Global Animal Law

Introducing an Intersectional Ethical Framework in order to Reconceptualise Legal Research on International Trade and Animal Law

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Abstract

This thesis seeks to answer the question: to what extent can introducing an intersectional ethical framework to global animal law help to reconceptualise legal research on international trade and animal law. This thesis provides an ethics-based, critical, intersectional and posthumanist analysis of emerging global animal law (scholarship) and the disproportionately large impact of international trade law on its normative growth. This thesis provides five novel contributions to global animal law literature. First, this thesis builds an ethical toolbox from posthumanism, feminist ethics, intersectionality theory and Earth Jurisprudence. On this basis, this thesis delineates, for the first time, a second wave of animal ethics which is utilised as an ethics-based methodology for this research. Second, this thesis crafts a new critical narrative of animal law by putting various forms of (global) animal law into dialogue with global law metatheory and second wave animal ethics, critiquing global animal law (scholarship) for ethnocentrism and coloniality. Third, this thesis problematises trade policy's impact on animals by introducing new, critical analysis of its neoliberal underpinnings. This requires filling critical research gaps in the trade linkage debate by using complex trade data and qualitative analyses of law to assess the impact of trade on animal welfare. Fourth, this thesis critiques the unacknowledged dominance of unilateralism in trade law responses to the animal question. This critique identifies coloniality in trade law responses to the animal question which entrenches harmful norms within global animal law. Finally, this thesis utilises second wave animal ethics to reach a new set of proposals to improve global animal law's response to trade and animal welfare issues. The recommendations are for: more diverse scholarship and critical academic spaces; multilateral and multi-level global animal law solutions to problems caused by international trade; and an incorporation of animal welfare into WTO multilateral committee work.

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My sincerest thanks to Professor Elisa Morgera who provided thoughtful critique as my PhD reviewer. Thank you to the scholars at SCELG who do inspiring work and who have made great efforts to grow an environmental law family, giving me and my PhD a home. Saskia's PhD crew (we still need to brainstorm that name) gave me the space to openly and awkwardly work through the connections between my queerness and my animal advocacy. I can never thank them enough for that, and the myriad of other wonderful outcomes of our discussions. My gratitude also extends warmly and deeply to the incredible people at Lewis & Clark Law School's Center for Animal Law Studies, where I spent time as a visiting scholar. Amy, Delci, Joyce, Kathy, Pam, Raj and Russ all have my great admiration and a longing to see them as soon as possible. I am also grateful to Professor Anne Peters and the whole team at the Max Planck Institute's Global Animal Law section for making my visiting stay in Heidelberg so enjoyable and fruitful. I also want to acknowledge the way that the wider animal law and environmental law/justice communities have inspired me in writing this thesis. I have had countless interactions with inspirational scholars and activists in the field and I am grateful for each and every one of these. Whether at a conference, reviewing an article, collaborating on joint projects, teaching together, or sharing our dreams of a better world, each of these conversations have shaped the work I do, and I am so grateful to the village that raised me. I won't list names for fear of forgetting some. Instead, I want to specifically thank some of those inspiring people who have also become very close friends, with whom I have got to share in all of life's adventures. It is with the warmest heart that I thank Giada, Graham,

Julie, Mara, and Mika for every ounce of support they have given me in this journey, enriching my life and forging lifelong connections along the way.

To my family, I cannot help but write directly. Mum and dad, each and every one of my successes are wholly and unreservedly yours! For the way you nurtured my endless curiosity and outlandish dreams for the future, and for being there through every single step of this wild journey. I would be but a fraction of myself without you. And I would be even less without the other members of our clan: Kylle, Jackson, Jess, Mary, Lilo, Stitch. Know that you have carried me to the end of this journey in ways you may never know. Thank you for being there always. Gavin, you are core to this clan now but also much more than that. I cannot thank you enough for bearing the weight of this PhD with me. The brainstorming together, your endless curiosity about what I'm reading and writing, your relentless ability to cheer me on no matter how slow I'm moving, and your ability to make me believe in myself when I think I've forgotten how. Having a PhD once felt like a far-off dream but, now, the fact you are in my life means no dream is too big!

This thesis is dedicated to the animals (non-human and human) that make up the Otherhood, in the hopes that they will see days of greater flourishing.

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Introduction

1. Feathers, Boots

Feathery corpse rests, rivulet trickles, faint trail's edge.
Liminal place to lay and become.
Din of scouts, curious haste, tranquillity stomped out.
Sudden striking boots, loosened feather.

Stopped dead, a shadowing boy roots.
Queer, exquisite pain doubles down.
That night, Mother's hand, ruining tears.
Feathery kinship, grasped over twenty years.

Every animal advocate has an origin story. We trot them out in response to questions from friends, naysayers, students, and our own community members. Our origin stories are core to our identity and to our shared history as animal advocates, lawyers, and ethicists. I have told my own story for most of my life, but I did not fully comprehend it until two years ago. The evolving meaning-making of this story inspired this socio-legal work on the trade in animal Others and their bodies. It provides this work with rich, narrative context, facilitating deep understanding of the injustices caused by the laws, policies and norms that undergird international trade in animals and their bodies.

The evolving meaning-making of this story has inspired the reflexive critique in this thesis of global animal law scholarship and its failure to adequately respond to the tragedy of the trade in animals and their bodies. It has also facilitated the development of a methodology for this research that regards law through a critical lens that not only values animal flourishing but also questions what we mean when we say 'animal' and how their oppression intersects with the oppression of women, racial and religious minorities, indigenous peoples, disabled people and queer people. I've begun to think that the tears of that night communicated more than the twenty years of words that followed. So, I will try to unpack those feelings before proceeding to conceptually and normatively elaborate on the insights of this story for this socio-legal work. This emotional insight and the sociological scene-setting that will follow are included here to focus the

reader's attention on animal perspectives. This is necessary to ground a resistance to the anthropocentrism of law and legal scholarship in this thesis. My hope is that the animal perspective will be centred in the reader's mind throughout this journey.

That pain was raw, visceral and wrenching. It was a gut-punch that doubled me over in confused helplessness. Imagining the pleasures those boys derived from their kicks drove me to strange and dark contemplation. I knew I was supposed to recognise the depths of my pain as disproportionate; the bird was already dead, after all. And yet, the pain arose so naturally that I knew its roots ran to certain, unquestionable depths. There is an integrity to this knowledge of animal kinship amongst children. But, as I saw that night, this kinship can be quickly unlearned. I think our predisposition towards this unlearning is tied to our position in society.

What it took me twenty years to learn was that my kinship with that bundled, feathery corpse ran deeper than empathy. When those boys weren't busy with their boots, they were teaching me lessons it will take a lifetime to unlearn. They knew I was queer before I knew what that meant, they called me 'poof'. They encouraged me into hiding, training me to mask my sensitivity and effeminate traits. The same entitled self-assurance that strapped their boots, loosed their tongues, creating hierarchy and delineating a domain of Otherhood. I was made Other, together with that bird. And so, it took me twenty years to learn, I was crying for the bird but also for myself.

Twenty years later and I have learned the power of the Otherhood as a communal force to face the boots of systemic oppression. I capitalise 'Other' to highlight the concept's profundity and distinctiveness, to draw attention to the bodies, minds and perspectives of marginal Others, and to recognise the advocacy, socio-political and philosophical work of critical animal scholars that identify with their own Otherness.[1] The round, endless 'O' also evokes the circle of moral concern which I wish to draw attention to and critique.[2] The work of women, racial and religious minorities, indigenous peoples and disabled people drew this connection for me. Their work drives this thesis. For this reason, and in honour of feminist standpoint theory, I stand firmly and proudly as an ethical vegan researcher of queer Otherhood in embarking upon this work. Feminist standpoint theory is one amongst multiple theories that recognise that knowledge is situated and

[1] For example, Syl Ko, 'Notes from the Border of the Human-Animal Divide: Thinking and Talking about Animal Oppression When You're Not Quite Human Yourself' in Aph Ko and Syl Ko (eds), *Aphro-ism: Essays on Pop Culture, Feminism, and Black Veganism from Two Sisters* (Lantern Books 2017). Note, while I was initially inspired by Emmanual Levinas' 'Other', I do not use his work in this thesis and do not capitalise 'Other' in reference to his work. See Emmanuel Levinas, *Totality and Infinity* (trans Alphonso Lingis ed, Duquesne University Press 1969).

[2] See chapter I section 4.2.

that we should focus on experiences of 'marginalized groups as a source of knowledge and understanding' given their unique insights into power dynamics and oppression.[3]

These personal reflections are essential contextualisation. They are a rejection of the false objectivity of research; particularly mainstream, conservative and dominant research (and researchers). This situational approach to my research exposes the value in the ostensibly and falsely neutral. It is this falsity and 'naturalness' of dominant perspectives that has forced animals and my fellow queers into Otherhood. Comprehension of the depths of my kinship with the feathered corpse arrived too late in this project for me to actively seek out theories from my own queer siblings in support of this work. Thus, I elaborate an exciting postdoctoral agenda in my conclusion which will evolve the work set out here through queer inquiries. Meanwhile, this socio-legal work grounds itself in a methodology borne of intersectionality theory, critical animal studies, feminist animal ethics, posthumanism, Earth jurisprudence and certain critical race and indigenous perspectives on animal lives.

Our oppression gives our research unique strength, for we are not beholden to the traditions of everyday society, science and knowledge-building enterprises which have perpetuated things like false dichotomies (human/animal, heterosexual/homosexual, male/female, nature/culture), universal truths (in reality, borne of situated contexts and, thus, not representing 'truth' in other contexts) and systemic oppression. The situatedness of this research is no reason for dismissal, as legal scholars are wont to do with subjective works. Rather, it demands this work be treated with the utmost seriousness and that its imperatives of transparency, scepticism of existing power dynamics and situatedness be treated as a model for legal and socio-legal research at large.

This introduction will proceed in three parts. First, I will provide a reflection on the nature of Otherhood, borne of intersectionality and grounding this thesis' theoretical and philosophical foundations. This gives us our definition of the 'animal'. Second, I will elaborate the oppression of non-human animals and the central role of commodification, trade and law in this. Third, I map the landscape of this thesis, identifying its waymarkers and the course to its final destination.

2. The Otherhood

[3] Iddo Landau, 'Feminist Standpoint Theory' in DC Phillips (ed), *Encyclopedia of Educational Theory and Philosophy* (SAGE Publications 2014) 331.

We are a universe of our own—this domain of Others.[4]

The concept of Other and the concept of animal are interwoven, even synonymous at times. 'Human' is a narrow sociocultural construct that has been set apart from the abnormal animal Other which is typified as tending toward 'anomaly, deviance, monstrosity and bestiality'.[5] So, in socio-legal works, it is impossible to understand the term 'animal' on solely biological terms. In such terms, an animal is '[a] living organism which feeds on organic matter, typically having specialized sense organs and a nervous system and able to respond rapidly to stimuli; any living creature, including man [sic]'.[6] Passing over the paternalism of 'man' for now, this definition is sociologically deficient. It fails to capture the way 'animal' is used. If this meaning were widely used, 'non-human animal' would be the normal denomination for the other-than-human and we would recognise the human-animal dichotomy as false because all humans are animals. We also might not be jarred by hearing reference to animal people.

The way we commonly understand 'animal' is not biological. We tend to reveal and harmfully entrench sociocultural conceptualisations of 'animal' through endless colloquialisms, the sheer quantity of which speaks volumes in itself. Even just a cursory list includes cow (unpleasant woman), pig (greedy), snake (treacherous), chicken (coward), sheep (conformist), sheepish (shy), bitch (nasty woman), bullish (aggressively confident), rat (deceitful), dog (contemptable man), snail (slow), bird-brained (stupid), horse around (be silly), shark (dishonest), and leech (exploitative, reliant). More simply, to say 'you're an animal' is to infer uncivility, a weaponised colonial falsity. Ape is used similarly against black and indigenous peoples. At every step, the animal category is denounced, defiled and defaced. This is closely related with how animals are socially and politically oppressed. Interestingly, the rare exceptions where animal metaphors carry positive weight (lone wolf, lion-hearted) align with charismatic mammalian megafauna. There is moral inconsistency and gendering going on here.

All humans are animals, but some are treated as more animal than others.[7] This is because, sociologically and politically, the label of humanity has been applied narrowly, leaving some homo sapiens behind. During the Enlightenment, a white, male, able-bodied conception of 'humanism' evoking the Vitruvian male became entrenched.[8] This labelled female, black, disabled and queer

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[4] Ko (n 1) 73.

[5] Rosi Braidotti, *The Posthuman* (Polity Press 2013).

[6] *Oxford English Dictionary* (Oxford University Press 2010).

[7] George Orwell famously said 'all animals are equal, but some are more equal than others'. George Orwell, *Animal Farm* (Penguin Classics 2000).

[8] Braidotti (n 5); Syl Ko, 'By "Human," Everybody Just Means "White"' in Ko and Ko (n 1).

humans as a dichotomous Other/animal. The most serious consequences of this have seen indigenous peoples murdered and their lands stolen, and black people bought and sold as slaves. In this way, the human/animal divide has been used to advance objectives of power and commerce. Some of the most insightful animal ethics work is done by black vegans who are simultaneously dealing with the consequences of their own dehumanisation whilst also trying to improve the lot of non-human animals.[9] As an example of what they call for, Syl Ko states that we must not 'glamorize "the human"' because this would 'uphold the superiority of whiteness' which defines humanity.[10] Instead, we must imagine different, decolonised and posthuman alternative realities. This requires recognising that there is nothing distinct about the human that can adequately distinguish it from all other animals.

So, at the core of this research project is an effort to indistinguish the categories of human and animal and to elaborate relationalities between them, as will be elaborated in chapter I.[11] This should sew a seed of intrigue, so that upon each instance of reading the words 'animal' or 'human' in this work, the reader is drawn to question how they regard those terms and the oppressive roots of those perceptions. Unfortunately, living in a world borne of Enlightenment era humanism leaves animal law scholars with a difficult choice: adopt problematic language or eschew common language with potentially confusing or misleading results. I opt for the former because the goals herein are so significant that the cost of confusion is exceedingly high. Thus, I will go forward with using 'animal' to refer to non-human animals. However, substantively and normatively, I will continue to nuance and pick away at the false human-animal divide, exposing it as nonsensical.

The indistinctness of the human and animal categories imparts two important lessons. First, the systemic harm of Othering is significant and often overlooked. For that reason, this thesis rejects means of emancipation that acquiesce with other systemic harms. Second, self-identification with 'sub-human' labels may facilitate recognition of the political harm of Othering.[12] In turn, this may facilitate collective rebellion of 'the Otherhood': a potential banner for a ragtag band of critical, marginal (schol)activists, human and animal persons who find their 'social, political, and moral status' is 'rooted in the domain of the Other'.[13] This work calls for the Otherhood to stand for animals, and for animal advocates to stand for Othered humans. Syl Ko identifies a 'problematic Eurocentric compartmentalization of the world' as having separated

[9] Ko (n 8).

[10] ibid 26.

[11] Chapter I section 4.1.2.1.

[12] Ko and Ko (n 1).

[13] Ko (n 1) 73.

various Others from one another.[14] In actuality, various oppressions 'make up the same territory'.[15] Increasing recognition of this might lessen the pain we feel when, for example, I am ridiculed for my veganism in queer spaces and I deal with homophobia in vegan and environmentalist spaces.[16] Doing this requires recognising our 'liminal' subhumanity which might feel painful but ought to be liberating and radical.[17]

Some animal advocates resist such efforts toward recognising intersecting and systemic oppressions, treating this as an effort to decentre the animal and impose identity politics into animal advocacy.[18] These advocates perpetuate the 'myth that (white racialized) consciousness produces "objective, "universal," and "raceless" knowledge about nonhuman animals'.[19] I cannot be clear enough about this: white or mainstream animal advocacy that is silent on issues of racism or sexism or homophobia or ableism are not devoid of identity politics. They take a stance by remaining silent. This silence begets an ignorance of systemic and intersecting oppressions. Thus, arguments that personalising, contextualising or situating animal ethics is divisive or drawing attention away from animals cannot be taken seriously. This had to be made clear at the outset, given that the audience for this work is primarily animal law scholars and activists. Now, given that the audience for this work also includes environmental law scholars and activists and all other kinds of social justice warriors (and academics), I turn to setting out the unique social and legal situation of animals in the Otherhood.

3. ~~Fair~~Foul Trade

1,187 billion (1,187,000,000,000)

That is the number of animals that have been killed by humans for food in the 39 months between commencing this PhD project and its submission in December 2020.[20] That's an eye-watering three billion every single day. For comparison, all recorded human deaths in the same 39-month

[14] ibid 71.

[15] ibid 72.

[16] ibid 71.

[17] ibid 73–75.

[18] Aph Ko, '#AllVegansRock: The All Lives Matter Hashtag of Veganism' in Ko and Ko (n 1).

[19] A Breeze Harper, 'Foreword' in Ko and Ko (n 1).

[20] Matt Zampa, 'How Many Animals Are Killed for Food Every Day?' (*Sentient Media*).

period is an estimated 189 million.[21] But the problem for this thesis is not just that we kill animals so wantonly (though, that is a grave problem). The problem is subjecting animals to 'lifelong deprivation of absolutely everything that makes life worth living or even endurable'.[22] The problem is also that we use law and policy to perpetuate power dynamics that permit torture and killing; that we think ourselves the kinds of beings that can normalise, industrialise and regulate mass-scale torture and killing. This is, in no uncertain terms, an abomination.

Central to animals' suffering is trade. Later in this thesis, I will introduce the long history of trading in animals and their bodies. Globalisation and industrialisation have contributed significantly to this suffering. This has been further enhanced through the globalising effect of trade and the arrival of international, transnational and global legislation to govern this. It is very clear that we no longer simply kill animals out of apparent necessity; we do so for products made of their bodies that bring us pleasure, facilitating indulgence and gluttony. Even discounting the fact that we do not need animal food to live healthy, flourishing lives, we clearly do not need the *volumes* of animal food products that globalisation has produced. Due in part to globalisation, industrialisation and trade, animal suffering is most pressing with regard to farmed animals (including fish) but also with regard to animals used in research and animals kept in zoos or other enclosures. This is true both due to the intensity of suffering imposed on those animals as well as due to the scale of the suffering (three billion deaths every single day). The impact of this does not stop with the tortured farm animals themselves. This is because farmed animals now make up 60% of all mammals remaining on Earth, with humans amounting to 36% and wild mammals just 4%.[23] Our obsession with meat and dairy is contributing to global hunger, deforestation and the squeezing of wild animals out of their natural habitats and into extinction.

The torture of farmed animals, wild animals in captivity, animals used in research and others is commonly available knowledge. There is nothing I can add to describe those horrors in an original way here. Watch *Dominion*, *Cowspiracy*, *Earthlings*, *Blackfish*, *Food, Inc*, or any number of documentaries on animal suffering. Read Jonathan Safran Foer's *Eating Animals*, Ruth Harrison's *Animal Machines* or Phillip Lymbery's *Farmageddon*. Comprehending the horrors that are tackled in this thesis requires these audio-visual nightmares and these extended, narrative and storied reflections on the torture endured by animals. Comprehending what must be done requires a deep unlearning of our societal training that has allowed us to consume animal products with nary a

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[21] Hannah Ritchie, 'How Many People Die and How Many Are Born Each Year?' (*Our World in Data*, 2019) <https://ourworldindata.org/births-and-deaths> accessed 18 December 2020.

[22] Mary Midgley, 'Why Farm Animals Matter' in Marian Stamp Dawkins and Roland Bonney (eds), *The Future of Animal Farming: Renewing the Ancient Contract* (Blackwell publishing 2008) 30.

[23] Yinon M Bar-On, Rob Phillips and Ron Milo, 'The Biomass Distribution on Earth' (2018) 115 PNAS 6506.

thought for where they came from. If one wishes to express an informed opinion on animal law, the bare minimum requirement is a deep knowledge of the subject matter and the reality of animals' lives (something most legislators and policymakers utterly fail to ascertain).

