financed 15 projects on AW with the participation of institutions outside of the EU.⁸² For instance, the “Welfare Quality project” was the first bigger EU project focused on animal welfare which resulted into a creation of scientific network between different countries. It “developed standardized ways of assessing animal welfare and integrating this information to enable farms and slaughterhouses to be assigned to one of four categories (from poor to good animal

⁸⁰ *Ibid.*

⁸¹ IFC, “Creating Business Opportunity through Improved Animal Welfare”, 2011, [https://ifcext.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_AnimalWelfare_QuickNote/\\$FILE/Animal+Welfare+QN.pdf](https://ifcext.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_AnimalWelfare_QuickNote/$FILE/Animal+Welfare+QN.pdf).

⁸² European Commission, COM(2018) 42 final, *op. cit.*, p. 5.

welfare).”⁸³ This activity contributed to the creation of international animal welfare standards.

EU has also invested in technical assistance and capacity building activities such as BTSF Program and TAIEX.⁸⁴ The BTSF is “Better Training for Safer Food” that started in 2005 in the non-EU countries exporting animal products to the EU. It consisted of different regional workshops⁸⁵ and training missions where country-specific issues were discussed,⁸⁶ as well as e-learning. The trainings consisted of basic AW principles applied in the EU and by the OIE, especially regarding animal slaughter and transport, often touching upon the problems found during the EU audits. More than thousand participants received education between 2004 and 2015.⁸⁷ Another type of capacity building activity was the participation of third-country personnel in the events in the EU. Animal welfare during slaughter and killing for disease control were the main topics of the meetings.

TAIEX, “The Technical Assistance and Information Exchange instrument” is a “DG NEAR peer to peer tool for capacity building and supporting public administration in Neighborhood countries in the approximation, transposition and enforcement of EU legislation and policies.”⁸⁸ TAIEX focuses on public and semi-public bodies, from

⁸³ INRAE, “Welfare quality”, <https://www1.clermont.inrae.fr/wq/>.

⁸⁴ European Commission, COM(2018) 42 final, *op. cit.*, p. 5.

⁸⁵ In Brazil, Costa Rica, Chile, Thailand, ...

⁸⁶ Brail, Chile, Thailand, Malawi, Lesotho.

⁸⁷ European Commission, COM(2018) 42 final, *op. cit.*, p. 6.

⁸⁸ European Commission, Directorate-General for Health and Food Safety, *op. cit.*, p. 42.

parliaments and regional governments to economic entities and civic society involved in the implementation of the EU best practices. The activities cover workshops with the presence of EU experts, study visits where guests learn directly in the Member State's administration, and expert missions when EU expert is sent to beneficiary administration to advice on specific issues related to implementation or enforcement of EU law.⁸⁹ It is only applicable in the countries under the "Enlargement and the Partnership Instruments."⁹⁰

These activities represent long-term investments for the EU with the purpose to raise awareness in animal welfare issues and to build capacity and spread the knowledge between industry professionals. Via these projects "Commission, with the EU Member States, has played a prominent and decisive role in raising global awareness on animal welfare and significant results have been achieved."⁹¹ In this way, the EU promotes its approach to animal welfare in the non-EU countries and increases the professional skills of livestock personnel as well as the administration officers responsible for implementation of EU import conditions demanded by the "Slaughter Directive."⁹²

4) CONCLUSIONS

⁸⁹ *Ibid.*

⁹⁰ Balkan countries (Macedonia, Serbia, Albania, Montenegro, Bosnia and Herzegovina, Kosovo) and Turkey, Turkish Cypriot in the northern section of the island, and Mediterranean and North African Countries (Algeria, Israel, Jordan, Egypt, Lebanon, Tunisia, Palestine, Syria), and Armenia, Azerbaijan, Jordan, Belarus, Georgia, Moldova, Ukraine.

⁹¹ European Commission, COM(2018) 42 final , *op. cit.*, p. 9.

⁹² Council Directive 93/119/EC, *op. cit.*

It is evident that the EU has committed to the dissemination of animal welfare standards in order to achieve robust international consensus on the matter. Indeed, the EU has raised awareness on animal welfare issues in a global context. EU legislation penetrates third countries and their legislation, private sector, and even public opinion. As a result, EU has become an extraordinary global standard setter in matters of animal welfare, including many other areas as well,⁹³ influencing international arena and its reactions to particular issues. This is possible because EU has the “capacity and the propensity to impose [its] high standards on the world (...)”⁹⁴

All along the dissertation we have been building the case of animal welfare as a global problem that needs a global solution. Animal welfare issues are inherently borderless, and their global aspect has been proven on several occasions. Farm animals are part of a global market in which the EU is one of the bigger players. EU exporting its animal welfare norms reflects on hand the interest and need of third countries to develop higher AW standards because of the global nature of AW issues and on the other hand, it confirms the maturity of EU animal welfare framework and its ambition to actively transform international arena. The latter is driven partly by the awareness that “in a globalized world of liberalized trade in animal products- unilateral animal welfare standards are not desirable and not feasible, both for moral and

⁹³ Such as environmental law, human rights, rule of law, consumer health and safety, data protection, ...

⁹⁴ PETERS, Anne, *op. cit.*, p. 55.

economic reasons.”⁹⁵ This is also because the imports can easily undermine EU standards.

Clearly, the EU both inspires and effectively changes the state of animal welfare protection in the world. This is possible because, as we have previously established, EU norms on AW represent regional portion of universal values, global public interest, common concern of humankind and public interest norms. In similar vein, Joseph Stiglitz said, “Europe’s success is due in part to its promotion of a set of values that, while quintessentially European, are at the same time global.”⁹⁶ In our assessment, good animal welfare is part of these values and that is the reason why EU animal welfare norms are getting spread across the world and why there is a demand for them. International dissemination of EU animal welfare standards contributes to the longstanding EU’s aim to ameliorate animal welfare globally and eliminate unfair trading practices. It represents a significant element of development of international animal law. The export of EU animal welfare norms is therefore part of a wider mosaic of actions leading towards stronger international animal protection. Why there is a need for further, more unified international approach will be discussed in the next subchapter.

B) LIMITATIONS OF REGIONAL ADVANCES

“As animal use is embedded in the context of global capitalism, performed in transnational supply chains and subject to a global regulatory competition, these

⁹⁵ PETERS, Anne, *op. cit.*, p. 245.

⁹⁶ STIGLITZ, Joseph, “The EU’s Global Role”, <https://www.theguardian.com/commentisfree/2007/mar/29/theusglobalmission>, in BRADFORD, Anu, *op. cit.*, p. 249.

*problems have a global dimension.*⁹⁷

Anne Peters

We have illustrated EU's strength in the normative export of animal welfare norms. We have also demonstrated that the EU's legislation is built on the same principles as general international regimes.⁹⁸ This confirms that the regime of international animal law is indeed emerging.⁹⁹ Nonetheless, a question arises whether this kind of animal welfare development is sufficient. Is EU's regulatory power strong enough to make visible and serious changes globally? And how long will this process take? Although very important, the export of EU's animal welfare norms is only one of the multidimensional regulatory actions necessary for the creation of higher international animal welfare standards. With the environmental emergency we need a more unified way to tackle animal welfare problems. EU's *Brussels effect* in animal welfare is, however, a breeding ground for any future international developments. It provides a solid basis built on the public interest norms and backed by the existence of elements of general international regimes.

Why is it not enough to focus on the regional developments and export of EU's norms? From the beginning we have been proposing the need for an international system of animal welfare protection in form of international animal law. Regional advancements, although very

⁹⁷ PETERS, Anne, *op. cit.*, p. 57.