We must open our eyes to painful restraint and confinement. Crates or cages for months or years is the norm for calves killed for veal, sows kept for repeated impregnation, and laying hens kept in battery cages. We must open our eyes to pain. Most animals farmed for food are genetically engineered so they grow far faster than their tiny bodies are capable of supporting. They are immobilised by broken legs as a consequence and pumped full of copious antibiotics preventatively; we bring them into the world with the full knowledge that pain and disease will be their everyday reality. We must open our eyes to blind terror. Animals led to their place of death know what is happening and are sometimes forced to watch as they await their turn in line. We must open our eyes to the fact that these harms, and countless more, are the cost of our steak dinner, the milk in our coffee, the leather in our shoes. Finally, we must open our eyes to the reasons that we do not care and that these reasons are far more engineered and societally orchestrated than we realise.

As will already be clear, this thesis will display emotion, particularly rage and despair. This improves rather than diminishes the academic credentials therein. This is because intellectual insights rest within emotion. Works that perpetuate a false rationality/emotion dichotomy are bland and dishonest.[24] It is clear from all this that this thesis is about perspectives on what is right and what is wrong. In present contexts, amidst such vast suffering, it is impossible to detach considerations of animal law from animal ethics. This reflection has introduced the material reality and the facts of animals' lives. Chapter I will introduce the animal ethics that provide us with the reasons to care about this.

I should clarify that this thesis applies to the treatment of all animals. Humanistic divisions of animals into their use-categories ("pets" for companionship, farmed animals and fishes for food, animals in research for testing, wild animals for admiration and conservation) are arbitrary and deeply anthropocentric. Such divisions reduce an animal's sociological importance to their utility according to human preferences,[25] ignoring their priorities and societies. This does not mean a one-size-fits-all approach is the way forward. Rather, I propose utilising a material conception of

[24] See chapter I section 4.3.2.2.

[25] Linda Hurcombe and Theresa Emmerich Kamper, 'The Materiality of Human-Animal Relationships: Animals as Hides, Furs, Fibres, Sinew, and Tools', *84th Annual Meeting of the Society for American Archaeology* (HumAnE Archaeology 2019) <https://core.tdar.org/document/451585/the-materiality-of-human-animal-relationships-animals-as-hides-furs-fibres-sinew-and-tools> accessed 18 December 2020.

animals rather than an anthro-social one.[26] This entails focusing on what an animal is rather than what we intend to do with its corpse. Thus, the legal, political and ethical protection and consideration required by different kinds of animals differs due to their abilities to flourish. This is the appropriate marker of division, not human usage.

What does the law have to say about all of this? Through mechanisms including the law, 'European colonizers decided that non-human animals are disposable, exploitable, and non-sentient…and then they categorized Black Africans as such types of animals'.[27] There is a long history of legal oppression of animals interlinking with racial oppression. In this way, law is a colonizer's tool and animal law is used as such; but, Audre Lorde's work demonstrates that using the 'master's tools' is a flawed approach which perpetuates systemic oppression and, in this case, ultimately fails animals and humans.[28]

Animals have property status in most legal systems; they are law's Other.[29] This facilitates unfathomable suffering of billions of sentient beings every year in animal agriculture, animal testing, and zoos. Animal law has emerged as a necessary, emancipative solution to animal suffering, creating animal legal subjectivity. However, animal law perpetuates a double oppression. First, it utilises an inside/outside moral boundary, excluding the non-sentient animals, plants and ecosystems that environmental law recognises. Second, animal law perpetuates coloniality by oppressing the Global South, treating fur-farming dogs and cats in Asia as morally reprehensible but permitting and weakly regulating western factory farming of pigs, chickens and cows. This is evident in the new legal subdiscipline of global animal law.

I refer to coloniality over neocolonialism. Neocolonialism focuses on post-colonisation dependency and indirect rule, perpetuating 'colonial forms of social organization' based on race and class.[30] It is a useful phrase, though perhaps overused to refer to many things following colonisation which entail colonial power dynamics. Coloniality is a more useful concept for this thesis. Coloniality is conceptualised by Latin American scholars as a 'matrix of power in the modern world'.[31] Coloniality entails perpetuation of the 'relationship between the European – also

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[26] Richard York and Stefano B Longo, 'Animals in the World: A Materialist Approach to Sociological Animal Studies' (2015) 53(1) Journal of Sociology 32.

[27] A Breeze Harper, 'Dear PETA, Black Lives Matters so Where Are You in All This Mess?' (*SistahVegan*) <http://sistahvegan.com/2014/12/19/dear-peta-black-lives-matter-so-where-are-you-in-all-this-mess/> accessed 18 December 2020.

[28] Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House* (Penguin Classics 2018).

[29] See exploration in chapter II.

[30] Nelson Maldonado-Torres, 'Colonialism, Neocolonial, Internal Colonialism, the Postcolonial, Coloniality, and Decoloniality' in Yolanda Martínez-San Miguel, Ben Sifuentes-Jáuregui and Marisa Belausteguigoitia (eds), *Critical Terms in Caribbean and Latin American Thought* (Palgrave Macmillan 2016) 73–74.

[31] ibid 76.

called 'Western' – culture, and the others' as one of 'colonial domination' in which Western culture is coded 'paradigmatic' and others destroyed.[32] It also entails 'social classification … on a global scale' according to race. This, it will be shown, accurately depicts what is happening with regard to animals. Non-western practices of animal consumption are coded barbaric whilst western factory farming is the norm, with invisible harms. Globalised, legislative patterns are being used to entrench this power matrix and cultural destruction. Race will also be shown to be key to understanding the concept of the animal. Coloniality is also associated with its antithesis, decoloniality, which aspires beyond 'surviv[al]' to the 'creat[ion] of *an-other* world'.[33]

Global animal law scholarship misappropriates the 'global' label to describe western scholarship on global issues, developed without engagement with the Global South, indigenous and marginalised communities. The response of animal law and animal law scholars to the realities of globalisation are troublingly ethnocentric. This is particularly evident in the law that governs animals that are traded; such law is a product of legal systems that centre upon neoliberal norms and free market ideology. Thus, trade law is an eminently important subject of study in order to comprehend the shortcomings of animal law and in order to facilitate its improvement. The next section will set out the socio-legal questions to be tackled in this thesis.

4. Waymarking the Journey

The first overarching objective of this thesis is to improve the lives of animals. The second overarching objective of this thesis is to ensure that the means of improving animals' lives through law and policy reject systemically oppressive mechanisms. In pursuing these objectives, I will focus on subject matter including global animal law, animal ethics and international trade law. I consider that achieving the two objectives requires deep consideration of animal interests and intersecting oppressions in both law and scholarship. Thus, the central research question of this thesis is: to what extent can introducing an intersectional ethical framework to global animal law help to reconceptualise legal research on international trade and animal law.

This thesis will argue that global animal law fails to engage with the Global South, indigenous and marginalised communities: it is western-centric, not global. International trade law has infiltrated global animal law's early development, entrenching shallow, utilitarian, anthropocentric concerns for animals. I will argue that animal lawyers fail to critique this because

[32] Aníbal Quijano, 'Coloniality and Modernity/Rationality' (2007) 21 Cultural Studies 168, 169–170.

[33] Maldonado-Torres (n 30) 76.

they are indoctrinated by trade norms and the neoliberal force. This thesis will propose a brand new, intersectional second wave of animal ethics to resolve this troubling situation, reconceptualising research and law on animals and trade. This thesis also formulates a future research agenda, utilising the ethical framework to inspire more effective (animal) law from an intersectional and posthumanist perspective in the globalised age of the Anthropocene. References to effectiveness refer to an improved ability to protect animals through means that account for intersectional ethics. The five substantive chapters of this thesis will unfold as follows.

The first chapter contains a deep-dive into animal ethics, critiquing Peter Singer's utilitarian animal welfarism and Tom Regan's deontological animal rights. Focus is shifted to posthumanist thought, feminist literature, intersectionality and Earth jurisprudence. I use these theories to create a unique ethical toolbox and to delineate, for the first time, a second wave of animal ethics. This provides this thesis with its methodology. I develop four requirements to ground animal law in intersectional animal ethics. These require that: subjects be afforded ethical consideration due to their unique flourishing, not similarity theory; moral circles be eschewed in favour of ethics that prioritise marginal Others; ethics of care be utilised instead of individualistic, liberal rights; and that situatedness is favoured over universalised ethics, avoiding ethnocentricity and coloniality.

The second chapter of this thesis crafts a crucial new critical narrative of animal law by putting various forms of (global) animal law into dialogue with global law metatheory and second wave animal ethics. I reveal previously unacknowledged coloniality in animal law scholarship and practice. I conclude that many gaps within global animal law have been filled by international trade law. Thus, the roots of normative deficiencies within global animal law are identified, facilitating proposals for reform.

In the third chapter, I problematise trade norms and policy by introducing new, critical analysis of the neoliberal underpinnings of trade policy and the scope for including animal interests there. I fill critical research gaps in the trade linkage debate (which concerns interactions between trade and social issues) by using complex trade data and qualitative analyses of law to assess the impact of trade. I identify a four-pronged impact: (1) open markets, (2) low animal welfare havens, (3) chilling effect, and (4) lack of labelling. I reach the novel conclusion that trade liberalisation frustrates efforts to incorporate animals' interests into law by perpetuating conceptions of animal welfare as a "non-trade issue".

The fourth chapter of this thesis provides the novel outcome of a new dialogue between international trade law and second wave animal ethics. This focuses upon World Trade Organization (WTO) jurisprudence, free trade agreements, and unilateral trade measures. This reveals a previously unidentified preference for unilateralism in trade and animal welfare policy.

This contribution fills gaps in trade linkage literature, identifying coloniality within animal protection in unilateral trade policy. I prove that resolving this tension requires literature that is not indoctrinated by the objectives, norms and priorities of the trade regime.

Finally, in the fifth chapter, I develop a new and unique set of proposals for trade and animal welfare policy and scholarship, inspired by second wave animal ethics. The recommendations are for: more diverse scholarship and critical academic spaces; multilateral and multi-level global animal law solutions to problems caused by international trade; and an incorporation of animal welfare into WTO multilateral committee work.

My hope is that this thesis will inspire the development of global animal law (including scholarship) which will appropriately respond to the challenges of animal oppression, systemic oppression and globalisation. Deep integration of marginal perspectives is required in order to do so. Global law (distinct from international or transnational law) provides an exciting new subject and means of study for animal lawyers. A current moment of reflexion amongst international trade law actors and scholars also presents exciting opportunities for animal lawyers to make a difference. It is hoped that sharing marginal perspectives on animal law will allow global animal lawyers to make real, significant impacts on animals' lives through means that reject systemic oppression and coloniality. It is time for animal law to take seriously the insights of marginal scholars, joining the Otherhood in its fight against the boots of oppression.

Chapter I

Second Wave Animal Ethics:

A View of (Global) Animal Law from the Margins[1]

1. Introduction

Animals are systemically marginalised and exploited in contemporary society in ways that intersect with the treatment of women, ethnic and religious minorities, disabled people, and queer people.[2] Throughout history, dominant societal groups have used difference from the dominant norm (male, white, able-bodied, heterosexual, cisgendered and human) as justification for denying suffrage to, enslaving, going to war with, committing genocide against, or eating members of our Earth community that have been Othered. Social justice movements frequently succeed by proving similarity with the Other, revealing that it has equal inherent value.[3]

This tactic has been replicated by mainstream animal ethics in opposition to the Othering of animals in society. I describe this body of work as 'first wave' animal ethics.[4] 'First wave' animal ethics encompasses heavyweights of the animal liberation movement including Peter Singer, Tom Regan and Gary Francione.[5] First wave ethical systems, focusing on animal welfare and animal rights, are typified by their use of liberal-rational, non-situated theory to justify drawing animals

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[1] An adaptation of this chapter is published as: Iyan Offor, 'Second wave animal ethics and (global) animal law: a view from the margins' (2020) 11(2) Journal of Human Rights and the Environment 268.

[2] Maneesha Deckha, 'Toward a Postcolonial, Posthumanist Feminist Theory: Centralizing Race and Culture in Feminist Work on Nonhuman Animals' (2012) 27(3) Hypatia 527.

[3] Taimie L Bryant, 'Similarity or Difference as a Basis for Justice: Must Animals Be like Humans to Be Legally Protected from Humans?' (2007) 70(1) Law and Contemporary Problems 207, 208.

[4] Inspired by the waves of feminism.

[5] Peter Singer, *Animal Liberation* (4th edn, Harper Perennial ed 2009); Tom Regan, *The Case for Animal Rights* (University of California Press 2004); Gary L Francione, *Animals, Property, and the Law* (Temple University Press 1995); Gary L Francione, *Rain without Thunder: The Ideology of the Animal Rights Movement* (Temple University Press 1996); Gary L Francione, *Animals as Persons* (Columbia University Press 2008).

within the circle of moral concern together with humans on the basis of similarities deemed to be relevant, such as cognitive ability, self-consciousness or sentience. This chapter provides alternatives which prioritise listening to animals and respecting their distinct worldviews. This requires accepting emotion as a valid form of knowledge, which first wave animal ethics rejects. A rational, liberal turn in animal ethics has conceptualised emotion as suspect, erratic and womanly.[6] This thesis regards this as a misstep, presenting emotion as knowledge which is essential to undoing the detachment of humans from the lives and pain of animals.[7]

This chapter argues that the ideas espoused by first wave animal ethics (some of which are reflected in animal law) are suboptimal and potentially harmful, particularly in the context of global animal law. Thus, this chapter makes a first, novel effort to demarcate the scope and direction of a new 'second wave' of animal ethics.[8] This argument stems from my Othered positionality and is forwarded through intersectional, posthumanist and feminist theory. Second wave animal ethics is posited as a more effective ethical grounding for animal law and, thus, a methodology and critical lens through which to investigate the trade and animal welfare issues of this thesis.

This chapter will unfold as follows. First, section II will explore the connection between law and ethics, justifying the ethics-based methodology and critical analysis in this thesis. This also contextualises animal law's use of ethics to enhance its legitimacy and effectiveness.[9] Then, section III will define and distinguish first and second wave animal ethics, introducing intersectionality as a connecting thread for second wave animal ethics. Thereafter, section IV will analyse four key limitations of first wave animal ethics based in the similarity argument, circles of moral concern, liberalism, and ethnocentric universalisation. Second wave animal ethics is shown to address each deficiency, offering a more ethical and effective basis for animal law. This reveals the central ideas

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[6] Josephine Donovan, 'Animal Rights and Feminist Theory' in Josephine Donovan and Carol J Adams (eds), *The Feminist Care Tradition in Animal Ethics* (Columbia University Press 2007) 59. An example denouncing emotional knowledge: Ian A Robertson, *Animals, Welfare and the Law: Fundamental Principles for Critical Assessment* (Routledge 2015) 32 et seq.

[7] See below at section 4.3.2.2.

[8] Incidentally, Singer references waves to distinguish editions of an edited collection on, largely, utilitarian animal ethics: Peter Singer, *In Defense of Animals: The Second Wave* (Blackwell 2006). Robert Garner discusses a 'second generation' of post-rights animal ethicists: Robert Garner, *Animals, Politics and Morality* (2nd edn, Manchester University Press 2004). Also, Paul Waldau's 'second wave animal law' was inspiring: Paul Waldau, 'Second Wave Animal Law and the Arrival of Animal Studies' in Deborah Cao and Steven White (eds), *Animal law and welfare: international perspectives* (Springer 2016).

[9] Thomas G Kelch, 'The Role of the Rational and the Emotive in a Theory of Animal Rights' in Donovan and Adams (n 8) 273–274.

defining the second wave. The first wave's functioning is explored only briefly because it benefits from extensive treatment in the literature.[10]

The four key deficiencies start with an overly narrow focus on particularly intelligent or able species due to reliance on problematic 'similarity arguments'. These maintain that animals must be similar to humans in ways deemed relevant in order to be worthy of moral protection.[11] A second wave alternative would afford ethical consideration to animals as the kinds of things that they are, without requiring similarity. This opposes, for example, Tom Regan's theory of animal rights, which applies only to mammals over one year in age.[12] This tells us how to determine who is ethically considerable. Secondly, first wave animal ethics seeks to enlarge the circle of moral concern but tells us nothing about how to treat those outside the circle.[13] A second wave alternative looks outside the circle of moral concern in the first instance in order to prioritise the Other. This tells us who is ethically considerable. Thirdly, first wave animal ethics stems from the liberal tradition.[14] A second wave alternative regards liberal ethical concepts of individuality, rights, and obligation as ill-fitting in relation to questions of animal ethics, preferring interconnectedness, relationality, emotional insight and care. This tells us what ethically considerable beings are owed. Finally, first wave animal ethics sets out universal, non-situated systems of rules.[15] Such frameworks risk perpetuating ethnocentricity and matrixes of power reflecting coloniality on the global scale. Second wave animal ethics exposes the harms coloniality and ethnocentric universalisation causes to marginalised groups of humans. This tells us how to be reflexive and open to evolving understandings in ethics.

This animal ethics deep dive is essential reflexion to address (global) animal law's ethical shortfalls and to formulate more ethical and effective protections for animals against the impacts of trade. Second wave animal ethics is neglected by animal law scholars. Thus, I hope this provokes debate amongst first wave subscribers and inspires more uniquely insightful marginal scholarship on animal law which, presently, relies on animal welfarism and animal rights ethics.[16] The genesis of global animal law (as a scholarly sub-discipline and area of law) adds gravity to this neglect.[17]

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[10] Waldau (n 8) 16. For examples, see Simon Brooman and Debbie Legge, *Law Relating to Animals* (Cavendish Publishing Limited 1997) ch 1; and Thomas G Kelch, *Globalization and Animal Law: Comparative Law, International Law and International Trade* (2nd edn, Kluwer Law International 2017) ch 2.

[11] Bryant (n 3) 208; Francione 2008 (n 5) 137 et seq.

[12] Regan (n 5) 264 et seq.

[13] For example, ibid 362–363 and 396.

[14] Deckha (n 2) 528.

[15] Text to n 368 below.

[16] Chapter II section 2.3.

[17] See chapter II.

Global animal law is an emerging area of legal study on the global aspects of law as it relates to animals. Global animal law is subjected to critical analysis in chapter II. Increasing global scholarly endeavours are dominated by western scholars promoting their policy approaches and, consequently, their ethics on the global stage. Animal rights arguments are dominating this emerging conversation and second wave ideas are generally neglected.[18] The genesis of global animal law inspires reflexion in this thesis on longstanding inequalities within the animal liberation community. These include tendencies toward coloniality and patriarchal argumentation rather than broad, collaborative discussion and prioritisation of intersectionality and marginal perspectives. Marginalised Others have unique insights of oppression. Thus, this thesis is grounded in the animal ethics of women, postcolonial thinkers, queer folk and others. This abundant, ground-breaking body of work is making waves in animal ethics but is yet to find a foothold in animal law. This, it will be argued, ought to change.

2. Animals and the Law: A Necessary Role for Ethics

Outside and liminal perspectives on law can prove vitally insightful to its development. This is particularly true of fledgling areas of law which have not yet received sustained critical attention from lawyers, legal academics, judges, courts and legislatures. Animal law, whilst perhaps no longer fledgling, still stands to greatly benefit from such interdisciplinary investigation. Thus, this thesis utilises an ethics-based analysis of law as a means of critical inquiry. The relationship between law and ethics is a prominent feature of jurisprudential thought. This section will show that great jurisprudential thinkers disagree regarding the necessity of or absence of a relationship between the two. Nonetheless, most of us would agree that there is at least something moral about law, that immoral law is probably not a good thing. The view of most animal lawyers could be summarised as: 'morality is not enough to make law, but it is a relevant consideration'.[19] This thesis supports such a view.

Thomas Kelch and others have provided extensive jurisprudence-oriented analysis to justify a discussion of animal law that incorporates ethics.[20] I do not intend to repeat that literature here. This is because animal law scholars are very good at exploring law and ethics in the abstract

[18] Anne Peters, 'Liberte, Egalite, Animalite: Human-Animal Comparisons in Law' (2016) 5 Transnational Environmental Law 25, 42 et seq.

[19] Gareth Spark, 'Protecting Wild Animals from Unnecessary Suffering' (2014) 26 Journal of Environmental Law 473, 479.

[20] Kelch (n 10) 29.

but comparatively weak at pinpointing how they regard ethics as useful to the animal law project.[21] I intend to focus on the latter in this thesis and will provide only a brief defence of my view of law as inextricably interwoven with ethics. Lon Fuller defends a connection between law and morals in response to Hart's positivist take which seeks to 'preserve the integrity of the concept of law' by distancing it from ethics.[22] Fuller takes issue with the positivist practice, exemplified by Austin and Gray, of defining 'morality' to include 'almost every conceivable standard by which human conduct may be judged that is not itself law' such as the 'inner voice of conscience, notions of right and wrong based on religious belief, common conceptions of decency and fair play, culturally conditioned prejudices'.[23] Fuller asserts that for law to be efficient, it requires 'general acceptance' and to secure this requires a general belief that the foundation of law 'itself is necessary, right, and good'.[24] For Fuller, law has at least the pretence of morality. Fuller contends that if the law lacked this then it would be ineffective as the general population would reject it: compliance and enforcement would be impossible.

Of course, conceptions of right and wrong are not homogenous within any society (or between societies). Thus, to say that there is something ethical about law is not to say that it aligns (or should align) with any one vision of morality, such as my ethical vegan standpoint. This also means that examples of unjust laws cannot be used to reject the notion of an underlying moral element to law. The morality of law, in this thesis, is regarded as its necessary connection to a conception of the good held by lawmakers and the members of the society to which they are held accountable.

Jurisprudential scholarship has done little to tackle the animal question in law and, thus, has not provided the tools to think through competing conceptions of what the law regarding animals ought to be. The so-called 'mainstream theories' of jurisprudence, including natural law and legal positivism, are centrally concerned with 'human beings and human relationships'.[25] Natural law's focus on human reason and a divine (Judeo-Christian) law has entailed human dominion and a neglect of animal interests. Legal positivism regards the non-human world as 'remote, inappropriate and unnecessary to the operation of law'.[26] Further, positivism treats law as a science, free from moral evaluation which has foreclosed discussion of the animal question which

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[21] See chapter II section 1.

[22] Lon Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1958) 71 Harvard Law Review 630, 635.

[23] ibid.

[24] ibid 642.

[25] Peter Burdon, 'The Great Jurisprudence' in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press 2011) 61.

[26] Nicole Graham, *Lawscape: Property, Environment & Law* (Routledge 2011) 15.

has traditionally been treated as an ethical issue. For this reason, the work of unearthing the ethics in animal law has been left to animal law scholars.

The relationship between law and ethics is also particularly interesting and perplexing in the area of animal law. This is because, in common parlance, one will talk of animal rights and animal welfare, meaning something to do with what is right as well as what is protected in the law. The two are bound together in common understandings of animal protection and animal liberation. In fact, weaving law and ethics together is quite common in social justice movements where talk of what is right is inexplicably related to talk of what the law is and what it ought to be. Law and political action are treated by animal advocates and other social justice advocates as essential tools to facilitate liberation. Law that follows social justice movements has, at its heart, a fiery ambition, a history of protest and hard-won battles, of past violence and marginalisation through law. In fact, the 'force of law' can be said to derive partly 'from revolt itself'.[27] This kind of law is particularly relevant to considerations of ethics because it determines who is considered a legal subject and who is not.[28]

This thesis aims to use critical analysis to demonstrate that the law that governs animals' lives (particularly those animals that are traded) is already pregnant with ethics and norms that relegate them to property status and facilitates harm. To deny this is to impose a false rationality on our understanding of animal law. As Margaret Davies writes, 'there *is* a norm in normal', no matter how much one asserts their objectivity.[29] This thesis aims to expose false rationality and objectivity in the law governing animals' lives, in line with minoritarian critiques of the practice of centring the western white male experience in law. This chapter now turns to a discussion of first and second wave animal ethics in order to determine what ethical ideas and frameworks are best placed to inspire and inform the development of global animal law.

3. The Swell Period: Contemplating the First Wave Past and the Second Wave Approaching

3.1. The First Wave of Animal Ethics

[27] Olivia Barr, Luis Eslava and Yoriko Otomo, 'In Search of Authority, Rebellion and Action' (2009) 3(2) Oñati Journal of Emergent Socio-Legal Studies 1, 1–2.

[28] Hilary Sommerlad, 'Law and Social Justice' in Gary Craig (ed), *Handbook on Global Social Justice* (Edward Elgar 2018) 291–294.

[29] Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge 2018) 37.

Human exceptionalism and dominion have largely defined the human legal relationship with animals in the west. Invariably, it is the western story that has been repeatedly told in animal law texts. Second wave animal ethics seeks to change this. As Steven Wise states, '[f]or animals, the river of injustice that flowed through the West was fed by streams of Hebrew, Greek, and Roman law, philosophy, and religion'.[30] The Judeo-Christian tradition speaks, for example, of "man", exclusively divine, holding 'dominion' over nature, encompassing creatures and other things.[31] All is created to serve "man" and God's will is that "he" exploit nature 'for his proper ends' [double quotation marks are used to highlight the fallacious assertion of men representing all humankind].[32]

Western legal and ethical praxes have been heavily influenced by Aristotle's Great Chain of Being which determines that plants exist for the sake of animals, the brute beasts for the sake of man', women are inferior, and slaves exist to serve their masters' purposes.[33] In fact, John Heath has pointed out that '*all* Greek hierarchical thought about status' depends upon control of 'speech' and, thus, animals were widely regarded as lowly and beneath humans in social and ethical hierarchies.[34] For Plato, the attribute of significance is rationality. Plato's separation of the human from the animal is, in places, 'porous'[35] in that humans can live as animals but, seemingly, the reverse is not true.[36] Western legal and ethical praxes have also been influenced by René Descarte's assertion that animals are automatons or 'unfeeling machines' who, unlike humans, do not experience suffering and who do not have a soul.[37] Other philosophers, like Baruch Spinoza, have recognised animal sentience but have simultaneously denied them moral consideration, arguing that laws against killing animals are 'based more on empty superstition and unmanly compassion than sound reason'.[38]

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[30] Steven M Wise, *Rattling the Cage: Towards Legal Rights for Animals* (Profile 2000) 24.

[31] Matthew Scully, *Dominion: The Power of Man, the Suffering of Animals, and the Call to Mercy* (Souvenir Press 2011).

[32] Lynn White, 'The Historical Roots of Our Ecologic Crisis' (1967) 155 Science 1203, 1205.

[33] Aristotle, *The Politics* (Carnes Lord ed, University of Chicago Press 1984); Wise (n 30).

[34] John Heath, *The Talking Greeks: Speech, Animals, and the Other in Homer, Aeschylus, and Plato* (Cambridge University Press 2009) 171.

[35] Eve Rabinoff, 'Plato's Animals: Gadflies, Horses, Swans, and Other Philosophical Beasts, Written by Jeremy Bell and Michael Naas' (2016) 33(2) Polis: The Journal for Ancient Greek and Roman Political Thought 414, 417.

[36] Drew A Hyland, 'The Animals That Therefore We Were? Aristophanes's Double-Creatures and The Question of Origins' in Jeremy Bell and Michael Naas (eds), *Plato's Animals: Gadflies, Horses, Swans, and Other Philosophical Beasts* (Indiana University Press 2015).

[37] Kelch (n 10) 33 citing: René Descartes, A Discourse on Method and Selected Writings (John Veitch trs, Ep Dutton & Co 1951), 47-51.

[38] John Grey, '"Use Them at Our Pleasure": Spinoza on Animal Ethics' (2013) 3(4) History of Philosophy Quarterly 367, 367–368 citing Spinoza's Ethics IV p37s1. Note, for some arguments such as this I rely on secondary sources where animal studies scholars have already applied works of philosophy to the animal question.

At the same time, those interested in animal law are well aware of a history of animal care within the western tradition inspired by Pythagorean vegetarianism,[39] Kantian indirect duties to animals,[40] Darwinian evolution,[41] and Bentham's recognition of animal suffering.[42] Ethical consideration for animals has anthropocentric roots. Augustine, Aquinas and Pythagoras, for example, denounce cruelty to animals not out of a concern for animal suffering but, instead, out of a concern that this might lead to cruelty towards humans.[43] David Hume, an enlightenment philosopher and contemporary of Kant's, evolved this idea further by suggesting we owe 'gentle usage' to animals, though not justice.[44] A great shift in attention occurred when Jeremy Bentham stated, with regard to animals: 'the question is not, Can they reason? or, Can they talk? but, Can they suffer?'.[45] Deliberating suffering has continued, until today, to define a core feature of animal ethics as well as animal law.[46]

There have always been those who cared for animals and theorised as to why they matter morally and ought to be legally protected. This strand of protective ethical theory culminated in a mainstreaming of these ideas following the birth of the animal liberation movement in the 1970s, a movement encompassing divergent utilitarian welfarism and deontological rights-based ethics[47] which are increasingly being consolidated.[48] Of these, Peter Singer's welfarism and Tom Regan's theory of animal rights have had the strongest significance for and influence on the movement.[49] Their influence has meant that utilitarianism and deontology have formed the core of animal law scholars' interest in animal ethics.[50] Indeed, Singer's book, *Animal Liberation*, is credited with providing the philosophical foundation for a movement as well as providing gravitas behind the first western movements for the *legal* protection of animals.[51]

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[39] Kelch (n 10) 30 citing Thomas Taylor (trs), Iamblichus' Life of Pythagoras (Kessinger Publishing Co 2003), 134-135.

[40] ibid 35 citing: Immanuel Kant, The Metaphysics of Morals (Cambridge University Press 1996), 238.

[41] Charles Darwin, *The Descent of Man* (Princeton University Press 1981).

[42] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (2nd edn, Clarendon Press 1823) 144.

[43] Peter Singer, 'Preface' in Peter Atterton and Matthew Calarco (eds), *Animal Philosophy* (Continuum 2004); Kelch (n 10) citing Taylor, 134-135.

[44] ibid (Singer).

[45] Bentham (n 42) 144.

[46] For examples, see chapter II section 2.3.1.

[47] For example, Gary L Francione, 'Reflections on Animals, Property, and the Law and Rain Without Thunder' (2007) 70(1) Law and Contemporary Problems 9, 16.

[48] Steven P McCulloch, 'On the Virtue of Solidarity: Animal Rights, Animal Welfarism and Animals' Rights to Wellbeing' [2012] Journal of Animal Welfare 5.

[49] Singer (n 5); Regan (n 5).

[50] Francione 1995 (n 5) 6.

[51] Kelch (n 10) 80.

Singer decries speciesism whereby animal interests are irrationally and unjustifiably denied on the basis of species alone.[52] Unjustified discrimination on the basis of species is akin to discrimination on the basis of sex, race, disability, sexuality or gender identity. Singer is a preference utilitarian who includes animals within utility calculations in order to determine the most ethical course of action in any given situation.[53] A central critique of Singer's utilitarianism is that it is precisely the utilitarian system of ethics that has been used by humans to justify eating animals on the basis of their interests outweighing animals' interests in avoiding suffering.[54] According to Gary Francione, this balancing exercise is conducted on a 'rigged scale' due to animals' property status.[55] While property status can, incidentally, result favourably (for some companion animals for example), this is largely not the case and the eradication of property status has been instrumental in the emancipation of women and slaves. The liberal/neoliberal conception of property is based in 'individualism and absolutism'; it is a bundle of rights with 'use, exclusivity of use and alienability of goods and resources' at its core.[56] Animals are propertised in law on the basis of this view.[57] This is true even though most societies place necessary limitations upon this liberal/neoliberal conception of property, such as by protecting animals' welfare.[58] There is potential for second wave animal ethics to advocate for other conceptions of property to ground animal law but there is not the scope to explore this in this thesis. As will be shown in chapter II, utilitarianism forms the basis of most western animal law which tends to advocate for the avoidance of unnecessary suffering.[59] It also forms the philosophical core of animal welfarism, though the two are not synonymous and concern for welfare does not necessitate a utilitarian underpinning.

Deontological theories of animal rights offer, in theory, stronger protection of animal interests because the ethical value of an action is in the act itself rather than in its consequences.[60] Moral animal rights are regarded as 'protective fences'[61] and associated legal rights are regarded as

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[52] Singer (n 5) 9. The term 'speciesism' was coined by Richard D Ryder, *Animal Revolution: Changing Attitudes Toward Specisism* (Berg 2000).

[53] Peter Singer, *Practical Ethics* (2nd edn, Cambridge University Press 1993) 12–15, 34, 55–62, 119.

[54] Kelch (n 10) 83.

[55] Francione 1996 (n 5) 10.

[56] Paul T Babie, Peter D Burdon and Francesca Da Rimini, 'The Idea of Property: An Introductory Empirical Assessment' (2018) 40(3) Houston Journal of International Law 797, 803.

[57] See chapter II section 2.2.

[58] Babie, Burdon and Da Rimini (n 56) 805.

[59] Chapter II section 2.3.1.

[60] William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press 2009) 400 citing Jeremy Bentham, *'Nonsense Upon Stilts' in Rights, Representation and Reform: Nonsense Upon Stilts and Other Writings on the French Revolution* (CW 2002).

[61] Bernard Rollin, 'The Legal and Moral Bases of Animal Rights' in Harlan Miller and William Williams (eds), *Ethics and Animals* (Humana Press 1983) 106.

'elevated above the ordinary balancing of conflicting goods'.[62] However, when speaking of legal rights, as opposed to moral ones, balancing is still required (between competing rights). Nonetheless, hard-line liberals are critical of rights as a tool to protect animals. These critiques quite often suffer from an unjustified anthropocentric bias, a trivialisation of animal harm that is at odds with welfare science and a view of animals' property status as beneficial to their welfare (this chapter exposes this view as nonsense).[63] This chapter engages with counterarguments but not those that are unscientific and unempathetic and which are already tackled in the literature.[64]

Proponents of animal rights deserve a brief exploration here in order to frame the critique of moral rights elaborated later. Tom Regan's quintessential theory of animal rights, first published in 1983, defines a moral right as a 'valid claim to some sort of treatment', an 'entitlement which can be fought for if the right is withheld'.[65] Regan is a proponent of an interest-based conception of rights, as opposed to a choice-based conception of rights.[66] Animals have an interest in seeing their rights upheld. Contrastingly, choice-based conceptions of rights typically exclude animals as well as infants and many mentally disabled people. Regan argues that all subjects-of-a-life (including some animals who he describes as moral patients rather than moral agents)[67] have inherent value, are due respectful treatment, and should never be treated solely as means to an end.[68] However, Regan's definition of subjects-of-a-life is laboured and prohibitively confining, giving credence to critiques of animal rights views because they struggle to determine the characteristics of a moral subject.[69] This thesis focuses on the use of rights as a tool rather than potential substantive rights. [70]

Rights views are increasing in their adoption and pronouncement amongst animal liberators and animal law experts. One prominent vocal proponent is Gary Francione. Francione departs from Regan by replacing his subjects-of-a-life criterion with sentience.[71] Francione is opposed to the exclusive force of giving ethical significance to 'cognitive attributes' beyond

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[62] Peters (n 18) 49.

[63] Richard A Epstein, 'Animals as Objects, or Subjects, of Rights' in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press 2006) 155–157.

[64] See, for example Brooman and Legge (n 10) 79 et seq.

[65] Regan (n 5) 9–10.

[66] ibid 11.

[67] ibid 264.

[68] ibid xvii.

[69] ibid 264; Ellen P Goodman, 'Book Review: Animal Ethics and the Law' (2006) 79 Temple Law Review 1291, 1300.

[70] On the latter, see Regan (n 5) 248 et seq, 264–265 and 328.

[71] Francione 2008 (n 5); Gary Steiner, 'Foreword' in Francione 2008 (n 5).

sentience.[72] He also claims that animals have an 'interest in their lives' and 'their continued existence' in addition to their interest in avoiding suffering.[73] Francione claims that sentience naturally entails this interest in living because sentience is 'not an end in itself; it is a means to the end of staying alive'.[74] This goes beyond Singer and Regan and results in Francione's call for the abolishment of all 'institutionalized animal exploitation'.[75] Core to Francione's rights theory is the rejection of animals' property status which, he claims, denies inherent value and makes talking of legal rights 'meaningless'.[76] He argues that if animals are property, it will be impossible to safeguard their rights against trivial human interests.[77] Rights views like that of Francione have been mistakenly taken to mean there is an inherent tension between animal ethics and environmental ethics. This will be discussed below.[78] This chapter will critique essentialist philosophers, like Francione, who determine there to be one framework for determining the right answer for every ethical conundrum of animal use.

These developments have brought us to a situation where science, philosophy and political theory are denouncing human exceptionalism and the supposed inferiority of non-human animals. Animals' property status has been based on fallacies regarding their supposedly instrumental purpose, neglecting their inherent value and the damage caused by human dominion. Yet, law and policy cling to anthropocentrism. What change *has* been made to the law feels lethargic and creeping rather than pronounced and sweeping. It is proposed that second wave animal ethics might prove more effective as a means to convince law and policymakers to advance animal protection at greater speed and with wider and deeper effects. One key reason for this is that second wave animal ethics embraces a more diverse range of ideas stemming from diverse thinkers. To the best of my knowledge, the first wave animal ethics set out here have been developed exclusively by white, able-bodied, cis-gendered, heterosexual men. Chapter II will demonstrate that, to the extent animal law is based in ethics, it is based in the ethics developed by this narrow set of thinkers. This must change. Animal law ought to take cognisance of the animal ethics that stem from thinkers who know, intimately, what it means to reside on the outside of a moral circle of concern. These marginal ethics eschew the first wave's reliance on similarity theory, closed circles of moral concern, liberalism and universality.

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[72] ibid (Francione) 137.

[73] ibid 149.

[74] Gary L Francione, *Introduction to Animal Rights: Your Child or the Dog?* (Temple University Press 2000) 137–142.

[75] Francione (n 47) 11.

[76] Francione 1995 (n 5) 27–28; Francione 1996 (n 5) 179.

[77] Francione 2008 (n 5) 150.

[78] See below at section 4.2.2.

3.2. The Second Wave Approaching

Waves 'are not predictable, uniform or monolithic. They are, in fact, capable of multiplicity and diversity'.[79] Accordingly, second wave animal ethics, like second wave feminism, would encompass contrasting and even contradictory theories that are nonetheless temporally related and clustered in relation to an overarching theme or impulse. This wave would encompass theories of animal ethics that follow in time from Singer and Regan but which depart substantially from utilitarianism and deontology. According to this delineation, Francione's rights-based approach falls within first wave animal ethics even though he is contemporaneous with feminist ethicists Carol Adams and Josephine Donovan.

In drawing this distinction, this chapter argues that the overstated dichotomy between animal welfare (or utilitarian) positions and rights positions will no longer constitute the most consequential contention within animal ethics.[80] For context, the welfare-rights dichotomy is overstated because it relies on erroneous conceptions: of the welfare view as synonymous with utilitarianism, and rights-based ethics as requiring the total abolition of animal use for human ends.[81] This is not our focus and, although the debate continues,[82] the two positions are increasingly being consolidated in policy spheres. I suspect that this conversation will soon shift toward weighing the merits of first wave animal ethics (encompassing both welfare views and rights views) against the merits of second wave animal ethics. Each wave will continue to share many of the same policy objectives and, thus, should not be absolutely dichotomised. For example, McCulloch's major uniting content-message of the animal protection movement (that 'society should treat animals much better than we currently do') is also wide enough to broadly satisfy second wave animal ethicists.[83] Further, some may contest the placement of particular theorists within one wave or another. However, ethical divergences between the waves are significant and must be given the closest attention.

This chapter will set out key ethical ideas characterising the approaching second wave of animal ethics. While the chapter focuses on intersectional, feminist and posthumanist animal ethics, this focus is not intended to be exhaustive. For example, Marxist animal ethics and intersecting postcolonial and queer theories also have important insights to contribute to this

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[79] Prudence Chamberlain, *The Feminist Fourth Wave: Affective Temporality* (Palgrave Macmillan 2017) 21–23.