⁹⁸ With regards to universal values, global public interest, common concern of humankind and public interest norms.

⁹⁹ Together with increasing number of, private standards of corporations and guidelines of international organizations.

important, are limited. There is a need for development of general international regime focused on animal welfare. The reason for that is the existence of important limitations of any regional animal welfare advancement: the import of substandard products in terms of animal welfare, the omission of large part of the countries in the development of AW standards, the fact that AW is a truly global problem that spreads irrespective of regional delimitation. Throughout the dissertation we have been illustrating the global aspect of animal welfare problems, the necessity for an international response and a harmonized global approach. This is the red thread that was unraveling as we progressed in the research- a thread that unifies all the chapters and sets the tone of our hypothesis. Therefore, regional animal welfare advancements are not satisfactory. To have a clear vision regarding this assertion, this section merits a recapitalization of previously made findings as well as addition of some new points. More specifically, we will focus on the relocation and outsourcing activities of corporations, and the global dimensions of animal welfare issues that cannot be solved only by regional advancements.

1) RELOCATION

“The spread of industrial animal agriculture has likely created more suffering to animals than any other event in human history.”¹⁰⁰

Lewis Bollard

¹⁰⁰ BOLLARD, Lewis, “Global Approaches to Regulating Farm Animal Welfare”, in STEIER, Gabriela/ PATEL, Klaus (eds.), *International farm animal, wildlife and food safety law*, Heidelberg 2017, p. 86.

Animal-processing industry forms part of a global trade and logically, it takes advantage of the possibilities that this global market offers. One of the ways to evade high animal standards adopted in one country or region, is the relocation of businesses. “Such relocation, or “leakage”, to cheap and low-standard countries then renders high national animal-protection standards meaningless.”¹⁰¹ The corporations “choose home states based on the regulatory advantages they provide them, which stokes fear among states that business will move somewhere more advantageous.”¹⁰² Economic interests override animal welfare arguments which leads to overall laxity in AW legal standards. Because agricultural corporations are limited by the animal welfare rules in choosing the cheapest options for production in order to maintain low prices, they often seek other jurisdictions with absence of such constraints. “This relocation of companies is partly because of the structure of capitalism’s competitive structure. If one particular company does not relocate to lower their costs, another one that is willing or able to lower costs and compromise animal welfare will simply spring up to replace it.”¹⁰³ Moving to legislatively more lenient countries hampers any national or regional developments. Sometimes, just the threads to move the business elsewhere are strong enough to persuade

¹⁰¹ PETERS, Anne, *Global Animal Law: What It Is and Why We Need It*’, *Transnational Environmental Law*, Vol. 5, No. 1, (2016), p. 17.

¹⁰² BLATTNER, Charlotte, “Trophy Hunting, the Race to the Bottom, and the Law of Jurisdiction”, p. 148, in PETERS, ANNE, (ed.), *Studies in Global Animal Law*, Berlin 2020.

¹⁰³ PASCHKE, Megan, “Applying U.S. Animal Law Extraterritoriality to Improve Animal Welfare Standards Abroad and Avoid a Race to the Bottom”, *Denver Journal of International Law & Policy*, Vol. 49, No. 1, (2021), p. 20.

legislators not to pursue new stronger AW laws.¹⁰⁴ This pressures the states to slow down with their animal welfare developments as they fear the loss of investments.¹⁰⁵ An example of such relocation is the ban of domestic horse slaughter in US which resulted into transfer of this practice to Mexico and Canada.¹⁰⁶ “From 2006 through 2010, U.S. horse exports for slaughter increased by 148 and 660 percent to Canada and Mexico.”¹⁰⁷ The unexpected consequence of this cessation is a long transportation of horses just to be slaughtered in inhumane way outside of the US. NGO’s have recorded brutal handling of horses, their stabbing to death while conscious and total disregard for any animal welfare considerations.¹⁰⁸ Another good example of relocation are factory farms being replaced from developed countries such as EU, Australia, or New Zealand, where animal welfare standards are imposed upon the farmers, to less lenient environments, most notably, China or Brazil. “The globalization of industrial animal agriculture has been a boom for multinational agribusiness, which now control the global supply chains in pork, beef, and poultry production.”¹⁰⁹ For instance, New Zealand dairy company Fonterra has started to acquire operations

¹⁰⁴ For instance, in 2015 the *Bundestag* voted against the male chick shredding, against the massive public support to ban this practice. Their decision was influenced by the farmers’ threats to relocate. *See e.g.*,

¹⁰⁵ So-called the regulatory chill. Threats of outsourcing also lead to race to the bottom when countries change the regulation towards lowering the standards.

¹⁰⁶ PETERS, Anne, *op. cit.*, 2016, p. 18.

¹⁰⁷ US Government Accountability Office, *Horse Welfare: Action Needed to Address Unintended Consequences from Cessation of Domestic Slaughter*, Report to Congressional Committee, GAO-11-228, 2011.

¹⁰⁸ AVMA, “U.S. horse slaughter exports to Mexico increase 312%”, <https://www.avma.org/javma-news/2008-01-15/us-horse-slaughter-exports-mexico-increase-312>.

¹⁰⁹ BOLLARD, Lewis, *op. cit.*, p. 85.

in China since 2010. The conditions of these factory farms are considerably lower than those in the mother land and consists of thousands of cows living permanently indoors.¹¹⁰ China is also a giant in pork production. Important US companies Tyson and Cargill are expanding to China. Nowadays, “half of the world’s pork is raised and consumed in China.”¹¹¹ Multinational meat producing companies expand their business to developing countries “to take advantage of lower costs, and laxer labor, environmental, and animal welfare regulations.”¹¹² In this way the industrialized model of animal agriculture is rapidly and globally dispersing. But China itself is expanding its operations abroad. A Chinese company purchased the largest pork producer in the world, the Smithfield Foods located in North Carolina. Paradoxically, “producing pork in the U.S. is now significantly cheaper than in China, due to lax environmental regulations and relatively bountiful natural resources.”¹¹³ Factory-scale Chinese hog farms have higher feed costs, as they have less abundant resources: land, water, and grains.¹¹⁴ So, the relocation is now going both ways, making the factory farming even more intertwined.

¹¹⁰ SHARECHAT, “Updated: Fonterra spends \$42mill on new Chinese dairy farm”, <http://www.sharechat.co.nz/article/ba4d4a30/updated-fonterra-spends-42mill-on-new-chinese-dairy-farm.html>.

¹¹¹ BOLLARD, Lewis, *op. cit.*, p. 85.

¹¹² *Ibid.*, p. 88.

¹¹³ SWENSEN, Ken, “Factory Farming in China and the Developing world”, <https://www.britannica.com/explore/savingearth/factory-farming-in-china-and-the-developing-world-a-growing-threat>.

¹¹⁴ PHILPOTT, Tom, “Are we Becoming China’s Factory Farm?”, <https://www.motherjones.com/environment/2014/03/china-factory-farm-america-pork/>.

We can see that even when there are strong national or regional animal welfare standards, these do not apply, for instance, to an EU agribusiness that relocated its operations to third country such as Brazil or China and then re-imports the meat products back to EU.¹¹⁵ Or in case of biomedical or cosmetic research, when the laboratories are relocated outside of the EU in order to continue with the experiments. EU partially disrupts the imports of substandard products in terms of animal welfare, for example via the “Slaughter Directive”¹¹⁶ and its equivalence principle, the animal welfare condition on egg imports in new Mercosur agreement,¹¹⁷ the animal welfare requirements in bilateral agreements,¹¹⁸ the ban of imports of cosmetic products tested on animals,¹¹⁹ etc. Third countries, as we have seen, also voluntarily raise their AW standards to mirror the EU model in order to export quality products desired by EU citizens. These are, however, only partial victories that do not include big portion of the world’s largest meat producers and laboratory giants such as China, Indonesia, India, Iran, South Africa. Even countries and companies that elevate animal welfare conditions often have double operations, one dedicated to EU exports and the other for domestic markets and countries that do not require high animal welfare standards. This is why we need a harmonized approach to animal law. In a globalized world in which animals are tradable goods, regional developments are not sufficient. Although the

¹¹⁵ BOLLARD, Lewis, *op. cit.*, p 88.