[80] On the dichotomy, see Garner (n 8) 49.

[81] McCulloch (n 48).

[82] For example, Francione denounces welfarist legal reform as ineffective, confusing and even harmful. See Francione 1996 (n 5) 3–4, 78 and 95.

[83] McCulloch (n 48) 7.

second wave. Political philosophy, which uses political theory in place of ethics to deal with the animal question, also includes ideas that could prove important to the second wave,[84] though some of this work in political philosophy still subscribes to core first wave ideas (such as the attachment to liberalism).[85] Accordingly, while I argue that the four ideas set out in this chapter will be important for second wave animal ethics, I do not imagine or assume that all second wave animal ethics thinkers would necessarily agree on all the prepositions or ideas either implied or explicit in this exploration.

Current contexts provide two key rationales for incorporating second wave animal ethics into animal law studies. First, while there is now more welfare protection included in law than was ever the case in the past, animal exploitation is also more widespread and industrialised than it has ever been. In particular, the western factory-farming model is expanding east and south,[86] while the existing welfarist legal protection of animals acquiesces with this factory-farming model and with other extreme forms of exploitation of animals.[87] Thus, it is time to question the ability of first wave animal ethics to inspire sufficiently effective animal law and to pose alternatives. Second, globalisation and an increase in transnational and global law enhances the importance of deep and wide participation, local community engagement, and awareness of intersecting oppression. The discrete, universalised, closed theories of first wave animal ethics are too rigid to encompass the situated, intersectional thinking that second wave animal ethics facilitates. A second wave animal ethics toolbox approach is an innovation in this regard.[88] Intersectionality is a thread that links the individual tools I employ within this chapter.

3.3. Intersectionality as a Theoretical Framework for the Second Wave

[84] See, centrally, Sue Donaldson and Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford University Press 2013).

[85] See below at section 4.3.1.

[86] Danielle Nierenberg, 'Factory Farming in the Developing World' (2003) 16(3) World Watch 10; and Felicity Lawrence, 'Factory Farming "Spreading Disease around the World"' (*The Guardian*, 2002).

[87] Francione 1996 (n 5) 150.

[88] See examples of toolbox approaches in Kelch (n 9) 275–276; and Jessica Eisen, 'Beyond Rights and Welfare: Democracy, Dialogue, and the Animal Welfare Act' (2018) 51(3) Journal of Law Reform 469, 469.

The term 'intersectionality' was coined by critical race theorist Kimberlé Crenshaw in order to explain the particularities of oppression experienced by black women.[89] Crenshaw has since described intersectionality as having evolved into a 'method and a disposition, a heuristic and analytical tool'.[90] Intersectionality methodology requires change to 'the way one thinks' as well as 'what one thinks about'.[91] Intersectionality methodology can include a bundle of intellectual positions and actions. However, it does not aspire to a 'full-fledged grand theory or a standardized methodology'.[92] I would describe intersectionality methodology as, instead, a toolbox. This chapter argues that animal ethics, as employed by animal law and animal lawyers, would greatly benefit from an intersectional shift. Indeed, critical animal studies increasingly relies upon intersectionality whilst also being a discipline that is frequently interdisciplinary and radically political.[93] Some critical animal studies scholarship is based on many of the second wave priorities and values identified in this chapter.[94]

One could identify the uniting thread of the intersectional toolbox as its 'distinctive stance' which critiques the 'rigidly top-down social and political order' that facilitates oppressive realities that intersectionality theory reveals.[95] This is firmly rooted in Crenshaw's original vision for intersectionality as a tool to counter the invisibility of those experiencing multiple oppressions at once,[96] to locate power,[97] and to identify the mutual operation and exacerbation of various

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[89] Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1 University of Chicago Legal Forum 139.

[90] Devon W Carbado et al, 'Intersectionality: Mapping the Movements of a Theory' (2013) 10(2) Du Bois Review 303, 312.

[91] Catherine A MacKinnon, 'Intersectionality as Method: A Note' (2013) 38(4) Signs 1019, 1019.

[92] Sumi Cho, Kimberlé Williams Crenshaw and Leslie McCall, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis' (2013) 38(4) Signs 785, 789.

[93] Matthew Calarco, *Thinking Through Animals* (Stanford University Press 2015) 2.

[94] These include, according to the Institute for Critical Animal Studies: interdisciplinarity, exposure of false objectivity and apoliticality, intersectionality, rejection of binary thinking, and reflexivity. See Steven Best et al, 'Introducing Critical Animal Studies' (2007) 5(1) Animal Liberation Philosophy and Policy Journal 4, 4–5. Some critical animal studies scholarship relies on more restrictive rights frameworks. See Eva Giraud, 'Veganism as Affirmative Biopolitics: Moving Towards A Posthumanist Ethics?' (2013) 8(2) Phaenex Journal of Existential and Phenomenological Theory and Culture 47, 47.

[95] MacKinnon (n 91) 1020.

[96] Crenshaw (n 89) 140–141.

[97] 'Kimberlé Crenshaw on Intersectionality, More than Two Decades Later' (*Columbia Law School*, 2017) <https://www.law.columbia.edu/news/archive/kimberle-crenshaw-intersectionality-more-two-decades-later> accessed 18 December 2020.

inequalities.[98] This thesis uses intersectionality largely in the latter sense.[99] Locating power entails demarginalisation by centring the marginalised.[100] This thesis centres upon marginal perspectives to glean insights from first-hand experiences of oppression. It also, crucially, centres the animal in animal ethics, as far as possible. First wave animal ethics have suffered from paternalism that determines what animals want by speaking rather than listening.

Intersectionality theory problematises 'white male dominance': this is a central problem for animals in this thesis.[101] Intersectionality, as a methodology, exposes that dominance to 'critical light'.[102] This chapter will demonstrate that critiquing dominance is integral to animal liberation. This requires critiquing dominance in law and policy spheres and in the animal liberation movement itself which is based on white male theory. Linked to this, another central feature of intersectionality methodology is a critique of 'single-axis thinking' which 'undermines legal thinking, disciplinary knowledge production, and struggles for social justice'.[103] This requires exposing false objectivity and rationality as subjective and situated. This also requires an observation of the context in which theories are developed and a critical stance against homogenising and homogenous theory as the basis for a movement.

Applying intersectionality theory to animal ethics in this way is somewhat novel. Crenshaw's work does not consider extending intersectional consideration to animals. And yet, her framework naturally lends itself to that extension and, increasingly, there are calls within the animal liberation movement for better intersectional work by animal advocates.[104] Recent work mapping the growth of intersectionality theory highlights the wide-ranging utility of its focus on power and domination.[105] Also, new literature is unveiling that intersectional advocacy amongst animal activists and organisations is already apparent across the globe.[106] This counters the popular

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[98] Katy Steinmetz, 'She Coined the Term "Intersectionality" Over 30 Years Ago. Here's What It Means to Her Today' (*Time Magazine*, 2018) <https://time.com/5786710/kimberle-crenshaw-intersectionality/> accessed 18 December 2020.

[99] This thesis also looks at the experience of multiple oppressions but in institutions, movements and law rather than in individuals.

[100] Crenshaw (n 89) 167.

[101] MacKinnon (n 91) 1023 citing Crenshaw (n 89) 152.

[102] ibid.

[103] Cho, Crenshaw and McCall (n 92) 787.

[104] Rachelle DéCoud, 'The Migration to Intersectional Leadership in the Animal Rights Movement' (2016) 2(1) Sloth <https://www.animalsandsociety.org/human-animal-studies/sloth/sloth-volume-2-no-1-winter-2016/the-migration-to-intersectional-leadership-in-the-animal-rights-movement/> accessed 18 December 2020.

[105] Carbado et al (n 90).

[106] See, for example, Kadri Aavik, 'The Animal Advocacy Movement in the Baltic States: Links to Other Social Justice Issues and Possibilities for Intersectional Activism' (2018) 49 Journal of Baltic Studies 509; Genevieve Johnston and Matthew S Johnston, '"We Fight for All Living Things": Countering Misconceptions about the Radical Animal

propagandised conception of animal liberators as single-minded, human-hating and absurdly utopian.[107] This also demonstrates that personal experiences of animal liberators who are blind to other social justice struggles do not define the majority of the movement.

Black vegan feminists have taken strides to bring intersectionality to the animal liberation movement. Syl Ko argues that it is precisely the 'model of compartmentalizing oppressions', which has kept our various activisms separate, that is working at 'erasing us [minorities] altogether'.[108] Ko argues that 'categorical dichotomous, hierarchical logic [is] central to modern, colonial, capitalist thinking about race, gender and sexuality'.[109] Undoing this, which is required in order to achieve animal liberation, requires thinking differently and intersectionally. Various oppressions, for Ko, make up 'the same territory'.[110]

Some of the primary interpretive moves that define the application of intersectionality theory to animal ethics in this thesis are: rejecting binaries, rejecting universalism and essentialism in favour of situatedness and relationality, prioritising the Other, and deconstructing categories such as 'human' and 'animal'. These motives distinguish this work from other purportedly "intersectional" work that draws unhelpful, dismissive, assimilative and sometimes racially or culturally insensitive analogies between animal oppressions like factory farming and human oppressions like the slave trade or the holocaust.[111] Erasing particularities in this way would instrumentalise animal activism as an 'instrument of dispossession and colonization'.[112] This thesis rejects shallow intersectionality and the tendency of 'white settler animal advocacy' to '*perform* intersectionality' whilst failing to address 'settler colonial power'.[113] This requires 'resistance to the settler colonial formation' which this thesis demonstrates when discussing settler colonial contexts.[114]

Liberation Movement' (2017) 16(6) Social Movement Studies 735; Silvia Ilonka Wolf, 'Beyond Nonhuman Animal Rights: A Grassroots Movement in Istanbul and Its Alignment with Other Causes' (2015) 7(1) Interface 40.

[107] Johnston and Johnston (n 106) 747.

[108] Syl Ko, 'Notes from the Border of the Human-Animal Divide: Thinking and Talking about Animal Oppression When You're Not Quite Human Yourself' in Aph Ko and Syl Ko (eds), *Aphro-ism: Essays on Pop Culture, Feminism, and Black Veganism from Two Sisters* (Lantern Books 2017) 71–72.

[109] ibid 72 citing María Lugones, 'Toward a Decolonial Feminism' (2010) 25(4) Hypatia 742.

[110] ibid.

[111] One example amongst a multitude is JM Coetzee, *The Lives of Animals* (Princeton University Press 2001). See also Alan Northover, 'Animal Ethics and Human Identity in JM Coetzee's The Lives of Animals' (2009) 14(2) Issues in English Studies in Southern Africa 28, 37–38.

[112] Justin Kay, 'Vegan-Washing Genocide: Animal Advocacy on Stolen Land and Re-Imagining Animal Liberation as Anti-Colonial Praxis' in S Springer et al (ed), *Anarchist Political Ecology - Volume 1: Undoing Human Supremacy* (PM Press 2020). As an example, see Robert C Jones, 'Animal Rights Is a Social Justice Issue' (2015) 18(4) Contemporary Justice Review 467.

[113] Kay (n 112).

[114] ibid.

Intersectionality theory, as set out here, is a connecting thread for second wave animal ethics. The four key components of second wave animal ethics set out below were each identified through intersectional thought. They also centre upon intersectional values in their substance. This will set the second wave apart from the first wave, addressing the problems identified therein.

4. Second Wave Animal Ethics

4.1. The Similarity Argument

4.1.1. The Problem with the Similarity Argument

First wave animal ethics relies upon the similarity argument, which affords ethical consideration to marginal subjects when they are deemed relevantly similar to the paradigm case. This has occurred against the backdrop of animal welfare science, inspired by Charles Darwin's 19th century work revealing that animals share many significant functions and capabilities with humans.[115] For example, Regan attributes rights to animals deemed to be 'subjects of a life' because they experience things like 'a sense of the future', 'an individual experiential welfare', 'beliefs, desires and preferences'.[116] These are all traits shared by humans (the paradigm case). Accordingly, the only animals deemed by Regan to be sufficiently similar to the paradigm case here are mammals over one year of age.[117]

Though Regan's concept is expandable,[118] his use of humanistic traits as gatekeepers for moral considerability is problematic. Reliance upon rationality, moral agency, language, or the like, in order to attribute moral significance to animals also excludes 'marginal cases' such as certain humans who do not have these attributes.[119] This, in turn, risks treating those marginal humans as animals are currently treated and aligns with assumptions underlying arguments that were used to justify centuries of slavery.[120]

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[115] Kelch (n 10) 40 citing Charles Darwin, *The Descent of Man and Selection in Relation to Sex* (2nd edn, D Appleton & Co 1909), 66 and 128.

[116] Regan (n 5) 264.

[117] ibid 78.

[118] Mary Anne Warren, 'Difficulties with the Strong Animal Rights Position' (1986) 2(4) Between the Species 163, 165–166.

[119] Kelch (n 10) 35–36.

[120] ibid 36.

Significantly, why must animals be similar to humans to be worthy of moral consideration or legal protection.[121] This is both 'neo-humanist' and 'condescending'.[122] First wave animal ethics fails to answer this question satisfactorily. This could frustrate long-term gains for animal protection in law. Gary Francione, an animal rights proponent, recalls Darwin's statement that there are 'no uniquely human characteristics' and that differences are of degree, not kind.[123] Francione is an exceptional case as a first wave animal ethicist who denounces similarity arguments. Francione asks: '[w]hy is the ability to do calculus morally better than the ability to fly with your wings? Why is the ability to recognize yourself in a mirror morally better than your ability to recognize yourself in a scent that you left on a bush?'[124]

This strikes at the heart of the issue: the lack of justification for treating various capabilities as gatekeepers of moral considerability. This delays the conferral of rights upon animals deemed worthy (whilst we wait for science to prove capabilities)[125] and continues excluding other animals that, under second wave animal ethics, are worthy of ethical attention. For example, the Nonhuman Rights Project relies upon the similarity argument to argue for legal rights for the most intelligent, capable animal species.[126] Yet such relevant similarities to humankind cannot be successfully argued in all cases where animals require legal protection. The similarity approach risks leaving open to exploitation those animals who are not deemed to be relevantly similar to humans.[127] It also inadvertently promotes harmful research on animals to determine their ability to suffer.[128]

Steven Wise, founder and president of the Nonhuman Rights Project, seeks to distance himself from these consequences by stating that this approach is necessarily incremental.[129] Wise believes legal rights (based in 'practical autonomy'), as opposed to ethical rights, are necessary to make change.[130] Thus, Wise focuses upon how chimpanzees, bonobos and humans are three members of the same superfamily.[131] For Wise, the liberty owed to an animal depends upon its

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[121] Bryant (n 3); Catharine A MacKinnon, 'Of Mice and Men: A Fragment on Animal Rights' in Donovan and Adams (n 6).

[122] Rosi Braidotti, *The Posthuman* (Polity Press 2013).

[123] Francione 2008 (n 5) 138 citing Charles Darwin, *The Descent of Man* (Princeton University Press 1981).

[124] ibid 12.

[125] ibid 138.

[126] Wise (n 30) 237; Steven M Wise, *Drawing the Line: Science and the Case for Animal Rights* (Perseus Publishing 2002) 37.

[127] Francione (n 47) 54.

[128] Bryant (n 3) 220–224.

[129] Wise (n 126) 9.

[130] ibid 34.

[131] Wise (n 30) 139.

'mental abilities'.[132] Second wave animal ethics regards this view as dangerously restrictive. With the benefit of hindsight, we see similarity arguments have excluded deserving subjects from receiving due ethical consideration and legal protection. Wise titles one of his books *Drawing the Line*, arguing passionately that we have drawn the line of moral consideration wrong in the past. He fails to consider that we might be doing harm by drawing an exclusionary line in the first place.

Boundary drawing in ethical theory is understandably very difficult, and rating closeness to the paradigm (human) case has offered an easy but overly simplistic solution. This assumption is evidenced by leading legal academics, such as Anne Peters, who relegate the question 'which species should receive legal consideration?' to the back pages of their work as a question 'which cannot be resolved easily'.[133] Such relegation acquiesces with the potential infliction of harm in marginal cases by neglecting non-able bodied humans and those animals thought to possess fewer relevant capabilities. If one accepts that marginalised humans and animals matter, however, this acquiescence is reason enough to explore second wave alternatives.

4.1.2. Second Wave Animal Ethics Discrediting the Similarity Argument

In place of ranking and rewarding closeness to the human paradigm, this thesis adopts indistinction theory, an evolution of difference theory. Difference theory responds to similarity theory by aiming at the 'thickening and multiplication' of observed differences and a recognition that difference may be a basis for ethical consideration whereby differences are 'acknowledged, respected, and even treasured'.[134] Difference theory undoes conceptions of humans as having a 'timeless essence … untouched by history' and, instead, regards humans who 'emerge' from their culture.[135] The individual is relational and ethical contemplation arises from being 'thrown into a world of Others' rather than through rationality and autonomy.[136] This thinking stems from continental philosophy.[137]

Indistinction theory nuances this by observing similarities afresh: 'in the direction of animal to human'.[138] This facilitates breaking down the 'human' and 'animal' categories, an essential move

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[132] Wise (n 126) 37.

[133] Peters (n 18) 53.

[134] Calarco (n 93) 41 and 47.

[135] ibid 30–31.

[136] ibid 31–32.

[137] For discussion, see ibid 33 et seq.

[138] ibid 50.

for intersectional animal ethics. This creates the 'conditions for other modes of thought'.[139] I will outline the blossoming of indistinction theory before applying Martha Nussbaum's capabilities approach to the indistinct animal as a means to ethically consider individual characteristics whilst indistinguishing the human and the animal and avoiding harmful similarity theory.

4.1.2.1. Indistinction

Indistinction requires deconstructing the 'human' and its Other, the 'animal'. Anthropomorphising animals through similarity theory reinforces the human/animal dichotomy (including animals in the human category) and 'denies the specificity of animals altogether'. [140] Contrastingly, indistinction blurs these categories and recognises animal individuality. Jacques Derrida famously considers his shame upon being observed nude by a specific cat, '*this* cat' (not a literary, exemplary or metaphorical one, and Derrida refrains from calling the cat 'my cat').[141] He curiously regards his shame for being 'naked as a beast' in front of another naked animal.[142] Crucially, Derrida describes himself as '*near* what they call the animal', '[*a*]*fter*' and '*with*' it.[143] This passage rejects the distinctness of 'the animal' and the denial of subjectivity to it. This kind of indistinction and relationality is fundamental to countering similarity theory.

Rosi Braidotti achieves indistinction through a nomadising process of becoming animal, inspired by Gilles Deleuze.[144] This requires recognising how biological humans tend to 'fear … the animal within'.[145] This allows us to assume 'free access to and consumption of the bodies' of animals.[146] Nomadisation and becoming animal would entail 'deep bioegalitarianism' entailing 'the displacement of anthropocentrism and the recognition of transspecies solidarity on the basis of "our" being in this together'.[147] To become animal is to refuse that subjectivity is exclusively human and to enter into 'relation' with the Other.[148] Thus, we relinquish the human/animal dichotomy[149]

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[139] ibid 56.

[140] Braidotti (n 122).

[141] Jacques Derrida, *The Animal That Therefore I Am* (Marie-Louise Mallet (ed) and David Wills (trs) eds, Fordham University Press 2008) 3–11.

[142] ibid.

[143] ibid 11.

[144] Rosi Braidotti, *Nomadic Theory: The Portable Rosi Braidotti* (Columbia University Press 2011) 82 et seq.

[145] ibid 82.

[146] ibid 81.

[147] ibid 91–92.

[148] Calarco (n 93) 57.

[149] Braidotti (n 144) 93.

and we recognise how *we* are like *animals*, 'meaty bodies', and what that means.[150] This opens our subjectivity to 'open-ended, interrelational, multisexed, and transspecies flows of becoming by interaction with multiple others', which 'explodes the boundaries of humanism at skin level'.[151] Becoming animal entails an ethical imperative: 'the creation of a new kinship system: a new social nexus'.[152] Braidotti provides useful deconstruction but demonstrates limited understanding of multifaceted animal ethics, essentialising it as the first wave.[153] Thus, I turn to other theorists to flesh out how this imperative might materialise.

Kinship can be conceptually and theoretically fostered through an investigation of the 'human' and its animal Other. This kind of posthumanist theorising is critiqued for 'depoliticiz[ing]' animal studies.[154] Contrastingly, I regard deconstructive insights as essential to advancing the political conversation on animals. There is also insight to be gained from embodied experiences which can powerfully interact with deconstructive theory to form important, critical insights. Bron Taylor, for example, posits surfing as a religious, sensual experience that produces a biocentric 'holistic axiology', evoking 'communion and kinship' in non-human animal encounters, encouraging an 'animistic ethos'.[155] I experience kinship in sharing the surf with sea-turtles and seals and I believe law-making ought to embark from such positions of embodied kinship with nonhuman Others. Another example of embodied kinship is Val Plumwood's experience of being prey. Plumwood was dragged underwater by a crocodile and subjected to three 'death rolls' before she escaped.[156] Plumwood's vegetarianism rejects the notion of animals as 'living meat' due to her first-hand insight into the struggle of 'claim[ing] to be something more than prey, more than "mere" meat'.[157]

These embodied insights compliment growing theoretical recognition that various biologically human beings are excluded from the biosocial and imperial[158] category of the human.[159] The human, in this sense, is conceptualised (by Cary Wolfe) as '[t]he Cartesian subject of the cogito,

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[150] Calarco (n 93) 58–59.

[151] Braidotti (n 144) 83.

[152] ibid 93.

[153] Her errors include describing Singer as a rights advocate: ibid 89.

[154] Giraud (n 94) 47.

[155] Bron Taylor, 'Surfing into Spirituality and a New, Aquatic Nature Religion' (2007) 75(4) Journal of the American Academy of Religion 923, 925.

[156] Val Plumwood, 'Surviving a Crocodile Attack' (*Utne Reader*, 2000) <https://www.utne.com/arts/being-prey> accessed 18 December 2020.

[157] ibid. See also Calarco (n 93) 61.

[158] Braidotti (n 122).

[159] ibid; Ko (n 108); Kelly Oliver, 'Animal Ethics: Toward an Ethics of Responsiveness' (2010) 40 Research in Phenomenology 279.

the Kantian "community of reasonable beings", or, in more sociological terms, the subject as citizen, rights-holder, property-owner, and so on'.[160] Braidotti adds that it all starts with 'He: the classical ideal of "Man"' represented in 'Leonardo da Vinci's Vitruvian Man' which represents 'bodily perfection' as well as 'a set of mental, discursive and spiritual values', the deviation from which is imperfection.[161] This combines with a '[f]aith in the unique, self-regulating and intrinsically moral powers of human reason' which form 'an integral part of this high-humanistic creed' formed of 'eighteenth- and nineteenth-century renditions of classical Antiquity and Italian Renaissance ideals'.[162] This conception of the human is violently exclusive given the deep significance of humans' abilities to hold rights.[163]

New insights erode the distinctiveness of 'the human'. Capitalism and robotics blur that divide.[164] On capitalism, Braidotti writes 'all living species are caught in the spinning machine of the global economy'[165] Key insights identify how the human is set against an Other, its 'negative and specular counterpart' which supposedly lacks subjectivity, equated with 'consciousness, universal rationality, and self-regulating ethical behaviour'.[166] The Other is rendered as 'pejoration, pathologized and cast out of normality, on the side of anomaly, deviance, monstrosity and bestiality'.[167] 'Animal', as a phrase and concept, tends to stand in for the Other, as explained by critical race scholars. 'Animal' is expansive while 'human' is narrow. The Other can be biologically animal or anthropomorphic (if 'non-white, non-masculine, non-normal, non-young, non-healthy, disabled, malformed or enhanced').[168]

The goal of indistinction is not to accede animals to the 'privileged order' of the human; it is to create 'a way of life that no longer rotates around the human and the anthropological difference'.[169] This requires intersectional alliances and relationality.[170] Black vegan feminists' engagement with notions of animality demonstrate how intersectional alliances and relations strengthen multiple social justice struggles by indistinguishing 'humanity'. Black and indigenous bodies have been 'dehumanized'; a 'speciesist rendering of animality as injuring' which is a violence

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[160] Braidotti (n 122).

[161] ibid.

[162] ibid.

[163] ibid.

[164] ibid.

[165] ibid.

[166] ibid.

[167] ibid.

[168] ibid.

[169] Calarco (n 93) 65.

[170] ibid 66.

against 'racialized bodies' and an 'epistemic violence that denies animality its own subjectivity'.[171] Thus, minority groups fear dangers of aligning themselves with the animal and animal liberation struggles. Rectifying this requires ensuring that 'value is not allotted exclusively to the human' so that 'the entire more-than-human world [may] come to be revalued on their own terms'.[172]

Syl Ko describes herself as 'not-quite-human', her oppression as a black woman entangled with animal oppression due to the 'less than' status of the Other.[173] Ko politically activates this theoretical deconstruction. She argues that the 'real fight for all us Others is a "[break] with the imperialist ontology and metaphysical essentialism of Enlightenment man"'.[174] Ko shares a rallying call to all Others to 'use our exclusion and invisibility as a power' to 'build up a different "new world"' which rejects dichotomy and is 'centred on love" whereby we 'accept ambiguity and difference, grounded in an expansive, limitless "we."'.[175] For those of us embodying the outside, this is an act of survival as much as an act of compassion and empathy. Ko argues that 'our struggle is their struggle' in a literal sense: our liminality (for her black womanhood, for my queerness) forces us to 'reconceive and reject the standard articulation of what speciesism *is* and how to fight it'.[176] We are 'kindred spirits in a fight to depose "the human."'.[177] My alignment with this fight is strengthened by a lifetime's exposure to a despicable (yet widely held) view of queer folk as unnatural, unproductive, transgressive, and wrong. In living and thinking through Othered harm, I advocate an undoing of the human category.

4.1.2.2. Flourishing

Having deconstructed the 'human' and the 'animal', I turn to identifying what ought to determine ethical considerability, in place of similarity. Feminist animal ethicists oppose the similarity argument central to rights-based (first wave) animal ethics.[178] For example, Catherine MacKinnon recognises that attributing rights to the most cognitively able animals resembles the feminist movement's beginnings, which focused on the 'rights of elite women'.[179] To avoid exclusion,

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[171] Billy-Ray Belcourt, 'Animal Bodies, Colonial Subjects: (Re)Locating Animality in Decolonial Thought' (2014) 5(1) Societies 1, 5.

[172] Calarco (n 93) 69.

[173] Ko (n 108) 73.

[174] ibid 74 citing Zakiyyah Iman Jackson, 'Animal: New Directions in the Theorization of Race and Posthumanism' (2013) 39(3) Feminist Studies 669.

[175] ibid 74–75.

[176] ibid 75.

[177] ibid 73.

[178] Josephine Donovan and Carol J Adams, 'Introduction' in Donovan and Adams (n 6).

[179] Catharine A MacKinnon, 'Of Mice and Men: A Feminist Fragment on Animal Rights' in Sunstein and Nussbaum (n 63) 263 and 271.

animals should be seen 'on their own terms' instead of being assimilated with humankind.[180] This requires ascertaining what an animal would wish for itself, avoiding paternalism.[181] Paternalism is problematic because it entails problem solving without proper insight into the sufferers' experience of the problem. Before introducing an alternative approach, note that some first wave ethical theorists, like Singer and Francione, maintain that they avoid the similarity argument by using sentience as the only condition for moral consideration.[182] However, this is erroneous for two reasons.

Firstly, sentience can be regarded as a capacity similar to language or rationality. Thus, one cannot convincingly denounce the similarity argument whilst requiring sentience for moral consideration.[183] If the ethical action is the one that minimises suffering, then sentience is a useful benchmark. But, if alternative concepts, such as flourishing, also characterise ethical action, then sentience becomes just one benchmark amongst many. Sentience may even be regarded as an anthropocentric consideration if one accepts that non-sentient life may also flourish. Ethically contemplating non-sentient life does not pre-determine action. It does not, for example, require that humans must stop eating vegetables so they can flourish. However, renouncing similarity theory does create an opening that allows scholars to make environmental degradation or other ways in which non-sentient beings lack flourishing to become a subject of ethical consideration. Due to these reflexions, perhaps animal ethics ought to consider sentience without giving it a gatekeeping function. Secondly, references to animal sentience have focused upon an ability to suffer.[184] In recognising suffering similar to our own, first wave animal ethics deems it immoral to cause such suffering to animals. However, MacKinnon asks, '[w]hy is just existing alive not enough? Why do you have to hurt?', and argues that men have 'never had to hurt or to suffer to have their existence validated and harms to them be seen as real'.[185] Preoccupation with suffering may have blinded animal advocates to more useful concepts. Second wave animal ethics provides promising alternatives.

Martha Nussbaum applies a capabilities approach to animal ethics. This falls short in some respects but, overall, provides necessary tools to avoid the exclusionary, anthropomorphising and

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[180] Donovan and Adams (n 178).

[181] ibid.

[182] Francione (n 74) 137–142; Singer (n 5) 9.

[183] Gary Steiner, *Animals and the Limits of Postmodernism* (Columbia University Press 2013) 148.

[184] For example, Francione (n 74) 137–142.

[185] MacKinnon (n 121) 326.

speciesist traps of the similarity argument.[186] Nussbaum attributes ethical significance to capabilities but transcends the similarity argument by avoiding a hierarchy of capabilities. For Nussbaum, human-like capabilities are no more capable of grounding ethical responsibility than are other capabilities.[187] This argument is significant because the language of capabilities is loaded with a history of exclusion (of women, ethnic minorities, and animals) on the basis of prioritising capabilities such as language and reason.[188] Nussbaum's shortcoming remains that, despite avoiding hierarchy, she still utilises sentience as a gatekeeper for moral consideration, thus ultimately using the similarity argument.[189] This approach forecloses debate about what moral consideration might be owed to sentient life where proof of sentience is lacking, and to non-sentient life. Such foreclosed thinking is deficient as an ethical basis for animal law because animals and marginal humans are neglected precisely due to their marginality in ethical theorising.

Additionally, Nussbuam's approach is universalist and non-situated.[190] On this basis, one might question her inclusion within the second wave. Nonetheless, aspects of Nussbaum's approach provide tools with which to deal with marginal cases, proving useful for our purposes. Crucially, Nussbaum recognises varying capabilities in different species; things they are 'able to do and to be'.[191] This is reminiscent of Deleuze and Guattari as well as Braidotti who write about bodies and what they can do.[192] This focus facilitates the formulation of ethics that allow beings to flourish 'as the sort of thing they are', affording the 'dignity relevant to that species'.[193] Nussbaum's central thesis is that '[m]ore complex forms of life have more and more complex capabilities to be blighted, so they can suffer more and different types of harm'.[194] Therefore, ethical consideration requires different responses depending upon the capabilities of the subject.[195]

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[186] Other proposals include the anti-discrimination approach favoured by Bryant (n 3) 233. Also see discussion in Donna J Haraway, *When Species Meet* (University of Minnesota Press 2008) 22.

[187] Martha C Nussbaum, 'The Capabilities Approach and Animal Entitlements' in Tom L Beauchamp and RG Frey (eds), *The Oxford Handbook of Animal Ethics* (Oxford University Press 2014) 247.

[188] Steiner (n 183) 98.

[189] Martha C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press 2007) 361–362.

[190] See, for example, Rachel Nussbaum Wichert and Martha Nussbaum, 'The Legal Status of Whales: Capabilities, Entitlements and Culture' (2016) 72 Seqüência 19.

[191] Nussbaum (n 189) 71.

[192] Although, the examples provided give pause, as they relate to forced animal labour, not what animals would choose to do: Braidotti (n 144) 85.

[193] Martha C Nussbaum, 'Beyond "Compassion and Humanity": Justice for Nonhuman Animals' in Sunstein and Nussbaum (n 63) 309, 350.

[194] ibid 309.

[195] A similar idea is expressed by Thomas Berry and Mary Evelyn Tucker (eds), *Evening Thoughts: Reflecting on Earth as Sacred Community* (Sierra Club Books 2006) 149–150.

The sorts of capabilities that Nussbaum has in mind are related to dignity[196] and can entail such things as 'free movement, social interactions of many types, the ability to grieve or love'.[197] Flourishing also entails an absence of suffering but being ethical requires more than simply minimising pain and maximising pleasure.[198] This requires allowing animals to experience 'a whole form of life that includes love, grief, self-recognition, and much more'.[199] Further investigating animal flourishing may benefit from phenomenological insights as a means to acknowledge the way that 'objects in the world form tapestries of meaning for other animals'.[200] The phenomenological view would denounce factory farming as a 'loss of the brilliant constellation of unique worlds' that could stem from diverse animal life, in place of the homogenous genetically engineered lifeforms we farm.[201] Nussbaum thinks flourishing requires 'individuation' and, thus, she does not apply her theory to non-sentient nature.[202] However, Nussbaum notes she may be wrong on this count. The next section will demonstrate how such theoretical impasses regarding boundaries may be transcended.

Animal law would benefit from normatively embracing flourishing. To date, the focus on avoiding suffering in lieu of promoting flourishing has contributed to the failure of animal liberation to effectively link with other social justice movements.[203] Building a greater number of links between movements would, however, increase the ability of each movement to comprehend and to tackle intersecting oppressions. Nussbaum's ethics may inspire animal law that focuses on animal interests beyond basic interests in welfare.[204] Flourishing can inspire thoughtful reflexion on (dis)similarity of being and consequently variegated forms of animal protection, support and encouragement tailored to unique beings. First wave animal ethics has thus far proven incapable of stimulating law and policy approaches that have such strength and breadth: at present, the law still acquiesces with practices such as factory farming that deny animals the ability to flourish.

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196 Nussbaum (n 189) 159. On dignity, see Michael Bowman, 'Animals, Humans and the International Legal Order: Towards an Integrated Bioethical Perspective' in Werner Scholtz (ed), *Animal Welfare and International Environmental Law: From Conservation to Compassion* (Edward Elgar 2019) 109 et seq.

197 Nussbaum (n 187) 236. Also see Martha C Nussbaum, 'Working with and for Animals: Getting the Theoretical Framework Right' (2018) 19(1) Journal of Human Development and Capabilities 2, 10.

198 Haraway (n 186) 22.

199 Nussbaum (n 187) 246.

200 Zipporah Weisberg, '"The Simple Magic of Life": Phenomenology, Ontology, and Animal Ethics' (2015) 7(1) Humanimalia 79, 96.

201 ibid 101.

202 Nussbaum (n 197) 14.

203 Sue Donaldson and Will Kymlicka, 'Make It So: Envisioning a Zoopolitical Revolution' in Paola Cavalieri (ed), *Philosophy and the Politics of Animal Liberation* (Palgrave Macmillan 2016) 89.

204 Susana Monsó, Judith Benz-Schwarzburg and Annika Bremhorst, 'Animal Morality: What It Means and Why It Matters' (2018) 22 Journal of Ethics 283.

As the animal liberation movement and wider legal circles begin to consider animals as legal persons and (moral and legal) subjects, it is essential to expose human narcissistic assimilative patterns of recognition. Conceptions of indistinction and flourishing transcend the anthropomorphising tendencies in the first wave, identifying appropriate distinctions, avoiding hierarchy and moving away from a one-size-fits-all approach. The next section will explore the deficiencies of the circle of moral concern argument, leading to ethics that reject anthropomorphisation and which prioritise marginal Others.

4.2. The Circle of Moral Concern

4.2.1. The Problem with the Circle of Moral Concern

The circle of moral concern is a problem linked to, but distinct from, the similarity argument. The circle represents the boundary of moral consideration: those inside are subjects of moral consideration while those outside are not.[205] Theorists of first wave animal ethics construct a circle of moral concern whereby inclusion within the circle is determined by the similarity argument. For example, Regan's subjects-of-a-life are morally considerable and others are (probably) not.[206] The circle of moral concern, however, is problematic regardless of how its entry requirements are articulated because it gives inadequate consideration to those entities marginally within the circle and it says nothing about how to treat those entities outside the circle. This neglect has facilitated and justified centuries of oppression of women, racial and religious minorities, disabled people, queer people and animals. An alternative to constructing a circle of moral concern is developing boundless ethics that prioritise marginal Others. Such boundless ethics arguably could have identified such oppression as problematic much earlier, through ongoing processes of consideration and compassion. The development of such ethics can draw on Nussbaum's flourishing and award appropriate, variable consideration to different entities according to their capabilities.

Donna Haraway conceptualises the problem with utilising the circle of moral concern well. She writes 'trying to figure out who falls below the radar of sentience and so is killable while we build retirement homes for apes is … an embarrassing caricature of what must be done'.[207] The inside/outside dualism that the circle of moral concern depends upon is a dangerous 'hierarchical'

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[205] This is common terminology amongst animal ethicists. See, for example, Singer (n 8) 8.

[206] Regan hesitates in closing his moral circle, but offers no consideration of what is owed to those outside: Regan (n 5) 246.

[207] Haraway (n 186) 89.

iteration of 'centrist' liberal ethics which are not commonly questioned in animal law academia.[208] For example, Anne Peters hints at the inadequacy of the current conception of the moral circle, noting that 'over time, all of [the] purported unique characteristics of humans have been refuted as invalid' when these characteristics are also found in animals.[209] Thus, Peters claims, it is illegitimate to deny rights to animals based on dissimilarity to humankind. However, this argument still has two key problems. Firstly, Peters assumes similarity is a legitimate basis for extending the moral circle of concern. It was shown above that it need not be. Secondly, Peters argues that the circle's boundary line has previously been drawn incorrectly, implying that a line around all sentient beings would be correct. But the justification for drawing an exclusionary moral circle in the first place remains unclear. Peters describes the '*moral* and *legal*' dividing line between two species as being 'volatil[e]' and 'socially constructed'.[210] To draw a line around humans together with animals would be a further, though more evolved, social construct, which would simply repeat the 'Cartesian gesture of moral dualism'.[211] Ethical thought ought to do away with the volatile, erroneous circle altogether, in order to deal more quickly and effectively with the perpetuation of unjust oppressions (including those oppressions that are not yet recognised as unjust but which might only later be seen to be condemnable).

The dangers of centrist models of justice are further illustrated by John Rawls' work. Rawls argues that '[f]ully able-bodied persons are the paradigm case' of subjects of justice.[212] He proposes to first decide 'principles of justice' for the 'paradigm group' and then to apply this to '(so-called marginal cases)'.[213] But people with disabilities and animals have unique interests in justice that are equally deserving of respect. Centrist models of justice are incapable of providing tailored responses to the unique challenges and needs of marginalised groups. Indeed, deprioritising marginal cases meant that Rawls never ended up including animals as subjects or objects of justice.[214] The next section will highlight the benefits of developing second wave animal ethics that is not based on an inside/outside dualism. Deconstructing the subjects and boundaries of first wave animal ethics will help reunite animal ethics and environmental ethics in a mutually complimentary fashion.

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[208] ibid; Val Plumwood, *Environmental Culture: The Ecological Crisis of Reason* (Routledge 2002) 146–147.

[209] Peters (n 18) 27.

[210] ibid 26.

[211] Val Plumwood, 'Integrating Ethical Frameworks for Animals, Humans, and Nature: A Critical Feminist Eco-Socialist Analysis' (2000) 5(2) Ethics & the Environment 285, 286.

[212] John Rawls, *Political Liberalism* (Columbia University Press 1993) 244–245.

[213] ibid.

[214] John Rawls, *A Theory of Justice* (Belknap 1971) 504.