¹¹⁶ Council Directive 93/119/EC, *op. cit.*

¹¹⁷ See chapter no. VII, C, 4), a).

¹¹⁸ See chapter no. VII, C, 4), b).

¹¹⁹ Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products, *OJ L 342*, 22.12.2009.

EU successfully exports AW norms and changes the landscape for animals within and outside the EU, this is not enough given how market with animals works. EU's international activities are, nevertheless, an essential pillar for any future intents to adopt a comprehensive international animal welfare strategy. It offers a solid basis, on which future binding standards in trade agreements or any other type of legislation can be built.

2) OUTSOURCING

In the last 70 years, animal agriculture has industrialized. “Until the mid-twentieth century, the majority of the of the world’s farm animals were raised in low-density pastoral systems, in which a family cared for a small herd of animals, often spanning several different species.”¹²⁰ This has drastically changed, when farmers discovered that specialization in one breed only and their intensive breeding increases efficiency. Use of antibiotics and medicated feeds helped them to keep farm animals in artificial environments, unnatural for their needs. “They were also aided by the invention of artificial insemination in the early twentieth century, which allowed them to select for animals with greater productivity and a heightened ability to withstand intensive confinement.”¹²¹ 1950s and 1960s brought this new model of intensive factory farming to developing world. It was the times of Green Revolution that came with chemical fertilizers and genetic modifications of crop.¹²² This led to more food available for more agricultural animals. The cost of crop

¹²⁰ BOLLARD, Lewis, *op. cit.*, p. 84.

¹²¹ *Ibid.*

¹²² *Ibid.*

declined which allowed factory farms to feed their animals exclusively indoors, with no necessity to graze them on pastures. In this fashion, current intensive factory farming system has been created. It became quickly apparent, that it is economically lucrative, to divide the production steps into different countries, which have better geographical, environmental, or labor conditions for specific production methods, such as the pig fattening.

As a result, in the last decades the dispersion of production to countries with lower costs has been on the rise. “To meet growing demand for animal products and save land and labor costs, corporation have merged into multinationals and split up production across sites in the territories of different countries.”¹²³ Animals used for agricultural production are, therefore, often transported and shipped from one part of the world to another, enduring terrible conditions so the producers can save some costs of the production operations.¹²⁴ For instance, pigs that are reared in one country are sent for fattening stage to another one to so-called finishing sites, and from there to slaughterhouse in another country to save the costs that would be much bigger if the pigs stayed in country of origin. Australia for instance, ships cows and sheep to be slaughtered in countries with lower or no animal welfare regulations on slaughter. Also, “certain kinds of livestock are more easily raised in some environments than in others, so demand for some kinds of meat can be

¹²³ BLATTNER, Charlotte, *op. cit.*, p. 147.

¹²⁴ The issue of the outsourcing has been illustrated on several occasions *i.e.*, while presenting the theory of common concern of humankind, in chapter no. V, and in the chapter no. VII.

met only through international trade.”¹²⁵ This is not only environmentally unsustainable, but also horrible for animals that are subject to unhuman conditions during long transfers. This is happening for economic reasons as “the cost of transporting animals is lower than the cost of shipping feed.”¹²⁶ Also because countries take advantage of misleading labelling saying that the product is coming from a local country, even though it was only slaughtered there. In this way we have “Spanish-raised (“Italian”) horsemeat and Canadian (“Island-Produced Hawaiian”) pork.”¹²⁷ Or, shrimps, for example, “are harvested in the North Sea and driven 2000 miles to Morocco, where producers profit from cheap labour, after they are shelled and enriched with preservatives to inhibit decay, they are transported back to Northern Europe.”¹²⁸

The image that is presented to us by the industry, where animals are grazing on the farm, properly taken care of, then humanely slaughtered, is seriously flawed. This romantic idea is no longer a reality. Animal agribusiness is fully incorporated into globalized world, that allows the corporations to separate production into smaller steps in order to save costs. This inevitably brings more suffering to animals, more transportation and more pain as countries to which they were outsourced usually do not respect AW standards. In this way, corporations are evading rules that require more investments in animal

¹²⁵ MURRAY, Lorraine, “The Long-Distance Transport of Farmed Animals”, <https://www.britannica.com/explore/savingearth/highways-to-hell-the-long-distance-transport-of-farmed-animals>.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ BLATTNER, Charlotte, *op. cit.*, p. 12.

welfare. They can successfully circumvent new national or regional improvements in animal law.

From the above it is clear that national and regional advances in animal law are limited. “The animals’ plight cannot be alleviated by national [or regional] law and policy alone, not least because of the opportunities available to animal processing industries to evade national [or regional] regulation.”¹²⁹ The possibilities to relocate and outsource the agribusiness and easily get around higher animal welfare rules reflect the need for more comprehensive and unified strategy. From a global perspective, “agricultural industries are largely exempt from the law, or they create they own codes of conduct.”¹³⁰ They are also in the possession of almost all domesticated animals, thus “anything done to them usually falls through the cracks of law.”¹³¹ Therefore, when we look at the regional victories of the European Union, we can quickly feel bitter taste. When we are hit with the realities of factory farms and slaughterhouses in South Africa, China, Middle East, and many other places, we see the urgent need for a more holistic animal welfare action. How could this action look like will be illustrated in the next chapter.

3) INSUFFICIENCY OF REGIONAL ADVANCEMENTS TO SOLVE A GLOBAL PROBLEM

“Animal suffering is universal; animals are (ab)used all over the world. Everywhere in the world, wild animal species are disappearing at increasing rates, and domestic animals are massively exploited and killed for food production or other purposes,

¹²⁹ PETERS, ANNE, *op. cit.*, 2021, p. 532.

¹³⁰ BLATTNER, Charlotte, *op. cit.*, p. 405.

¹³¹ *Ibid.*

serving as “material” for experiments, while many others are also deprived of liberty and (ab)used for other purposes (such as entertainment).¹³²

Sabine Brels

The global aspect of animal welfare problems and their transboundary elements have been repeatedly demonstrated in this dissertation. We have illustrated the predicament of animals and its global dimension as well as the massive detrimental consequences stemming from animal welfare issues. Those are ecological, social, ethical, food-security related and animal and human-health related. Together, they form a tangled skein of causes and repercussions that cannot be unraveled with one-state, parochial strategies. This alone justifies the necessity for a global approach to animal welfare issues.

Animal trade is one of the main elements that triggers these issues and obstructs accomplishments of regional or national animal welfare rules. Trade in animals and animal products is on the rise as “[f]ood production is not only growing but is at the same time becoming an increasingly global business. For example, the international trade in meat is growing more than the production.”¹³³ The animal agribusiness is so globalized that the biggest global players in animal processing industry are connected between each other, creating “the Triangle”¹³⁴ between China, Brazil, and US. This has been already shown in the

¹³² BRELS, Sabine, “A Global Approach to Animal Protection”, *Journal of International Wildlife Law & Policy*, Vol. 20, No. 1, (2017), p. 106.

¹³³ PETERS, ANNE, *op. cit.*, 2021, p. 39.