4.2.2. Reuniting Animal and Environmental Ethics by Disbanding the Circle of Concern

Deep environmental ethics hold untapped potential for the modern animal law scholar. For reasons of space, I focus on Earth jurisprudence and not deep ecology. This choice is due to Earth jurisprudence's narrative on rights. Additionally, traditions such as continental philosophy also contain interesting insights that could be drawn on in developing unbounded ethics.[215] Space also does not permit an exploration of the insights from that tradition in this thesis. Earth jurisprudence is a legal-philosophical position that recognises the interconnectedness of living beings and that attributes rights to nature. This position posits that fundamental laws control the Earth's functioning and that humanmade laws are only valid if they comply with these fundamental laws.[216]

This theory offers a stimulus to encourage animal ethicists to reconsider their use of the moral circle of concern, but does not necessarily explain how that would be workable. On workability, Matthew Calarco argues that 'universal consideration', or boundless ethics, tells us nothing of what 'count[s]' or '*how*' various beings count.[217] Ethics without a circle of moral concern 'avoids predetermining the limits of moral consideration yet insists on the social and normative dimensions of ethical responsiveness'.[218] This open-texture means that ongoing consideration is necessary in all cases, most especially in those where moral considerability is undetermined. However, Calarco demonstrates that ethical consideration does not necessitate obligation. An open ethical system permits consideration of what is owed to rivers, artificial intelligence, or space matter, without predetermining the ethical action required. Such an approach opens up questions of how to treat Others rather than foreclosing them. It therefore also facilitates coexistence of animal ethics and environmental ethics. The potential advantage of such an open ethical system for groups who have been previously, or are currently, excluded from adequate ethical and legal consideration is arguably clear: after all, the harm caused by Othering and exclusion is unquantifiable. Despite its potential practical burdens, a boundless, precautionary approach has the potential to significantly reduce such harm through enhanced inclusiveness. A precautionary approach aligns with trends in environmental law, where precautionary principles have become a prominent feature of legislation, featuring in over fifty international agreements.[219] They mandate

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[215] William Edelglass, James Hatley and Christian Diehm (eds), *Facing Nature: Levinas and Environmental Thought* (Duquesne University Press 2012).

[216] Burdon (n 25).

[217] Matthew Calarco, 'Toward an Agnostic Animal Ethics' in Paola Cavalieri (ed), *The Death of the Animal: A Dialogue* (Columbia University Press 2009) 81.

[218] Anat Pick, 'Turning to Animals Between Love and Law' (2012) 76 New Formations 68, 68.

[219] For references to reviews of precautionary principles in environmental law, see Jonathan B Wiener, 'Precautionary Principle' in Michael Faure (ed), *Elgar Encyclopedia of Environmental Law* (Edward Elgar 2018) 175.

regulating 'in advance of harm' or 'taking action in the face of uncertain risks'.[220] Because the precautionary principle incorporates uncertainty into the law, it is generally thought it must be included in a non-permanent way so it may be 'provisional and adaptive'.[221] I will return to these questions in chapter V.

The generally assumed incompatibility between animal ethics and environmental ethics has been over-exaggerated, with many commentators emphasising animal ethics' focus on the individual and environmental ethics' focus on systems — a divergence stimulated by J Baird Callicott who, in 1980, attacked animal liberation ethics in favour of Leopold's land ethic.[222] Callicott pronounces on the ethical situation of animals without a basic understanding of their capabilities. Callicott has argued that domesticated animals are 'too dumb to benefit' from liberation and that domesticated animals are no more than 'living artifacts', likening them to 'tables and chairs'.[223]

Since Callicott's article, two central critiques have divided animal ethics from environmental ethics. First, animal ethics has been viewed as more exclusionary and restrictive than environmental ethics because animal ethics cannot incorporate entities such as plants, soil and water.[224] Second, it has been argued that animal ethics and environmental ethics stem from 'profoundly different cosmic visions'.[225] For example, animal ethics and environmental ethics have traditionally adopted diverging treatment of environmental pests and domestic species.[226] Environmental ethics tends to attribute moral value to the preservation of the biotic community, preferring conservation of ecosystems over the integrity of the life of 'pests'.[227] Animal ethics, conversely, tends to protect the life of the individual animal over the viability of the species or the ecosystem.[228] Animal ethics rewards higher cognitive functioning while environmental ethics rewards species that have more positive net sum impacts on the biotic community.[229] Both these critiques can be address by second wave animal ethics.

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[220] ibid 174.

[221] ibid 174–175.

[222] J Baird Callicott, 'Animal Liberation: A Triangular Affair' (1980) 2 Environmental Ethics 311; and Aldo Leopold, *A Sand Country Almanac* (Oxford University Press 1949).

[223] Callicott (n 222) 330.

[224] ibid 313.

[225] ibid 315.

[226] ibid 320.

[227] ibid.

[228] ibid 317–320. This is evident upon reading core animal ethics texts including Singer (n 5); Regan (n 5); and Francione 2008 (n 5).

[229] Callicott (n 222) 320.

In relation to the first critique, boundless second wave animal ethics could embrace entities such as animals, plants and rivers. It could use consideration of capabilities such as cognitive function and also consideration of factors such as degree of impact on biotic communities in order to make ethical decisions. Such an approach would be particularly useful for global animal law given that it deals with difficult issues of wild animal welfare and with the balancing of individual lives against species conservation, which, to date, neither first wave animal ethics nor environmental ethics have been capable of satisfactorily dealing with. This is because each prioritises one value to the exclusion of the other. First wave animal ethics provides no tools with which to contemplate ethical obligation towards non-sentient lifeforms, while environmental ethics are inadequate at offering enhanced and appropriate safeguards based on an entity's sentience.

To work with boundless ethics, it is crucial to determine what is owed to sentient and non-sentient lifeforms. This requires specific consideration and deliberation in individual cases rather than applying a strict overarching and all-encompassing framework. To achieve just results for animals through such a process of deliberation would require that one should avoid the hierarchy and anthropocentricity that is a result of focusing on capabilities that are human-like or beneficial to humankind. Thomas Berry's principles of Earth jurisprudence are helpful here. They state that nature has rights which are awarded to individuals because 'species exist only in the form of individuals'.[230] These rights are unique to the rightholder: '[b]irds have bird rights. Insects have insect rights. Humans have human rights'.[231] This variegated normativity arguably compliments the capabilities approach and offers the degree of specificity required in order to protect sentience where it is present.

On the second critique regarding divergent cosmic visions, second wave animal ethics can represent an effective meeting in the middle between different ethical frameworks. The polarisation of animal ethics and environmental ethics glosses over considerable and significant overlap between animal ethics and Earth jurisprudence stemming from a common regard and respect for the non-human Other. Both ethical approaches reject the use of property status as a legal tool to exploit animals and both recognise the inherent value of animals.[232] In most cases, a win for either movement constitutes a '[win] for both'.[233]

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[230] Berry and Evelyn Tucker (n 195) 149–150.

[231] ibid.

[232] Glenn Wright, 'Animal Law and Earth Jurisprudence: A Comparative Analysis of the Status of Animals in Two Emerging Discourses' (2013) 9 Australian Animal Protection Law Journal 5, 18, 21.

[233] ibid 24.

The benefit of second wave animal ethics bringing these streams together is evident in its application to the problem of environmental pests, which has no satisfactory solution drawn from first wave animal ethics or from environmental ethics.[234] The former would preserve the life of the pest in all circumstances, regardless of impact on bio-sustainability.[235] The latter would have no regard for the possibility of allowing the pest to flourish. Some animal advocates account for the intuition that 'endangered species are due more than bountiful species' through concepts such as compensatory justice.[236] However, most of first wave animal ethics regards all animal life as deserving of equal consideration. Second wave animal ethics, by contrast, could weigh individual and systemic interests in balance, thereby reaching conclusions that are arguably more appropriately sensitive to, and calibrated to particular cases. This approach would consider contributions to the biotic community both as a form of flourishing of individual animals and as part of a balancing of interests between animals and non-animal nature. The possibility of these more tailored ethical considerations is one of the potential benefits of doing away with the moral circle of concern.

Disbanding the moral circle of concern and recognising that nothing is, prima facie, morally inconsiderable has, however, raised concerns. Gary Steiner critiques open-ended, deconstructive ethics as committing animal ethicists to an 'indeterminacy of meaning', making 'clear principles that can govern ethical and political decision making' elusive.[237] Feminist animal scholars are also wary of such indeterminacy.[238] Steiner argues that it results in ethics that are 'wide open', refusing 'to make any discriminations for fear of exercising exclusionary violence', thus ending up 'taking no ethical stand at all'.[239] However, it is not the case that an ethical framework based on radical openness necessitates inaction or indeterminacy. Quite the contrary: such ethics require action, and more action. They require the provision of ethical treatment to those who have been determined to be deserving of ethical treatment, but also deep consideration for those interests typically excluded from ethical consideration. Such boundless ethics can still contemplate what standard of ethical treatment is owed to whom, but these decisions must be reached through

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[234] For example: Mark Sagoff, 'Animal Liberation and Environmental Ethics: Bad Marriage, Quick Divorce' (1984) 22 Osgoode Hall Law Journal 297, 304.

[235] For example, Regan (n 5) 359.

[236] Tom Regan, 'Animal Rights and Environmental Ethics' in Donato Bergandi (ed), *The Structural Links between Ecology, Evolution and Ethics: The Virtuous Epistemic Circle* (Springer 2013) 124.

[237] Steiner (n 183) 4.

[238] Josephine Donovan, 'Animal Rights and Feminist Theory' in Donovan and Adams (n 6) 12.

[239] Steiner (n 183) 156.

more specific and tailored procedures as opposed to being based on an immoveable standard applicable across the board.

Using, unbounded ethics that prioritise marginal Others to inspire the development of global animal law will also help to avoid the lethargic creep of ethical and legal subjectivity that has forced marginalised groups to wait for centuries for proper ethical and legal recognition of their ability to flourish and of the suffering imposed on them. Further, boundless animal ethics that prioritise marginal Others could tackle the supposed incompatibilities between animal ethics and environmental ethics. It would also allow space for insights from environmental ethics like Earth jurisprudence to inspire animal ethics. The next section will explore how animal ethics has been restrained from making such a move because of its commitment to liberal individualism. This commitment has made animal ethics difficult to reconcile with concepts of interconnection favoured by feminism, posthumanism and indigenous ways of being with animals.

4.3. The Liberal Tradition[240]

4.3.1. The Problem with Liberal Approaches to Animal Ethics

The scholarship of Singer, Regan and others treats the liberal tradition as the necessary backdrop of animal ethics.[241] Further, Otomo notes that most animal lawyers rely upon liberal individualism at the expense of potentially fruitful posthumanism and other critical ethics.[242] But the majority of liberal theorists do not grant justice to animals.[243] Relying upon liberal individualism and the utilitarian and deontological ethics that stem from this is a less than optimal approach to animal ethics for three reasons.

Firstly, liberal ethics have failed for centuries to ground effective legal protection of animal interests. Welfarist legal reform, grounded in utilitarian ethics, continues to permit gross violations of animal integrity in industries such as livestock farming and research. Theorising about the moral rights of animals has mostly failed to translate into recognition of legal rights.[244] Moving away from moral rights does not necessitate abandoning legal rights; the two are not synonymous. Instead, it is valuable to require more specificity about the kinds of rights legal systems award and the reasons

[240] I am indebted to Maneesha Deckha's work for alerting me to the nuances of the issues in this section. Her work deserves the closest attention: Deckha (n 2).

[241] Donaldson and Kymlicka (n 203) 73; Deckha (n 2) 528.

[242] Yoriko Otomo, 'Law and the Question of the (Nonhuman) Animal' (2011) 19 Society & Animals 383.

[243] Garner (n 8) 37.

[244] ibid 21.

why. Secondly, liberalism has entailed individualism and anthropocentrism, which has harmed various marginalised groups over time, as is evidenced by the shifting circle of moral concern. In part this exclusory dynamic is due to the liberal construction of moral subjects as being individuals 'with appropriately individualised interests'.[245] The moral concept of an individual is quite exacting and its requirements of consciousness, interests, sentience and so on have frequently resulted in animals being excluded.[246] Thus, the 'humanist conception of rights is inherently exclusionary' and relying upon such 'abstract universals … simply preserve[s] existing disparities of power'.[247] Thirdly, liberalism is intricately tied up with modern conceptions of property and, in consequence, with animals' status as property.[248] Despite these issues, animal law academics appear too entrenched within the liberal legal tradition to consider transcending it.[249] Drawing on feminist and posthumanist ideas as part of a second wave of animal ethics could inspire such transcendence.

4.3.2. Intersectional Connectivity and Care to Transcend Liberalism

4.3.2.1. Individualism and Intersectional Connectivity

Liberal animal ethics focuses on individuality, neglecting the interconnectedness of species and individuals.[250] This approach relies on agency even though it has proven difficult to achieve animal liberation this way.[251] Sue Donaldson and Will Kymlicka argue that liberal individualism tied with 'capitalism [and] enlightenment rationalism' are not to blame for 'animal exploitation'.[252] They argue that such exploitation is not the inevitable consequence or 'logic' of liberalism.[253] While there may be some value in this position, it is also the case that little attention has been paid to critical animal ethics that adopts an anti-liberal or anti-capitalist position in legal research, and that there remains a wealth of untapped potential there.[254] This section explores how intersectional, feminist

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[245] Marcel Wissenburg, 'An Agenda for Animal Political Theory' in Marcel Wissenburg and David Schlosberg (eds), *Political Animals and Animal Politics* (Palgrave Macmillan UK 2014) 32.

[246] ibid 34.

[247] Kelly Oliver, *Animal Lessons: How They Teach Us to Be Human* (Columbia University Press 2009) 30.

[248] Garner (n 8) 36.

[249] Other disciplines have given this consideration: ibid 36 et seq.

[250] Sue Donaldson and Will Kymlicka, 'Animals in Political Theory' in Linda Kalof (ed), *The Oxford Handbook of Animal Studies* (Oxford University Press 2017) 46.

[251] Gregory Smulewicz-Zucker, 'Bringing the State into Animal Rights Politics' in Cavalieri (n 203) 251.

[252] Donaldson and Kymlicka (n 203) 78.

[253] ibid 79.

[254] Kelch (n 10) 85–87; see, similarly Garner (n 8) 39–41. Kelch has more closely considered feminist animal ethics elsewhere: Kelch (n 9).

care-based animal ethics could inspire legal developments that are sceptical of dualisms and deeply critical of animals' property status.

Before discussing intersectionality, individuality should be deconstructed. Donna Haraway's conceptualisation of interconnectedness could fundamentally shift the work of animal law scholars. She writes that '[h]uman genomes can be found in only about 10 percent of all the cells that occupy the mundane space I call my body … To be one is always to *become with* many'.[255] Haraway prefers considering 'multispecies sociality' over individuality.[256] There would be no 'other', just the world as 'a knot in motion'.[257] Haraway argues that the divisions between humanity, animals and nature are 'social constructs' and all sentient life exists along an 'animal continuum'.[258] Braidotti similarly describes the posthuman subject (or 'nomadic subjectivity') as 'a relational subject constituted in and by multiplicity', meaning it 'works across differences and is also internally differentiated'.[259] The ethical bond is not formed by 'self-interests of an individual subject'.[260] Humankind should be conceptually reintegrated into nature and ethics would be determined from a base position of togetherness rather than detachment. This approach contrasts with the similarity argument, which retains separation and hierarchy but pulls animals 'up' the hierarchy with humans. This also counters Nussbaum's requirement of individuality for flourishing by undoing or nuancing notions of human individuality.

An exploration of interconnectedness could transform human ethical and legal relationships with animals. This holds the potential to transcend not only the liberal tradition but it also undoes the supposed logic of the similarity theory and the circle of moral concern. The feminist ideology to be outlined below benefits from relying on a more interconnected view of the world and interconnection is also a theme in intersectional studies. These theories are also useful for the unique insights to be gleaned from the experiences of marginalised groups, including women, who are prominent members of the animal liberation community.[261] Socially marginalised animal advocates have less motivation to 'distort the truth to perpetuate the status quo' than do dominant societal groups, because they see realities of 'pain and need'.[262] They can use their own

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[255] Haraway (n 186) 3–4.

[256] ibid 207.

[257] Donna J Haraway, *The Companion Species Manifesto: Dogs, People, and Significant Otherness* (Prickly Paradigm Press 2003) 6.

[258] Smulewicz-Zucker (n 251) 246.

[259] Braidotti (n 122).

[260] ibid.

[261] Garner (n 8) 39–40.

[262] Josephine Donovan, 'Attention to Suffering: Sympathy as a Basis for Ethical Treatment of Animals' in Donovan and Adams (n 6) 189.

lived experience to expose the damage a lack of recognition causes (to animals).[263] Thus, it is important to incorporate a politic of recognition in which marginalised communities are afforded attentive listening so that attention may be drawn to the 'damage inflicted upon groups and individuals when recognition is lacking'.[264]

By understanding 'interconnecting dominations', it is possible to better understand each of them 'sufficiently and correct[ly]'.[265] Intersectionality also helps to expose interconnected empathies and protections. Ethics like this can help to demonstrate that acts of caring are not 'hostile to each other' and that a 'conservative economy of compassion', which assumes 'there is not enough to go around', is false.[266] Drawing on intersectional ethical ideas also allows for a 'political analysis of the reasons why animals are abused in the first place' within patriarchal society.[267] Whilst this sort of analysis does occur in first wave animal ethics, it is generally marginalised and is not as central and essential to the operation of animal ethics as it could be for second wave animal ethics: intersectional animal ethics would, by definition, investigate 'debate and social change' without being hindered by a fear of unseating societal privilege.[268]

Feminist animal ethics is a prominent and advanced intersectional dialogue on animal protection.[269] It aligns with intersectionality theory's commitment to self-reflexion and its rejection of binaries.[270] Carol Adams pioneers an oppression strand of feminist animal ethics. Her approach recognises how both women and animals have been treated as 'objects rather than subjects' in a 'patriarchal world',[271] and she argues that 'vegetarianism without feminism is incomplete'.[272] The iterations of overlapping oppression here are numerous: 'animaliz[ing] women and sexualis[ing]

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263 Christie Smith, 'Articulating Ecological Injustices of Recognition' in Wissenburg and Schlosberg (n 245) 63–65.

264 ibid 63.

265 Deborah Slicer, 'Your Daughter or Your Dog? A Feminist Assessment of the Animal Research Issue' in Donovan and Adams (n 6) 120.

266 Carol J Adams, 'The War on Compassion' in Donovan and Adams (n 6) 21–22.

267 Donovan and Adams (n 178); Carol J Adams, 'Caring About Suffering: A Feminist Exploration' in Donovan and Adams (n 6); Donovan (n 262).

268 Eisen (n 88) 495; Kelch (n 9) 262.

269 Advancements followed Adams' pioneering work first published in 1990: Carol J Adams, *The Sexual Politics of Meat: A Feminist-Vegetarian Critical Theory* (20th Anniv, Continuum 2010). Research on intersections with race, sexuality and disability has grown more recently, eg: Deckha (n 2); Ko and Ko (n 108), Luis Cordeiro-Rodrigues and Les Mitchell, Animals, Race and Multiculturalism (Palgrave Macmillan 2017); and Susan McHugh, 'Queer and Animal Theories' (2009) 15(1) GLQ: A Journal of Lesbian and Gay Studies 153.

270 Emily Clark, '"The Animal" and "The Feminist"' (2012) 27(3) Hypatia 516, 517–518.

271 Adams (n 269) 219.

272 ibid 30.

and feminiz[ing] animals';[273] men using the denial of meat as a 'pretext' for brutalising women;[274] meat-eating by men symbolising their asserted dominance;[275] and the double oppression of female animals who provide dairy in their life and meat in their death.[276] This has inspired a spreading body of work, encompassing subjects like male entitlement and marginalising responses to vegan sexual preferences, as well as homophobic, racist tropes of "effeminized" masculinity in so-called 'rice eaters' and 'soy boys'.[277] This kind of theorisation is important, precisely because intersecting oppressions reinforce one another and, suggest, therefore, that cohesive rather than 'fragmented' activism is optimal.[278]

These ideas have been given little critical attention by animal law and policy experts. For example, Robert Garner dismisses the insights of feminist animal ethics as being of minimal relevance given that the formal legal oppression of women is now outlawed in most jurisdictions, while this is not the case for animals.[279] However, substantive oppression of women continues even where it has been formally outlawed, and moreover, women live with the history of oppression, and legal systems worldwide still continue to permit the oppression of women.[280] For example, Yoriko Otomo provides account of gendered harm, exploring how the state has 'directed' and 'created' an environment where 'marketing, production and distribution' of cow's milk is so extensive that cow's milk is drunk with 'nearly every meal' and there has been a 'decline of wet nursing and maternal breastfeeding'.[281] This cannot be explained solely by the 'life, nurture, comfort, purity and goodness' of milk and its 'dairy derivatives' but, Otomo suggests, also relies upon the liquid being 'entirely removed from the female labour that produces it'.[282] This tracks with the shift in production of milk outside the male-coded city to 'industrial warehouses' with bodies 'coded dirty, irrational and impure: female and animal'.[283] This contributes to the societal

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[273] ibid 4, 16.

[274] ibid 220.

[275] ibid 56.

[276] ibid 113.

[277] Iselin Gambert and Tobias Linné, 'From Rice Eaters to Soy Boys: Race, Gender, and Tropes of "Plant Food Masculinity"' (2018) 7(2) Animal Studies Journal 129; Annie Potts and Jovian Parry, 'Vegan Sexuality: Challenging Heteronormative Masculinity through Meat-Free Sex' (2010) 20 Feminism & Psychology 53.

[278] Adams (n 269) 15.

[279] Garner (n 8) 40.

[280] Lane K Bogard, 'An Exploration of How Laws Tend to Maintain the Oppression of Women and Animals' (2017) 38(1) Whittier Law Review 1, 4, 10–31.

[281] Yoriko Otomo, 'The Gentle Cannibal: The Rise and Fall of Lawful Milk' (2015) 40(2) Australian Feminist Law Journal 215, 223–224.

[282] ibid 224.

[283] ibid.

normative divide between the human and the animal, taking the milk, 'the "animal" part of the human … literally … away, subcontracted to bodies that exist outside the organs of the city'.[284] Otomo's crucial, feminist insight provides the animal liberation movement with lessons in politics of power and intersectionality that Garner does not comprehend. Such insights are essential to the effective and ethical growth of animal law amongst the realities of systemic oppression, particularly in globalised contexts.

Feminism also provides many reasons to think beyond rights. Rights are conceptualised by many critical thinkers as patriarchal leftovers of masculinist, liberal society, which exist to protect an 'elite of white property-holding males' in market economies.[285] Rights, conceptualised thus, favour 'separateness' and 'competitiveness' over 'interconnectedness and synthesis'.[286] The holders of such rights are highly individualised 'rational, autonomous, independent agents'.[287] Adams regards this conception of actors in society as fraudulent because it 'depends on the invisibility of women's caring activities':[288] women traditionally enabled property-holding, vote-casting men to participate in society by taking care of the home, while being denied their own socio-political agency. Further, many feminists blame the justice-based approach to ethics for subordinating women as well as animals and nature.[289]

Ethical tools that better recognise interconnectedness would therefore have certain benefits. Such ethics would help animal law to recognise that domesticated animals require human support and that wild animals require certain actions from humans to protect animal habitats, such as, for example, through climate change mitigation initiatives.[290] Such ethics would also see animals on their own terms, in contrast to rights-based approaches that overemphasise similarity to humans.[291] Of course, rights theorists reject this view by arguing that rights are not per se patriarchal or oppressive.[292] It remains the case, however, that rights that exist to combat oppression may still be applied in a way that further entrenches oppression.[293] Thus, it is important to avoid paternalistic policies which speak 'for the [nonhuman] other' rather than listening to them,

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[284] ibid 225.

[285] Donovan (n 262) 187.

[286] Liz Rivers, 'Nature in Court' in Burdon (n 25) 222.

[287] Donovan and Adams (n 178).

[288] Adams (n 267) 200.

[289] Eg Grace Clement, 'The Ethic of Care and the Problem of Wild Animals' in Donovan and Adams (n 6) 301.

[290] Donovan and Adams (n 178); Opi Outhwaite, 'Neither Fish, nor Fowl: Honeybees and the Parameters of Current Legal Frameworks for Animals, Wildlife and Biodiveristy' (2017) 29 Journal of Environmental Law 317.

[291] MacKinnon (n 121) 317.

[292] Kelch (n 9) 263; Francione 2008 (n 5) 20.

[293] See below at section 4.4.1.

seeing them on their own terms and more faithfully voicing their desires and needs.[294] This suggests that the solution to animals' issues must 'be theirs', which means moving beyond an 'enforced anthropocentric standard' for understanding animals in law.[295] This kind of shift starts with 'listening' to animals when they 'dissent from human hegemony', when '[t]hey vote with their feet by running away. They bite back, scream in alarm, withhold affection, approach warily, fly and swim off'.[296] Care theory provides a better basis for such ethical listening than rights-based approaches.[297]

4.3.2.2. Rejecting Rights in Favour of Feminist Care Ethics

Feminist care ethics, originated by Carol Gilligan, conceptualises morality as care involving 'responsibility and relationships' in contrast with a rights-based, autonomy-centric 'morality as fairness'.[298] Gilligan states that the 'moral problem arises from conflicting responsibilities rather than competing rights', requiring resolution that is 'contextual and narrative' rather than 'formal and abstract'.[299] This position contrasts with much first wave animal ethics by conceptually, linguistically and procedurally foregrounding responsibilities rather than rights.[300]

The act of caring is described by Josephine Donovan as: not a mother-infant kind of care but, instead, 'one of listening to animals, paying emotional attention, taking seriously—*caring about*—what they are telling us'[301] This requires emotional insight, introducing emotion as a source of knowledge and basis for responsibility.[302] Emotion is commonly rejected by first wave animal ethicists to avoid their positions being trivialised.[303] Yet, these theorists ultimately rely on 'intuition' or 'feeling' when their work displays gaps.[304] Second wave animal ethics, and feminist care theory, reject the dichotomisation of rationality and emotion, recognising that empathy is a 'complex intellectual as well as emotional exercise' and an 'imaginative exercise that requires judgement and

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[294] MacKinnon (n 121) 324.

[295] ibid; Josephine Donovan, 'Interspecies Dialogue and Animal Ethics' in Kalof (n 250) 208.

[296] MacKinnon (n 121) 324.

[297] Interconnection in collective rights of indigenous peoples also holds potential: Miodrag A Jovanović, *Collective Rights: A Legal Theory* (Cambridge University Press 2012).

[298] Carol Gilligan, *In A Different Voice: Psychological Theory and Women's Development* (Harvard University Press 1982) 17–23.

[299] ibid 19.

[300] Kelch (n 10) 431; Deane Curtin, 'Toward an Ecological Ethic of Care' in Donovan and Adams (n 6) 93.

[301] Josephine Donovan, 'Feminism and the Treatment of Animals: From Care to Dialogue' (2006) 31(2) Signs 305, 305.

[302] Donovan and Adams (n 178).

[303] Singer (n 5) ii–iii, ix–x; Regan (n 5) xii, 123–124; Donovan and Adams (n 6) 6; Kelch (n 10) 86.

[304] Marti Kheel, 'The Liberation of Nature: A Circular Affair' in Donovan and Adams (n 6) 46–47.

evaluation'[305] as well as 'observation and concentration'.[306] These arguments, moreover, span back to David Hume and even to Plato and Aristotle.[307] Coupling this with Haraway's rejection of individuality and Braidotti's posthumanism opens possibilities for empathy to extend to non-sentient lifeforms.

Care also requires shifting the 'epistemological source of theorizing about animals to the animals themselves'.[308] This also entails an undoing of the myth of 'autonomous isolates' and a 'society of rational equals' in order to acknowledge and deal with 'power differentials'.[309] What this means is that we must expose the fact that universalisation, deemed a necessary component of sound ethical thought, is not neutral and that someone must be doing the universalising, from a particular standpoint.[310] This does not mean that situated, contextual care theory is totally incapable of generalising certain ethical responses and, thus, forming the basis of any system of rules. It simply means that this generalisation must stem from deep listening and it must leave room for differentiation depending on the circumstances.[311] Donovan believes that this approach encloses a moral circle around those who can 'communicate cognitively and emotionally as to their needs and wishes'.[312] However, the intersectional toolbox approach allows us to distance ourselves from Donovan's adoption of a circle of moral concern. It seems eminently possible that this act of listening and decentring the self may apply to non-sentient life that communicate their needs and wishes in different, non-cognitive ways.

Justice-based ethics have been taken as '*the* moral point of view' in the west.[313] Turning towards care reveals justice to be one moral option amongst others. Working with care theory is important because it offers insights into characteristically feminist ethical thinking, namely into a 'more contextual mode of judgement and a different moral understanding' which have been dismissed and disparaged for little reason other than their difference to the male norm.[314] Yet, such theorisations offer real potential to inform how animal law is developed.

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[305] For references, see ibid 176 and 223.

[306] ibid 179–180; Lori Gruen, 'Empathy and Vegetarian Commitments' in Donovan and Adams (n 6) 388. On evolutions in social scence approaches to emotion, see the journal: Emotion, Space and Society at https://www.sciencedirect.com/journal/emotion-space-and-society/issues.

[307] Kelch (n 9) 279.

[308] Donovan (n 301) 305.

[309] ibid 306.

[310] ibid 308.

[311] ibid.

[312] ibid 309.

[313] Clement (n 289) 301.

[314] Gilligan (n 298) 18–19 and 22.

The central elements of care ethics that this thesis proposes can improve the development of animal law are: balancing responsibilities before rights, putting others' interests before our own; contextual and situated rather than abstract analyses of right and wrong; and validating emotion as a form of knowledge that is not necessarily dichotomous with rationality. It is not necessary, moreover, to abandon the mechanism of legal rights in order to draw from the insights provided by feminist ethics of care, notwithstanding the fact that questions concerning how such ethics might be implemented and operationalised in law require further exploration. Here, however, I focus on countering key critiques raised about utilising feminist care theory to inspire animal law.

Firstly, Francione and others argue that feminist care theory is incapable of preventing forms of abusive or violent treatment without relying on something like rights because, otherwise, legal interventions would continue to treat humans differently to animals.[315] Care theory's situatedness is also argued to preclude it from providing a 'guide to action' which would be capable of precluding meat eating[316] or forbidding the 'institutional exploitation of animals'.[317] Such arguments neglect the core commitment within feminist animal ethics, which argues it is wrong to harm sentient creatures; that humans have an obligation to care for animals that cannot care for themselves; and that humans ought to intervene to stop animal abuse.[318] Listening to animals in care theory means we take seriously that 'no animal would opt for the slaughterhouse' and so caring requires much more than welfare reform.[319] Those who believe care theory is incapable of taking a strong moral stance are not paying close enough attention. Additionally, critiques of the care ethic's efficacy also overlook or downplay certain challenges facing rights-based approaches, including the fact that rights compete and must be balanced against one another. Accordingly, there is questionable authority for arguing that rights (and no other ethical device) are capable of protecting animals.[320]

Francione and others have also failed to respond to the feminist counterargument that follows this defence. This counterargument critiques the non-situated *methods* of doing ethical work used by first wave animal ethics thinkers. First wave thinkers have responded by implying that the purity of their results justifies the non-situatedness of their methods. Accordingly, they counterargue that feminist care theory must be faulty because it cannot reach the same

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[315] Francione 2008 (n 5) 203–204; Francione 1996 (n 5) 20; Steiner (n 183) 1–2.

[316] Garner (n 8) 40.

[317] Francione 2008 (n 5) 188.

[318] Donovan and Adams (n 178).

[319] Donovan (n 301) 310.

[320] This sort of argument is made by Robert Garner, 'Animal Welfare: A Political Defense' (2006) 1 Journal of Animal Law & Ethics 161, 169.

universalised results.[321] This is circular and does not satisfactorily meet the feminist counterargument. Further, first wave thinkers cannot prove that situated thinking precludes feminist care theory's ability to ground serious ethical and legal protection for animals.

Secondly, some theorists have sought to counter care theory by arguing that people simply do not care about animals.[322] In response, a number of animal ethicists, discussing feminist care theory, provide a wealth of evidence to show that this approach is 'oversimplistic' and that caring for animals is the 'normal state of humans', citing as examples: animal companions; animal rescue; and guilt and expiation over hunting and slaughtering.[323] For example, Brian Luke provides a rich account of different cultural practices that support this view.[324] This is useful exploration because it permits second wave animal ethics to question more fundamentally *why* animal cruelty is perpetuated in all societies across the globe.[325] In some cases, the answer is that animals are an 'absent referent', whereby they are turned into 'meat', as if something entirely distinct from a living animal, through 'butchering' and renaming.[326] This construction of an absent referent is particular to industrialised animal agriculture, which utilises masking language and practices to frustrate natural human empathetic tendencies.[327] This puts one in mind of Bourdieu's references to the almost '*magical* power of naming', indicating the socioeconomic power structures at play in the naming of things.[328] In contrast to the way in which industrialised animal agriculture depends on abstractions, every other animal can 'see and hear their victims before they eat them'.[329] It is important to understand why animal cruelty takes place in order to develop effective policies toward change. It is not enough to simply assert that animal suffering is bad and we should not partake.

Thirdly, Grace Clement and other critics of care ethics argue that an emotional, care-based approach to animals would lead humans to be 'biased toward those close to us' such as pets, neglecting wild animals.[330] Donovan writes that this sort of argument misconceptualises care

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[321] Francione 2008 (n 5) 188.

[322] Brian Luke, 'Justice, Caring, and Animal Liberation' in Donovan and Adams (n 6) 134–135.

[323] ibid.

[324] ibid 135–136.

[325] ibid 136.

[326] Adams (n 269) 66.

[327] Luke (n 322) 138 et seq.

[328] Pierre Bourdieu, *Language and Symbolic Power* (John B Thompson (ed), Gino Raymond (tr) and Matthew Adamson (tr) eds, Polity Press 1991) 236 and generally.

[329] Adams (n 269) 77.

[330] Clement (n 289) 303; Eleni Panagiotarakou, 'Who Loves Mosquitoes? Care Ethics, Theory of Obligation and Endangered Species' (2016) 29(6) Journal of Agricultural and Environmental Ethics 1057, 1062–1063.

theory as 'kin altruism'.[331] For Donovan, care and compassion are ethically imperative acts that are to be applied universally and which materialise in the act of listening.[332] Additionally, Clement problematically essentialises wild animals in her argument, dichotomising nature and culture. In reality, human culture is part of, rather than distinct from, nature and animals. There are already readily apparent transgressions of this dichotomy such as house spiders or wild animals that wander into domestic settlements who operate across 'cultured' and natural spaces. Clement promotes focusing on 'individual animals' in the domestic sphere but she argues that 'outside that realm, it is appropriate to think more holistically'.[333] This approach troublesomely implies that it is proximity to humans that awards lifeforms with individuality.

Clement thinks humans cannot feel empathy for a rabbit eaten by a snake in the wild, but that we can feel empathy for an animal in a zoo.[334] In contrast, I argue that domestication is not necessarily linked with empathy in this way but, rather, that humans recognise 'eating and *being eaten*' as a 'fundamental fact of life' in the wild and that therefore we do not, and indeed mostly should not, interfere.[335] Eleni Panagiotarakou, on the other hand, has argued that an empathy shortfall would arise because of 'physical distance', 'psychological distance', fear or disgust (of mosquitoes, rats, spiders, etc) and because of 'short attention spans'.[336] This argument, again, falls foul of the 'kin altruism' misconceptualisation identified by Donovan. The rejection of care and emotion in animal law aligns with the use of abstract, universal approaches to animal ethics. Thus, the final imperative of second wave animal ethics to ground animal law is situatedness.

4.4. Ethnocentric Universalisation of Animal Ethics

4.4.1. The Problem with Universalised Animal Ethics

Each of the problems addressed above have skirted around the difficulties associated with universalised, non-situated animal ethics. Feminist theory and posthumanist theory both prefer situatedness and seek to expose universality as a western hegemonic myth. Drawing on these frameworks, it is important for animal law scholars, particularly those working in global contexts,

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[331] Donovan (n 301) 309.

[332] ibid 310.

[333] Clement (n 289) 307.

[334] ibid 305.

[335] ibid 305–306.

[336] Panagiotarakou (n 330) 1063–1064.

to address the possibility that animal liberation might perpetuate coloniality with an eco-imperialist tone.[337]

First wave animal ethics has been accused of being 'aggressively ethnocentric' and ignorant of indigenous ways of being that are tied up with animals and animality.[338] This argument has two strands. Firstly, that western society encourages 'imperialist extensions' of theory from 'privileged western perspectives' where harmful factory farming models are the norm, without taking care to look for conflict with non-western worldviews.[339] Secondly, that western theoretical traditions encourage 'dualistic conceptual structures and assumptions'.[340] Maneesha Deckha foregrounds such concerns when she references JM Coetzee writing of a fear that the animal rights movement might become 'yet another Western crusade against the practices of the rest of the world, claiming universality for what are simply its own standards' because of the 'privileging of western viewpoints and peoples'.[341]

There is ample evidence of the negative effect of the privileging of western viewpoints on marginalised communities. If one accepts the importance of addressing intersecting oppressions, the need to avoid such epistemic hierarchy ought to be taken seriously by animal advocates. The battle between Canadian Inuits and animal advocates is an obvious example. Animal advocates led by Humane Society International (with support from Ellen DeGeneres and other Hollywood figures) campaigned against seal hunting and, as a result, challenged the Inuit way of life.[342] Emiliano Battistini highlights how seals have become the 'friction point' between opposing ontologies and 'politics of food'.[343] A key problem here is that the seal hunt is visible, it is 'red blood on the white ice', while factory farming is 'abattoirs', 'hidden away', and treated as invisible.[344]

This contrast in visibility explains but does not justify the disparity in public outrage at the treatment of animals in both circumstances. While there is nothing '*inherently* discriminatory' about focusing upon minority practices like sealing because 'solving all the problems in the world should not be a prerequisite for a particular social justice campaign',[345] it is nevertheless 'difficult to ignore

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[337] Deckha (n 2) 534.

[338] Plumwood (n 211) 286.

[339] ibid 291.

[340] ibid.

[341] Maneesha Deckha, 'Animal Justice, Cultural Justice: A Posthumanist Response to Cultural Rights in Animals' (2007) 2 Journal of Animal Law & Ethics 189, 199 and 219–220 citing JM Coetzee, *Elizabeth Costello* (Harvill Secker 2003) 105.

[342] Emiliano Battistini, '"Sealfie", "Phoque You" and "Animism": The Canadian Inuit Answer to the United-States Anti-Sealing Activism' (2018) 31 International Journal for the Semiotics of Law 561.

[343] ibid 588.

[344] ibid 579–580.

[345] Deckha (n 341) 222.

the pattern of western critique of non-Western practices without an attendant reflexion and criticism of cultural practices marked as "Western"'.[346] Battistini, for example, highlights insightful anger displayed by Inuit Tanya Tagaq at 'fancy people who have a perfect roof over their head and lots of food because they can afford organic tofu and walk down the street to a market with all the vegetables there are in the world'.[347] She bemoans the hypocrisy of those who 'eat meat' but 'are disgusted at the thought of a dead animal' whilst noting that the veganism of those who criticise her lifestyle makes sense in their western environments.[348]

A central problem is that westerners equate 'animal use with animal abuse' because of the patterns of animal exploitation in the west and because of the "'hands off' perspective of an urban population remote from its food production sources'; western consumers have 'forgotten the possibility and dynamics of loving and even respectful use and interaction'.[349] The desire of the Inuit for a 'different kind of animal rights activism' that is tailored to different environments must be taken seriously by animal ethicists, particularly in the context of global animal law.[350] It is both unjust and ineffective to impose change from the west. This practice inevitably fails to recognise and adapt to different circumstances and to respect the independence and sovereignty of other nations and their peoples. Western animal advocates do not need to abandon their missions in order to recognise this. They do, however, need to go about achieving change at a global level in a way that fosters greater interaction and conversation across cultural boundaries.