¹³⁴ ZHOU, Wabqing, “The Evolution and Future of Industrial Animal Agriculture in the U.S., China, and Brazil”, https://brightergreen.org/wp-content/uploads/2015/11/the_triangle_discussion_paper_final.pdf.

chapter no. VII. There are many similar interdependencies. Exporters specialized in a specific meat production step have been crystalized, as a reaction to growing demand for animal products, especially in developing countries. “In the Middle East, in particular, animal imports have risen markedly: in 2016, Saudi Arabia alone imported nearly \$1bn worth of live animals.”¹³⁵ Hong Kong is dependant on meat imports from China, Saudi Arabia takes millions of sheep from Sudan, Australia, Denmark and Spain. Moreover, the developing countries are those that became dominant producers in the world. Yet, animal welfare standards are missing in these countries. Moreover, increasing demands for meat products are triggering raising need for grain and soy fed to animals, increased need for water and land. This significantly contributes to global warming and other ecological disasters which do not respect the borders of any state. These are global issues that cannot be ignored anymore, as we have shown in our dissertation.¹³⁶ We can see that, the interconnections between meat producing businesses are carped and unsightly and as a result any national or regional attempts to control them are difficult to succeed. It is no longer possible to be worried for the animal welfare within the delimitation of one’s state or region. Animal welfare has become an issue of international concern.

In addition, in our case study we have only touched upon land animals used in agriculture. Animal welfare problems involve nonetheless many other animals such as those used in entertainment, in zoos, in

¹³⁵ OSBORNE, Hilary/ van der ZEE, Bibi, “Live export: animals at risk in giant global industry“, <https://www.theguardian.com/environment/2020/jan/20/live-export-animals-at-risk-as-giant-global-industry-goes-unchecked>.

¹³⁶ See chapter no. VII, A), 3), b).

laboratories, wildlife, pets, animals used in aquaculture, etc. All these different animal welfare issues cannot be solved by individual strategies especially in our globalized times when animals are often shipped or transported from one country to another. There is transboundary link in every animal-welfare sector and issues of all of them are interconnected. Globalization and animal trade are enabling for example, the response to a massive demand for donkey skins in traditional Chinese medicine. Kenya increased its donkey exports to China, which has triggered overuse and transboundary criminality (theft of donkeys, also in neighboring countries) and is risking the extermination of Kenya's donkey population.¹³⁷ There are many more examples in our dissertation confirming the global aspect of animal issues, whether it is the case of biomedical research, farm animals or the wildlife. Increasingly interconnected world allows the globalization of animal suffering which is growing in terms of scale and forms, for all the animals, domesticated or wildlife. Because of that "there is a need for animal law to come of age in our globalized world, and the global nature of modern animal law must be embraced and pursued in a unified and cross-culturally understandable manner as a strategy to promote the global interests of animals."¹³⁸ Parochial, regionally limited animal welfare advancements are not capable to solve a truly global and multidisciplinary problems of animal welfare and their vast environmental, social and health consequences. Moreover, as we have seen, without a global approach there is a persistent danger of evasion

¹³⁷ PETERS, Anne, *op. cit.*, 2021, p. 40.

¹³⁸ KELCH, Thomas, "CITES. Globalization, and the Future of Animal Law", p. 291, in *What can animal law learn from environmental law*, Washington 2015.

of national and regional advances, which triggers regulatory chill and even a race to the bottom.¹³⁹

We can conclude that the externalization of EU's animal welfare standards is a major element in the dissemination of higher animal protection in the world. It is an essential action leading to better animal welfare globally. Nevertheless, because of the globalized nature of animal issues, we cannot rely on the EU as a sole executor responsible for international amelioration of animal welfare. EU's *Brussels effect* forms part of a bigger picture where the EU represents an inspiration and a solid pillar on which other international actions can be developed. This international approach needs to be universal, *i.e.*, to include majority of countries, it needs to be multidisciplinary, *i.e.*, focus of different aspects of animal welfare and include all animals and lastly it needs to be holistic,¹⁴⁰ *i.e.*, take into consideration the interconnections of animal welfare with environment, global health, food security, etc. Concrete forms of international actions towards better animal welfare we will present in the next subchapter.

C) THE NEED FOR A HARMONIZED INTERNATIONAL STRATEGY

*"It is impossible at this point to predict whether and how the development of international animal law will go on."*¹⁴¹

Anne Peters

¹³⁹ PETERS, Anne, *op. cit.*, 2021, p. 57.

¹⁴⁰ BRELS, Sabine, *op. cit.*, p. 105.

¹⁴¹ PETERS, Anne, *op. cit.*, 2021, p. 591.

One of the central hypotheses of this dissertation is that animal welfare issues have a global dimension. Animals form part of a globalized business that operates on the global market. They are commodities that are being moved around the world, slipping from one jurisdiction to another. Partial efforts in form of regional advances are insufficient and sabotaged by the economic incentives. Global trade in animals and serious consequences of AW issues trigger the need for a truly international approach to face the multilayered and multidisciplinary concerns of animal welfare.

In the preceding chapters, we have illustrated the emergence of a new general international regime of international animal law given the existence of universal values, global public interests, common concern of humankind¹⁴² and public interests norms (so far only with a regional character).¹⁴³ Existing international animal welfare regulation and possible future developments of international animal law were already outlined as well.¹⁴⁴ Nonetheless, we reckon that it is important to conclude this dissertation with a look to the future. We will, therefore, recapitalize important aspects in this matter and add new possible developments in the specific field of farm animal welfare. These could be applied to other fields of international animal law, such as laboratory animal welfare, wildlife welfare, entertainment animal welfare, etc. More

¹⁴² *See*, chapter no. V.

¹⁴³ *See* chapter no. VII, C), 1), b), iv).

¹⁴⁴ *See*, chapter no. IV for existing international regulation concerning animals and chapter no. VI. for the possible future scenarios.

specifically, we will present the creation of international animal law treaty and the creation of best practices at international institutions.

1) A MULTILATERAL TREATY

“We are witnessing the globalization of animal cruelty. This is so despite laws for protecting animals being accompanied and increasingly informed by the deepening of knowledge in animal welfare science, and despite the recognition of the legal and moral wrong of acts of cruelty against animals in both law and in the general community in most countries.”¹⁴⁵

Deborah, Cao/ Steven White

Throughout our dissertation we have learnt that currently, there are no international treaties on animal welfare. International treaties protecting animals are concerned only with wildlife conservation and do not include welfarist aspects, “or at best in an accidental, ancillary and fragmented fashion.”¹⁴⁶ Domesticated animals are only protected internationally via soft law,¹⁴⁷ and regionally via a hard law by the EU’s Regulations and Directives.¹⁴⁸ EU’s animal welfare framework represents the most developed hard law on animal protection. However, it is regionally limited, and it does not include the biggest perpetrators in animal businesses.¹⁴⁹ “This lack of international consensus leads to the current disparate treatment of animals around

¹⁴⁵ CAO, Deborah/ WHITE, Steven (eds.), *Animal Law and Welfare- International Perspectives*, Heidelberg, 2016, p. 2.

¹⁴⁶ PETERS, Anne, *op. cit.*, 2021, p. 533.

¹⁴⁷ See chapter no. IV, B) concerning OIE’s standards on agricultural animals.

¹⁴⁸ See chapter no. VII, C).

¹⁴⁹ China in animal testing and animal agribusiness, Middle East, Latin American countries, African countries in animal agribusiness, other Asian countries such as Thailand in animal entertainment, etc.

the world, echoing the need for any international framework addressing the issue.”¹⁵⁰ As a result, the overall finding is that although there are important developments in international protection of animal welfare, they are still deficient and do not match serious consequences of poor AW. Moreover, they operate on the premises of an anthropocentric society characterized by a speciesist relation towards non-human animals. “For these reasons, we should not expect too much from law; it cannot be a game changer for human-animal relations. Nevertheless, we can try to make the law as good as it can get.”¹⁵¹

In the chapter no. V, we have concluded that the ideal protection of animal welfare would be via the adoption of a multilateral treaty. This is because they are ideal instruments for the protection of global public interests and creation of public interest norms. However, we regard its adoption as improbable in the near future. We identified several reasons for this impasse: high variability in animal welfare domestic regulations, moral imperialism and westernization of animal welfare regulation and lobbying preventing animal welfare advancements. Nevertheless, this should not limit us in constructing the theoretical basis for such developments. We should “pursue a “realistic utopia” for animals globally, proceeding “from the international political world as we see it” and extending “what are ordinarily thought to be the limits of practicable political possibility”.”¹⁵²

¹⁵⁰ FAVRE, David, “An International Treaty for Animal Welfare”, *Animal law*, Vol. 18, p. 237.

¹⁵¹ PETERS, ANNE, *op. cit.*, 2021, p. 536.

¹⁵² *Ibid.*, p. 599. Citing RAWLS, John, *The Law of Peoples*, Cambridge 1999, pp. 11 and 83.

Animal welfare treaty would represent one of the ways to broaden global consensus “on how a particular species of animals should be used, and if a use is acceptable, what level of welfare must be provided during the use.”¹⁵³ International treaty would be an effective tool to fight the reality of multinational corporations that trade or use animals. “If there were worldwide standards for animals within commerce that assured a cruelty-free life for animals, then the forces of capitalism would accept this as a base and seek the least cost products within that set of rules.”¹⁵⁴

In the chapter no. IV, we have seen that there were several attempts to adopt an international treaty via soft law declarations calling on their adoption such as the Universal Declaration on Animal Welfare. These declarations represent an important step towards the materialization of an international treaty. Animal law academics are also proposing different scenarios on how such a treaty could look. David Favre presents an umbrella treaty named *International Convention for the Protection of Animals* that includes four protocols: a Companion Animal Protocol, a Protocol for the Care of Exhibited Wildlife, a Protocol for the Taking of Wild Animals, and a Protocol for the International Transportation of Animals.¹⁵⁵ Focal point of this treaty would be animal welfare as it is “the best available and most acceptable term in most countries”¹⁵⁶ as opposed to animal rights, which are likely not to receive sufficient support. We agree with this welfarist approach, as has been

¹⁵³ FAVRE, David, *op. cit.*, p. 247.

¹⁵⁴ *Ibid.*, p. 249.

¹⁵⁵ *Ibid.*, p. 259.

¹⁵⁶ *Ibid.*, p. 239.

illustrated all along our dissertation. His proposed treaty has a well-thought language as it must allure as many countries as possible and at the same time create provisions that would lead to better animal welfare. Also, it includes enforcement mechanisms that would assure its correct implementation. Substantive provisions count with the creation of administrative agencies in each party overseeing the fulfillment of treaty obligations. Given the unequal conditions in different countries, parties could decide which protocols to join, depending on the political support and other aspects. “Agreeing to be part of a protocol will require some level of national implementation, depending on the topic.”¹⁵⁷ The treaty should also establish its Secretariat that would carry out the internal operations of the treaty.¹⁵⁸ Here, an inspiration from CITES¹⁵⁹ can be drawn.¹⁶⁰ Then, each protocol focuses on a specific animal welfare sector. These provisions need to lead to an effective amelioration of animal welfare globally. This also means that they will be restricted in their ambition, as in order to attract as many states as possible, a common ground has to be agreed. The objective of international treaty is to form a community that takes into consideration AW issues and the provisions can exist only if there is sufficient political will. The treaty “can only be as progressive on animal welfare issues as is politically feasible at a particular point in time. The idea of an ongoing community

¹⁵⁷ *Ibid.*, p. 258.

¹⁵⁸ *Ibid.*

¹⁵⁹ Convention for International Trade of Endangered Species of Wild Fauna and Flora, United Nations, adopted 1973 in Washington.

¹⁶⁰ CITES could stand, as has been illustrated before,¹⁶⁰ as an inspiration for animal welfare treaties with regards to its different aspects. Especially its inter-convention cooperation and cooperation with NGOs which raise joint efforts to achieve the common goals could be valuable for AW treaties.

is to allow the politically acceptable consensus to grow more protective over time.”¹⁶¹

To conclude, the proposed *International Convention for the Protection of Animals* is an example of how future treaty on animal welfare could look like. Success of any AW international treaty depends on its acceptance by states and its capability to produce significant improvements.¹⁶² As has been pointed out, the prospects for adoption of treaty on animal welfare are not realistic any time now. There would have to be a state that is willing to call for a negotiation process and “this initial hurdle has not yet been overcome (...)”¹⁶³ The initiation of the treaty could also happen via a division of the UN or “large international non-government organization could lobby governments to take up the issue.”¹⁶⁴ We cannot predict which scenario will happen, however we believe that with the increasing pressure from the NGOs, scientific evidence, public pressure from citizens, increasing domestic and regional animal welfare regulation, a time will come when a political window will be opened for an international treaty in animal welfare. Until this happens, there should be, as we have proposed before,¹⁶⁵ soft law developments triggering eventually the hard law advancements. These non-binding instruments are for example the OIE’s *Guiding*

¹⁶¹ FAVRE, David, *op. cit.*, p. 260.

¹⁶² BOWMAN, M. J, “The Protection of Animals Under International Law”, *Connecticut Journal of Int’l Law*, Vol. 4, (1989), p. 499.

¹⁶³ *Ibid.*, p. 262.

¹⁶⁴ *Ibid.*, p. 263.

¹⁶⁵ See chapter no. VI, B), 3.

2) SOFT LAW STRATEGY: BEST PRACTICES AT INTERNATIONAL INSTITUTIONS

Different international organizations have adopted non-binding instruments that address animal welfare. As we know, the most impactful international standards on this matter are the aforementioned *Guiding principles of the Terrestrial Animal Health Code*. They recognize animal welfare as a global public interest and a concern of international community. They reflect the global need for protection of agricultural animals and react to the negative consequence of animal agribusiness. As we have learnt, the OIE's animal health codes represent an animal welfare benchmark. They influence domestic legislations, regional approaches to animal welfare, they even form part of many trade agreements, as we have already seen. We reckon that the development of OIE's standards will continue to contribute to higher animal welfare. In the chapter no. VI and VII¹⁶⁷ we have also shown how these standards contribute to spread of animal welfare via their inclusion in the trade agreements. They are able to trigger international cooperation and lead to hard law instruments.

However, several improvements could be done, as outlined in the chapter no. IV, as there are many gaps and weaknesses in their current version.¹⁶⁸ “[T]he OIE could achieve a real change if it announced that

¹⁶⁶ OIE, *Terrestrial Animal Health Code*, Vol. 29, Paris, 2021.

¹⁶⁷ More specifically, chapter no. VI, B), 3) and VII, C), 4) c).

¹⁶⁸ For more details *see* chapter no. IV.

all standards must conform to the “five freedoms”,¹⁶⁹ something which is currently missing. This alone would lead to considerably higher animal welfare standards recommended by the OIE, as currently slaughter provisions do not require specifically to protect animals from pain or confinement provisions do not require freedom to express natural behavior.¹⁷⁰ Vague language could be also improved in order to eliminate different interpretations leading to unequal applications of the standards. They could also take into account novel scientific reports linking poor animal welfare with animal and human health as well as environmental consequences and broaden their scope.

OIE’s standards are dedicated to land and aquatic agricultural animals,¹⁷¹ they do not include other domesticated or wild animals. However, such soft law instruments would be beneficial for other animal welfare sectors as well. One of the future possibilities is that the OIE encompasses other animals under its auspices and creates best practices for their handling as well. For example, with regard to laboratory animals, the OIE counts with an *ad hoc* group on laboratory animal welfare which adopted in 2007 the drafted text *OIE Guidelines on Research Animal Welfare*. Although it has not been formally adopted, the existence of the *ad hoc* group and its intents to include laboratory animal welfare into OIE’s agenda reflect the possibility of broadening the OIE’s standards. Or another scenario is that the best practices relative to different animal welfare sector emerge through other organizations

¹⁶⁹ BOLLARD, Lewis, *op. cit.*, p. 104.

¹⁷⁰ *Ibid.*, p. 105.

¹⁷¹ Besides Terrestrial Animal Health Code there is an Aquatic Animal Health code. See OIE, *Aquatic Animal Health Code*, Paris, 2021.

dedicated to specific animals, such as the Council for International Organizations of Medical Sciences partnered with the OIE.

In any case, best practices are a great way to advance animal welfare and influence different stakeholders. This is because international organizations “bring together industry groups, national governments, and animal protection organizations (...)” and as a result they have the international reach and the expertise to affect developing as well as developed countries. The emergence of more soft law on animal welfare in form of such standards is realistic and could be very helpful not only for the actual animal protection but it could also pave the way for the future attempts to adopt a multilateral treaty. As we have learned previously, soft law is capable of triggering hard law advancements in as it represents a great benchmark for future treaties, and it could serve as a first stride towards the appearance of legally binding norms on animal welfare.¹⁷²

3) CONCLUSIONS

Our last chapter took a close look at the regional animal welfare developments underway; it accentuated the necessity of a comprehensive international approach given the limitations of any domestic or parochial changes and outlined some future possible scenarios of such international response.¹⁷³ These might happen

¹⁷² See chapter VI, C, 3), c).”

¹⁷³ Here, we cannot help but mention the extraterritorial jurisdiction that we have delved into in the chapter no. II, C, 2). There, we have illustrated its advantages in animal welfare development. States by giving their laws extraterritorial reach can take from corporations their main power in the domestic forum, which is the threat to move abroad. See BLATTNER, Charlotte, *op. cit.*, p. 68. Therefore, extraterritorial jurisdiction can prevent corporations from escaping domestic rules.¹⁷³ We will not

simultaneously, or one might precede another. Anyhow, the emergence of new hard or soft animal welfare law is on its way to reality. This is because the concern for animal welfare is present in international society. It has “already come a considerable way towards becoming established as part of international law and (...) groundwork has been laid for this process to continue.”¹⁷⁴

The international response is spearheaded by regional advancements, especially by the EU’s animal welfare model spreading its higher standards abroad and highlighting the need for a universal approach to AW. We reckon that the EU’s role will be growing given that “the EU cannot retrograde and is therefore compelled to actively promote and disseminate animal welfare standards worldwide in order to protect European farmers and European animal products on the global market.”¹⁷⁵ Another important global player in the amelioration of animal welfare is the OIE and its standards focusing on land and agricultural animals. Together with the EU they represent important elements of international animal welfare development. Moreover, as we have seen all along the dissertation, animals are increasingly forming part of different forms of regulations, whether domestic, regional or international, whether in form of soft or hard law. From improving the legal status of animals in different jurisdictions, to gradual implementation of animal interests in the WTO case law; to animal

develop these arguments further, as we just want to remind the reader about this possibility of animal welfare advancement.

¹⁷⁴ SYKES, Katie, “Nations Like Unto Yourselves’: An Inquiry into the Status of a General Principle of International Law on Animal Welfare”, p. 47, *Canadian Yearbook of International Law*, Vol. 49, (2011).

¹⁷⁵ PETERS, Anne, *op. cit.*, 2021, p. 588.

conservation species agreements; OIE's soft law; FAO's, UNCWFS's¹⁷⁶ and OECD's contributions; EU's animal welfare framework and trade agreements. "This legal evolution builds on and in turn manifests the emerging global overlapping but still rough consensus on the importance of caring for animals."¹⁷⁷ These considerations are aligned with our hypothesis that the general international regime of international animal law is emerging and that because there are considerable gaps and limitations of current state of animal welfare protection, a harmonized international response is necessary.

With this conclusion we finish the last chapter of the dissertation, hoping that the case study on farm animal welfare brought some light into a still quite unknown territory of international animal welfare and that it sparked your attention. In the times when the regime of international animal law is still in its infancy, it is crucial to dedicate our efforts to the construction of strong theoretical pillars on which future developments could be built. If nothing else, we wanted to draw your attention to unimaginable pain that the agricultural animals have to endure and the multilayered consequences of poor animal welfare. If nothing else, one thing to remember is that there is animal suffering, an everyday pain which is not necessary, which is inexcusable, which harms not only them, but also us, our planet, our entire ecosystem. It is time to act.

¹⁷⁶ United Nations Committee on World Food Security.

¹⁷⁷ *Ibid.*, p. 589.

CONCLUSION

“Mankind’s true moral test, its fundamental test (which lies deeply buried from view), consists of its attitude towards those who are at its mercy: animals. And in this respect mankind has suffered a fundamental debacle, a debacle so fundamental that all others stem from it.”¹

Milan Kundera

We began this dissertation with nothing more than strong personal interest in animal welfare issues. With a blurry idea on how to grasp the topic, we entered the labyrinth of philosophical streams, legal theories, historical analysis, environmental considerations, ... We were lucky though. We brought with us a red thread, that guided us along the journey and saved us from dead ends, keeping us on the right path. The red thread was public international law. It gave us the primary direction and kept us from turning into purely philosophical waters that are so predominant in questions relative to animals. It also allowed us to explore unknown territories and reach new shores. The journey was often hard, with no or limited number of fellow travelers that entered these, before unexplored, territories. Time after time, we had to rely only on our own judgment.

Translated to less poetic language, the process of writing this dissertation was not always easy. From the beginning we were faced with the reality of limited sources on interactions between international law and animal welfare. Philosophical and ethical sources helped us to achieve the essential understanding of the background of the topic.

¹ KUNDERA, Milan, *The Unbearable Lightness of Being*, trans. HEIM, M.S., New York 1991, p. 289.

From that moment on, we were mostly on our own. This was the “danger” of entering into a legal discussion when the topic is still in its inception. On the other hand, this allowed us to create something original, unaffected by external influences.

Encouraged by the preliminary research, we based our dissertation on the premise that there is a serious interest of international community for animal welfare questions. This essential idea has been confirmed in many instances of the dissertation. Whether it is the growing body of etymological and biological research on animal sentience; growing popularity of animal welfare theory penetrating our lives and legislation; increasing number of vegans, vegetarians, and flexitarians; concrete citizens’ opinions on animal welfare in multitude of surveys; proliferation of animal welfare regulations on national, regional and international level; increasing interest of international organizations in animal welfare; expanding research on the interconnections between poor animal welfare and environment, global health and food security, etc.

The global aspect of animal welfare issues, the interest in animal welfare and the need for an international regulation have been examined from different angles. Each chapter furnished new perspective, creating together a colorful mosaic of causes leading to the existence of animal law as a general interest of international community. The confirmation of this argument is important as it supports the relevance of this dissertation and the need for an international approach towards animal welfare issues. In addition, throughout the chapters we have learnt that current international regulation is insufficient and has serious

deficiencies impacting effective animal protection. As a result, the dissertation affirmed the need to develop an emerging regime of international animal law.

Consequently, two main tasks were constituted as the core of this research. The first was to gain legal certainty about the construction of international animal law as general international regime. Second one focused on the practical application of analytical tools of general international regimes to the case of EU farm animal welfare, demonstrating in this way the materialization of our theory in positive law. To show successful competition of both tasks, we will present the conclusions stemming from each chapter. We will not review these findings in detail beyond their quintessence.

FIRST: Human-animal relations have experienced deep transformation. What started as a close personal link between us and the animals, developed into a completely globalized attitude. Progressively we have been losing our closeness with animals until the point of a total disconnection from our food source. This gap between “us” and “them” reflects current anthropocentric premise according to which humans are central entities with intrinsic value, unlike other animals. Another conclusion is that the animals can feel pain and can suffer as proved by novel etymological and biological discoveries. Because they are sentient, we need to protect them. Last input establishes that status of animals is undergoing many changes in different jurisdictions around the world because of growing pressure from civil society to improve animal lives. Animals are being recognized as sentient beings and moved from legal status of things. As a result, we see progressive discrediting

of animal suffering and intents to improve their standing in different states around the world.

SECOND: After comparing subjects, actors, sources, and territorial jurisdiction in the traditional international law and modern international law we conclude that there have been seismic shifts in the international legal order that now regulates a diverse range of interests and concerns. Public international law is open to systematic changes. It is capable of reflecting current needs and interests of society and it can encompass new values that do not proceed only from states. This reflects a kaleidoscopic, interconnected, interdependent and highly diverse world in which we live, dominated by globalized problems affecting all of us. This is essential for the inception of new international regimes, such as the regime concerning animal welfare. Second chapter, therefore, proved the readiness of international law to regulate questions on animal welfare.

THIRD: Different rulings of international jurisprudence involving animals sustain that there are global tendencies towards better protection of animal welfare and significant change in the international law which goes in harmony with the findings from the previous chapter. More specifically, *The Case of Exploitation or Preservation of Pacific Fur Seals*,² represents a negative position of international law of 19th century towards animal protection. On the other hand, the *US-Tuna II (Mexico)*,³

² Behring Sea Arbitration: Award of the Tribunal of Arbitration constituted under Art. 1 of the treaty concluded at Washington on the 29th February 1892 between Her Britannic Majesty and the United States of America/ presented to both Houses of Parliament by command of Her Majesty, August 1893.

³ *United States- Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Panel Report, WT/DS381/R, 15 Sep. 2011. *United States- Measures Concerning*

Shrimp-Turtle,⁴ *Whaling in Antarctic*⁵ and *EC- Seal Regime cases*⁶ proved that international law has experienced a profound positive transformation with regards to animal protection. The growing weight of animal interest considerations against economic rationales is a sign of such development. The reason for this change in the rulings was the necessity of international law to adapt itself to new interests and values of society including the protection of animals and the environment.

FOURTH: There is a growing body of international law dedicated to animal welfare, however only represented by soft law advancements (except for EU animal welfare framework representing regional advancements). No overarching multilateral treaty on animal welfare has been adopted. Current regulation on animal welfare in form of for example, the *OIE guidelines*,⁷ are circumstantial, fragmented, vague, unenforceable, and insufficient to solve complex animal welfare problems. This accentuates the need for a better international protection of animal welfare. For this to happen we need to focus on a construction of international animal law as a general international regime. Because without strong theoretical pillars stemming from the

the Importation, Marketing and Sale of Tuna and Tuna Products, Appellate Body Report, WT/DS381/AB/R, 16 May 2012.

⁴ *United States- Import Prohibition of Certain Shrimp and Shrimp Products*, Panel Report, WT/DS58/R, 15 May 1998 (*US-Shrimp*). *United States- Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, WT/DS58/AB/R, 12 Oct. 1998 (*US-Shrimp AB*).

⁵ *Whaling in Antarctic (Australia v. Japan: New Zealand intervening)*, Judgement, I.C.J. Reports, (adopted March 21, 2014).

⁶ Panel Report, *European Communities- Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R, WT/DS401/R (adopted Nov. 25, 2013), Appellate Body Report, *European Communities- Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, (adopted Jun. 16.2014).

⁷ OIE, *Terrestrial Animal Health Code*, Vol. 29, Paris, 2021.

public international law, we cannot successfully justify the creation of intranational animal law.

FIFTH: The term “international” animal law is the most appropriate for a legal system encompassing international regulation on animal welfare. First, because it is close to the positive law as opposed to notions such as “universal” or “global” that could be perceived as romantic ideals existing far from structured legal system. Therefore, as pragmatic as we are, the most credible proposal is using the notion of “international” animal law. Second main conclusion is that the globalization has both negative and positive influence on animal welfare. Negative influence can be seen in the integration of animals in global economic marketplace in which they represent commodities trucked, shipped or flown over large distances to accommodate the needs of the market. At the same time, most of animals are property of big multinational companies that exploit their economic value. Research also outlined vast negative consequences of animal agribusiness on the environment. Positive influence of globalization is visible in the increasing bottom-up concern for animals happening throughout the world as well as change in the eating habits.

This chapter also confirmed a hypothesis according to which animal welfare is a universal value, global public interest of international community and common concern of humankind. Protection of animals is included in the legal systems of nearly every state and has important role in most of the belief systems and cultures which suggests that it is a universal value of international community. Next, to determine animal welfare as global public interest means that the protection of animals

has global and intergenerational dimension and requires an international answer because it needs to be protected by international community in its entirety. Poor animal welfare is also a common concern of humankind as it has a transboundary dimension and serious long-lasting adverse effects for the humanity and future generations. The analysis confirmed that animal welfare needs urgent international regulation as it has global nature, and its issues are of a major magnitude. Consequently, this chapter prepared a breeding soil for the construction of international animal law as general international regime that protects global public interests of international community, encompasses common concern of humankind, and protects universal values.

SIXTH: Because there are glaring gaps in international regulation of animal welfare it is crucial to develop harmonized international answer. For that to happen we need strong pillars on which future developments can be constructed. As a result, we analyzed international animal law as general international regime and confirmed its emergence. By doing this we proved that the regime protects general interests of international community, that it has relative autonomy, it is very complex and dynamic with decentralized structure, and includes plurality of norms and obligations.

Next, we determined that at present it is difficult to encounter public interest norms protecting animals in form of binding norms of international law, customary norms, general principles of law, or resolutions of international organizations. This suggests that international animal law is only in its inception. However, we identified the regional existence of public interest norms on animal welfare in

European Union in form of the Directives, Regulations and Art. 13 TFUE. This implies that animal welfare is an important concern and value within the EU which in turn also suggest that there is a need, on the international level, to deal with transboundary animal welfare issues. We also established that public interest norms included in international treaties would be the ideal tool for animal protection given their universality and protection of general interests. Nonetheless, we had to acknowledge the difficulties with its adoption such as high variability in animal domestic regulations, the danger of moral imperialism and the existence of strong industry lobby to maintain the *status quo*. Soft law developments were identified as alternative to international treaties as they can effectively facilitate international cooperation and trigger hard law and eventually lead to multilateral treaty.

Lastly, the scope of international animal law could be robust due to the complexity and diversity of animal welfare issues. The basic ramifications could encompass wild animal welfare, laboratory animal welfare and farm animal welfare.

SEVENTH: European Union has created a substantial body of law regulating animal welfare through which many cruel practices were reduced. EU animal welfare framework is constructed upon myriad of legislative and non-legislative tools such as Directives, Regulations, Recommendations and Opinions as well as resolutions, action programmes, declaration, interinstitutional agreements, reports, etc. Animal welfare is also included in trade agreements as a secondary topic. The reasons for adoption of animal welfare protection on the EU level are based upon the following considerations: animal sentience, public

pressure and consumer choices, environmental implications of animal agribusiness, animal and human health protection. As a result, EU has acquired animal welfare leadership, it is a pioneer in animal welfare regulation, and it represents the most developed animal welfare framework on international level.

Next, European Union's animal welfare framework is in concordance with notions of universal values, global public interests, common concern of humankind and public interest norms, representing their regional scope. EU regulates animal welfare to protect important values of the EU citizens which are in turn part a greater general interest of international community. The growing concern of EU citizens for animal welfare is reflected in the Eurobarometer surveys,⁸ European citizens' initiative⁹ and online consultation process.¹⁰ This chapter also developed the thesis according to which the EU norms on farm animal welfare represent public interest norms on a regional level, as they protect important values of EU citizens. EU regulations concerning farm animal welfare are, therefore, constructed upon the same instruments as those proposed for international animal law. This implies that EU could advance the development of international animal law.

⁸ TNS Opinion & Social, Special Eurobarometer 229: February-March 2005, *Attitudes of consumers towards the welfare of farmed animals*, requested by Directorate General Health and Consumer Protection, European Commission, June 2005 and TNS Opinion & Social, Special Eurobarometer 442: November-December 2015, *Attitudes of Europeans towards Animal Welfare*, requested by Directorate General Health and Consumer Protection, European Commission, March 2016.

⁹ European Commission, Communication from the Commission on the European Citizens' Initiative (ECI) "End the Cage Age", 2021/C 274/01, C/2021,4747, *OJ C* 274, 9.7.2021.

¹⁰ Kantar Public, *Online Consultation on the Future of Europe*, Interim report, Report requested by Directorate-General for Communication, European Commission, 2018.

EIGHT: EU farm animal welfare legislation has serious gaps that impede the EU animal welfarism to gain its full traction. Following shortages were determined as main problems: the mismatch between granting animals the status of sentient beings and at the same time using them as tradable goods; vague language of the legislation and insufficient enforcement and poor compliance. These limitations allow the existence of cruel factory farming practices. Reforms that could improve current state of affairs consist in setting up harmonized system of national penalties for non-compliance, use of clear objectives in the Directives and Regulations and use of precise language.

Concrete practices causing animal suffering were identified: the predominance of live animal transport over meat and carcass only trade, painful and unnecessary mutilations of farm animals and use of cages. Together they expose animals to horrific conditions and excessive pain. Live animal transport is inhumane and has serious adverse effects for animal welfare, animal and human health and the environment. For instance, on the vessels animals suffer from extreme fatigue, heat, overcrowding, infectious diseases and injuries are not uncommon. Often animals have no room to sit down and have to stay at the same position for the entire journey. Road transport has also major consequences such as deprivation of food and water, extreme temperatures, lack of rest, overcrowding, ... Long journeys lead to high mortality numbers and injuries. Solutions include first and foremost general ban of long transports. Until this is achieved, we propose higher number of inspections, shorter traveling times, more rest stops,

sanctioning of Member States that do not enforce the rules, inclusion of all animals into the *Council Regulation (EC) No 1/2005*.¹¹

With regards to mutilations, many cruel practices are still in use. These include dehorning and animal branding in cattle; castration and vasectomies without anesthesia, ear notching, mulesing, disbudding, tail docking in sheep and goats; nose ringing, castration, tattooing, teeth cutting in pigs; beak trimming in poultry. The analysis confirmed that these mutilations are used to reduce undesirable behaviors. Those are, however, caused by the inadequacies of current model of animal agriculture and the environment in which animals must live. The solutions consist in systematic changes of factory farms such as reduction of quantities of animals, more natural lighting, use of anesthetics for inevitable procedures, improvement in the nutrition, ...

Pervasive public disagreement with suffering of farm animals of EU citizens led the EU to the revolutionary decision to ban the use of cages on farm animals from the year 2027. This is an unprecedented decision that will require important changes in the current model of intensive breeding facilities. It is an important advancement of farm animal welfare proving that economic considerations are getting outweigh because animal sentience matters.

Lastly, change of the global food system is confirmed as inevitable. The EU has taken the scientific reports and public pressure seriously. As a

¹¹ Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97, *OJ L 3*, 5.1.2005.

result, animal welfare labelling and meat tax are discussed as effective tools for change leading to less meat consumption, decrease in the environmental consequences of animal agribusiness, transformation of food system towards predominantly plant-based produce, higher transparency, and food sufficiency.

NINTH: European Union is a normative power with a global positive influence of animal welfare. As a global player in the market, it has significant regulatory effect on the dissemination of animal welfare standards. This means that the EU animal welfare framework does not benefit only animals within its borders but also those beyond. Its animal welfare standards are externalized to foreign companies, governments, and international organizations. Several ways of norm export have been determined. Except the trade agreements, there are three main mechanisms. First, so-called “Brussels Effect” through which the EU unilaterally regulates global markets given its large economy and regulatory influence. Global corporations react to EU regulations by adjusting their private policies which is the *de facto Brussels Effect*. Foreign governments are also influenced by EU advancements and adopt EU-like norms which is the *de jure Brussels Effect*. Multitude of examples have been provided to exemplify it. Further, the EU exercises a bargaining power that impacts international organizations, such as the OIE, FAO or International Finance Corporation that adopt soft law influenced by the EU. Lastly the EU finances and supports many projects concerning animal welfare within and outside the EU with the aim of capacity building and technical assistance.

Limitations of regional advances were acknowledged. Export of EU animal welfare norms is only one of the multidimensional regulatory actions needed for better international animal protection. International answers are necessary to solve this transboundary problem. One of the reasons is the fact that international trade threatens parochial advancements through relocation and outsourcing. Consequently, the plight of farm animals cannot be solved by regional advances because the possibilities of animal agribusiness to evade national and regional regulations are significant. Another reason of parochial limitations is the global nature of animal welfare issues that requires a global answer. Intensive rearing systems are globalized. Developing countries are adopting the western model of factory farms and due to lower costs and low animal welfare rules they are able to export cheap meat to other countries. Moreover, even if foreign factory farms adopt EU-like standards, usually they have double operations, one for EU and one for domestic markets and other countries. Furthermore, farm animal welfare has global consequences for our environment and global health that require a more holistic approach.

Because of this, future international normative developments were identified: multilateral treaty and soft law in form of best practices. Example on how the international treaty on animal welfare could look was given. For instance, it should have precise language, clear objectives, enforcement mechanism, administrative agencies, different protocols on different sectors on animal welfare focusing in this way on specific needs of farm animals, laboratory animals, etc. Nonetheless, as has been previously shown, the chances of adopting animal welfare treaty are not high in the near future. To fill the legal vacuum and to

trigger future hard law advancements, there should be a focus on soft law. In particular, best practices of international organizations such as the *OIE Guidelines*¹² were proposed as ideal instrument to protect animals internationally.

TENTH: Coming back to our initial story, the red threat has successfully brought us out of the labyrinth. Along the journey we have formulated a novel proposition for development of international animal welfare protection. However, as the research on this matter is still young, further exploration needs to be done to investigate the ways on how to advance it. With the increasing interest in animal welfare but also with the growing adverse consequences of its poor management, we expect flourishing academic debates taking place in the near future.

We end this dissertation with a believe that the compassion has no limits and that we are slowly but surely awakening to include our fellow living beings in its realm. We hope that our research has given you new perspective and new reasons to consider animal interests in your everyday life.

¹² OIE, *op. cit.*

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