Thinkers such as Francione (who categorises the killing of animals in any circumstance as wrong) have been critiqued for foreclosing discussion on this issue and for advocating 'species apartheid'.[351] Discussion of justifying killing is uncomfortable for abolitionist animal ethicists, however these are conversations that must be engaged with in order to research global animal law. As Deckha argues, any ethical assessment of animals' situations should 'come only after a process of attentive listening and consideration of divergent perspectives'.[352]

Thus, it is clear that animal liberation tactics can be practiced in a way that reinforces coloniality. However, it is important to note that animal liberation is *not* an intrinsically or necessarily imperial concern and those who argue this often have ulterior motives. Animal

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[346] ibid.

[347] Battistini (n 342) 583 citing Tanya Tagaq, 'Eating Seal Meat Is a Vital Part of Life in My Community' (*VICE*, 21 Oct 2014) <https://munchies.vice.com/en_us/article/z4gdjy/eating-seal-meat-is-a-vital-part-of-life-in-my-community> accessed 18 December 2020.

[348] ibid 580.

[349] Plumwood (n 211) 297.

[350] Battistini (n 342) 586.

[351] Donaldson and Kymlicka (n 250) 46.

[352] Deckha (n 341) 220.

liberation is not an intrinsically colonial endeavour because it is not (exclusively) a western endeavour. Meat eating is 'integral' in western culture and, indeed, Europeans were exposed to vegetarianism when colonising India.[353] What is clear is that animality has always been a 'colonial encounter': 'non-westerners were racialized through associations with the body and animality' and now they are 'racialized through their uses of animals'.[354] Additionally, livestock animals were used as a tool to evict native peoples from their lands through the fiction of *terra nullius*.[355]

This colonial encounter requires a different ethical response than if animal liberation were intrinsically colonial. This requires decolonising animal advocacy. An effective means of doing so is to commit to an indistinct understanding of the 'human' and the 'animal' and to commit to awarding ethical consideration to each. This requires intersectional thought and the recognition that animal advocacy through means that oppress colonised or otherwise marginal communities is counterproductive and counterintuitive. This is because such advocacy contributes to the systemic oppression that is the root cause of animal harm. The intersectional and feminist ethics explored in this chapter provide the tools required for this kind of thought because they refuse 'all-or-nothing type purity', allowing for situated and politically-minded ethical decision making.[356] Marti Kheel makes it clear that acknowledging these tensions does not make it impossible to take investigative action.[357] Moving through these ethical conundrums requires the deep listening of care theory directed toward animals and 'cultural insiders' who understand their peoples' practices in a way that is not essentialist. For example, Greta Gaard notes how these insiders are able to identify how the hunting practices of a privileged, and often male, subset of an indigenous culture are taken by outsiders to represent the culture as a whole.[358] The association of 'masculine self-identity' and meat eating in indigenous cultures is an interesting area for potential study but,[359] crucially, it is not the place of non-native ethicists to challenge internally 'oppressive features of marginalized cultures'.[360] Such inquiries must be led by community members.[361] It has also been

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[353] Maneesha Deckha, 'Teaching Posthumanist Ethics in Law School: The Race, Culture, and Gender Dimensions of Student Resistance' (2010) 16(2) Animal Law Review 287, 302.

[354] Glen Elder et al, 'Le Pratique Sauvage: Race, Place, and the Human-Animal Divide' in Jennifer Wolch and Jody Emel (eds), *Animal Geographies: Place, Politics, and Identity in the Nature-Culture Borderlands* (Verso 1998) 81.

[355] Kay (n 112).

[356] Traci Warkentin, 'Must Every Animal Studies Scholar Be Vegan?' (2012) 27(3) Hypatia 499, 500.

[357] Marti Kheel, 'Vegetarianism and Ecofeminism: Toppling Patriarchy with a Fork' in Steve F Sapontzis (ed), *Food for Thought: The Debate Over Eating Meat* (Prometheus Books 2004) 335.

[358] Greta Gaard, 'Tools for a Cross-Cultural Feminist Ethics: Exploring Ethical Contexts and Contents in the Makah Whale Hunt' (2001) 16(1) Hypatia 1, 17.

[359] Kheel (n 357) 335.

[360] Gaard (n 358) 18.

[361] ibid.

noted above that non-western cultures have very different and insightful ways of being with animals. For example, many native languages do not have a translation for the word 'animal', because indistinction is natural to them.[362] The following section will detail how second wave animal ethics deals with these conundrums.

4.4.2. Second Wave Animal Ethics as Situated and in Opposition to Coloniality

For many animal advocates, dietary choices 'reflect and reinforce our cosmology, our politics'.[363] For this reason, veganism has, in practice, been adopted as a 'moral baseline' of personal action for inclusion in the animal rights movement.[364] However, such a position has marginalised communities where veganism is less attainable or has not been regarded as necessary due to the means of sourcing animal food.[365] Therefore, investigating ethical veganism is core to a growing movement toward more situated animal ethics. Such discussions resonate with feminist arguments against demands of veganism 'from an external source' because of the 'elitist, classist, and racist' undertones that such calls have displayed in the past.[366] The alternative is to engage in conversations and to promote the benefits of avoiding meat, the consumption of which can be understood as a 'form of patriarchal domination' whose elimination can help 'dismantle the structures of oppression'.[367] This view, forwarded by western scholars, may not be acceptable in indigenous cultures where meat eating is required for cultural practices beyond sustenance. My point here is to encourage open, reflexive conversation rather than imposition. This section will outline arguments in favour of more situated approaches, particularly in discussions of global animal law, before addressing some of the concerns that such an approach is unpalatable to western animal advocates.

As is implicit in the argument offered earlier, feminist care ethics favour 'a particularized, situational response' rather than 'abstract and formalistic' rules or judgements.[368] This resistance to abstraction and formalism emerges from feminist recognition of the 'masculinism, the white-

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[362] Kay (n 112).

[363] Adams (n 269) 245.

[364] Donaldson and Kymlicka (n 203) 92.

[365] ibid 93.

[366] Gruen (n 306) 334.

[367] ibid.

[368] Donovan and Adams (n 178); Slicer (n 265); David Eaton, 'Incorporating the Other: Val Plumwood's Integration of Ethical Frameworks' (2002) 7(2) Ethics and the Environment 153.

Anglo ethnocentrism, the heterosexism – lurking behind what parades as universal'.[369] Related to this, is the idea that the adoption of a universalising approach could threaten the early development of global animal law by enabling a related ethnocentric imposition of western ideology. This entails decolonisation of ethical theory and resulting policy which is required for situated, second wave animal ethics. On this view, animal ethics cannot be enforced from the Global North, nor should it be developed in isolation. This is unjust and ineffective: it fails to work toward a less oppressive society and local people are more likely to reject an imposed ethical or policy position developed without their input.

Careful reflection is required to think through how situatedness would work in practical legal settings. Of course, the law relies on precedent and predictability, and it is also true that individual assessments are made by courts applying statutory rules, but situatedness is arguably of more immediate significance when addressing global contexts and discussing transnational law and legal discourse. The need for cross-cultural situatedness seems relatively clear in such contexts. However, it may also be that second wave animal ethics could regard the application of situational, contextual judgements as beneficial in domestic legal settings. This question requires further exploration, which is beyond the scope of this thesis. For now, it is significant to note that situated ethical thought is required in order to counter charges of ethnocentricity in animal law in global settings, and in order to deal with two accompanying problems. The first problem is the tendency of particular and situated ideas to be portrayed as universal and rational in first wave animal ethics. Such conclusions are faulty if reached without engagement with non-western and indigenous communities. The second problem is that a non-situated approach to animal ethics lends itself to the troubling pattern of extending 'individual human sanctity' to a wider group by treating certain animals, along with humans, as being 'above nature'.[370] While rationality and universalism have gone hand in hand with the similarity argument and with the moral circle of concern within first wave animal ethics, a core problem with relying on individual human sanctity is that this foundation is also used to justify all manner of harm caused to non-sentient nature.

Haraway provides ideas that could inspire moves towards a more situated animal ethics that, in turn, could enable a more sensitive and adaptive, situated global animal law compared to current conceptualisations of global animal law that rely on animal rights theory. Haraway is adamant that 'nurturing and killing [is] an inescapable part of moral companion species entanglement' and that to reject that fact would be to perpetuate human exceptionalism and

[369] Smith (n 263) 66–67.

[370] Plumwood (n 211) 293–294.

separateness from other life.[371] She points out that it is a 'factual, semiotic, and material' point that '[t]here is no way to eat and not to kill, no way to eat and not to become with other mortal beings to whom we are accountable, no way to pretend innocence and transcendence'.[372] Haraway rejects efforts of ethical vegans like Francione to entirely remove themselves from the food chain as being an 'exterminationist nonsolution', because this relies upon a false dichotomisation of nature and culture.[373] Haraway rejects the nature-culture divide and human exceptionalism, arguing that humans too are food and are killable.[374] Relying upon more abolitionist rights frameworks dodges this question of killing.[375] For Haraway, the alternative is to command 'thou shalt not make killable' in place of '[t]hou shalt not kill'.[376] This alternative would require that humans should 'live responsibly within the multiplicitous necessity and labor of killing':[377] Killing 'does not end the question; it opens it up'.[378]

Haraway's position seems to be a logical consequence that emerges when the similarity argument and the moral circle of concern are dismissed as the basis for animal ethics. The difficulty with Haraway's idea, however, when thinking of law, is that it would be unthinkable for any enactment of a commandment not to 'make killable' to do away with the force of the 'thou shalt not kill' commandment folded into the law of murder. It might even be the case that doing away with 'thou shalt not kill' potentially makes it more difficult to reduce the unnecessary killing of animals because it opens up space for instrumentalisation. Indeed, Haraway herself considers that some 'instrumental relations' between humans and animals should be 'nurtured' rather than snuffed out.[379] She thinks humans ought to decide what is acceptable instrumental use by being 'nonmechanical and morally alert [to the] consequences for all the parties, human and not, in the relation of unequal use'.[380] Perhaps this kind of thinking could excuse animal killings that appear more innately justifiable, such as the killing involved in Inuit subsistence seal hunts or other Indigenous relationalities with animals that entail killing, while condemning the majority of less justifiable western animal killing. However, a danger remains: it might be the case that the flexibility

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371 Haraway (n 186) 105–106.

372 ibid 294–295.

373 ibid 105–106.

374 Plumwood (n 211) 294 et seq.

375 For example, Francione 2008 (n 5) 149 and 157.

376 Haraway (n 186) 80.

377 ibid.

378 ibid 92.

379 ibid 77.

380 ibid.

in this kind of approach, and especially its refusal to rule out all animal killing, could convince animal advocates that a much-needed move away from liberalism and its underlying suppositions is, in the final analysis, undesirable.[381]

Debates that engage with these kinds of complexities are taking place amongst those who take animal suffering very seriously and who also stand firm against western hegemonic understandings, and there needs to be extensive discussion amongst animal lawyers in transnational forums about what, if any, killing could be justified in order to respond to calls for situated animal ethics. Thus, it could be useful for animal advocates to engage with the 'nonmechanical and morally alert' ethical consideration Haraway recommends, as opposed to over-rationalised systems of ethical reasoning that foreclose further thinking.

Haraway does not explore the idea that killing and eating animals in most western contexts might be unnecessary. It could be that the situated thinking she requires could be used to condemn most animal-eating in western contexts. (Certainly, from my intersectional standpoint, I suggest that ethical veganism makes sense in such contexts.) In any event, one does not need to agree with Haraway's conclusions in order to pursue the kind of thinking she promotes. At first blush, Haraway's conclusion appears like it could be used to justify forms of animal killing that fall foul of second wave animal ethics. But, in reality, Haraway shows that accepting interconnectedness means accepting the instrumentality of eating.[382] This acceptance may be the necessary upshot of situated animal ethics. If so, it is a conclusion that will be difficult for western (and other) hard-line animal advocates to accept.[383] In the context of global animal law, this does not matter. The core value of situated thought and debate is that any kind of legislating on animal issues in a globalised world (where views on the treatment of animals diverge) *necessitates* legitimisation. That is to say, global animal law will need to be context-responsive, nuanced and to embrace space for difficult conversations in order to be widely accepted as legitimate.

First wave animal ethics is not able to recognise that 'one size doesn't fit all' in the way that second wave animal ethics can.[384] It is not clear what the *right* outcome of this on-going engagement will be, but it *is* clear that this approach, of engaging with different epistemologies and

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[381] Donovan and Adams (n 178).

[382] Haraway (n 186) 87.

[383] This is displayed in conflict between Greenpeace Canada directors (who published an apology and a non-apology) regarding anti-sealing campaigns and Inuit communities: Joanna Kerr, 'Greenpeace Apology to Inuit for Impacts of Seal Campaign' (*Greenpeace*, 2014) <https://www.greenpeace.org/canada/en/story/5473/greenpeace-apology-to-inuit-for-impacts-of-seal-campaign/> accessed 18 December 2020; and Paul Watson, 'I Do Not Apologise for Opposing the Slaughter of Seals' (*Pamela Anderson Foundation*, 2016) <https://www.pamelaandersonfoundation.org/news/2016/1/27/i-do-not-apologize-for-opposing-the-slaughter-of-seals-by-captain-paul-watson> accessed 18 December 2020.

[384] Donovan and Adams (n 178).

ontologies, is the right way through which to seek answers. It is also true that one can forward a view of veganism as a 'practice that disrupts humanist logic by displacing the structural position of the animal as legitimately "consumable"'.[385] This opposes Haraway's conception of veganism as an exterminationist non-solution. In this way, veganism is a practice to 'unsettle' the human/animal dichotomy.[386] One could even counter that eating animals is the more 'totalising' course.[387] Respecting context whilst promoting a vegan diet where it is possible and appropriate can be regarded as 'ethical veganism' in contradistinction to the 'universal vegan imperative' of first wave animal ethics.[388]

Another benefit of situated ethical veganism is its ability to react to developments in plant studies, an element of posthuman studies.[389] Greta Gaard presents troubling findings in this regard for animal ethicists: plants show signs that they do not want to be eaten, they demonstrate that they feel 'vegetal versions of fear and pain' and they have consciousness.[390] These findings are troubling because ethical veganism relies upon eating plants and boundless ethics without a circle of moral concern requires taking these findings seriously. This may provide evidence of Haraway's determination that we cannot eat without killing. The intersectional, second wave response to this is not to eat whatever we want without ethical thought, as many veganphobics will tell us to whilst trolling on twitter or counterprotesting. Rather, this requires recognising that there is a 'moral *direction*' rather than a 'moral *destination*' to ethical decision-making about food.[391] Consuming plants, as far as we know right now, allows us to consume less and to cause less suffering.[392] Contextual veganism allows us to consider new knowledge and to engage seriously with plant studies in a way that universalist first wave animal ethics cannot. Thus, situatedness operates across space and time (as knowledge develops).

To conclude on situatedness, it should be noted that this does not represent indeterminacy. Situated ethical thought can denounce coloniality and animal oppression through an attention to the circumstances of individual cases. Situated thought may be able to justify animal killing in certain circumstances but these circumstances are not as widely drawn as first wave critics suggest.

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[385] Giraud (n 94) 50.

[386] ibid 53.

[387] ibid 62.

[388] Christiane Bailey and Chloë Taylor, 'Editorial Introduction: Animal and Food Ethics' (2013) 8(2) Phaenex Journal of Existential and Phenomenological Theory and Culture i, 258.

[389] Greta Gaard, 'Critical Ecofeminism: Interrogating "Meat," "Species," and "Plant"' in Annie Potts (ed), *Meat Culture* (Brill 2017).

[390] ibid 274.

[391] ibid 276 citing Deane Curtin, 'Toward an Ecological Ethic of Care' (1991) 6(1) Hypatia 60.

[392] ibid 279–280.

Indeed, first wave animal ethics permit animal killing in all but the most radical of theories. Situatedness, the fourth component of second wave animal ethics, operates on the first three. It acts as a check against paternalism whilst also acting as a guide to pursuing effective action. While the first three components will require listening to and respecting an animal's desire to be alive, the fourth component adds that oppressive means of achieving this result are unjust. However, the ethical dilemma does not stop there. Second wave animal ethics entails an ethical imperative on those capable of doing so to find a non-oppressive means of achieving the result determined to be ethical by the first three components. This is a collaborative, painstaking process, and it entangles the ethical dilemma in the real world rather than imposing an exacting moral imperative that would make the situation worse.

5. Conclusion

The aim of this chapter was to identify key failings of first wave animal ethics and show how these have limited and restricted animal law studies. The chapter advanced four key ideas. First, that animal advocates ought to stop assuming animals only deserve moral and legal consideration if they are like humans. Instead, we should accept, celebrate, reward, and legally protect difference whilst also committing to indistinction theory and an undoing of the human/animal dichotomy in place of relationality and connectedness. Second, animal advocates ought to stop assuming that moral and legal consideration should extend to animals and no further. Third, animal advocates ought to stop over-relying on liberal concepts like rights and start engaging with (intersectionally) marginalised communities, incorporating deep listening through care theory as a means to centre ethical decision making on the animals' own desires. Fourth, animal advocates ought to stop assuming that animal ethics needs to be the same everywhere. This fourth suggestion arguably poses the biggest challenge for animal ethicists, particularly for those committed to universalising assumptions. Universalisation, as argued above, is problematic for a range of reasons, and it seems vital now to question the universalising ethics produced from a western standpoint, and to recognise the reality of situated diversity and multiple forms of knowing.

An associated aim of this chapter was to identify a second wave of animal ethics as part of an effort to move away from approaches to animals (in ethics and in law) that attempt to shoehorn all cases into the narrow framework of one particular theory. While many of the ideas presented here call for further elaboration in the future, this chapter has set out to provide a toolbox of ideas and approaches, united by intersectionality theory, that might be drawn on in developing

alternatives. This exploration is of particular consequence for the emerging conversation surrounding global animal law which, in order to have legitimacy, will require deeper reflexion and justification of its underlying ethics.

This chapter provides this thesis with its ethics-based methodology. Critical, intersectional second wave animal ethics will be used as an analytical tool to unearth the ethical components of existing laws that govern animals' lives. This methodology will also be used to envisage how the law might be improved. In chapter II, this thesis will explore the development of animal law and global animal law through a second wave lens. Critiques will be launched against global animal law that will situate the problem of trade and animal welfare. The law that governs animals who are traded is woefully poor at safeguarding their interests, as will be demonstrated in chapter IV. This is due in large part to the ethical and normative underpinnings of that law, which are explored in chapter III. Exposing the fact that trade law is ethically and normatively situated paves the way for chapter V to apply second wave animal ethics to the problem of trade and animal welfare in order to envisage effective change. Second wave animal ethics recognises that avoiding the ethical in animal law amounts only to a false objectivity that forecloses engagement with opposing and marginalised worldviews. It is high time that more animal law scholars admitted the foreclosures operative in the first wave and began the process of taking intersecting marginalisations seriously.

Chapter II

Global Animal Law:

An Intersectional Conception of Global Law that Prioritises Animal Interests, Diversification and Decolonisation of Emerging Law and Scholarship

1. Introduction

[N]orms do not change simply in response to rational arguments.[1]

Nor in response to (equally valid) emotional arguments. But with added political force and legal provision, norms might change.[2] So goes the argument of the political theorists forging deeper connections between animal ethics and animal law through a political turn in animal studies.[3] These animal advocates are committed to enacting change through politics because change requires more than 'preaching and proselytising' to individuals.[4] As such, practical animal ethics have long been pronounced.[5] However, ethics-based animal law remains elusive. Ethics-based animal law scholarship could help to remedy this. Fortunately, animal law scholars frequently

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[1] Marcel Wissenburg and David Schlosberg, 'Introducing Animal Politics and Political Animals' in Marcel Wissenburg and David Schlosberg (eds), *Political Animals and Animal Politics* (Palgrave Macmillan 2014) 5.

[2] Competing views on this: Gary L Francione, 'Reflections on Animals, Property, and the Law and Rain Without Thunder' (2007) 70(1) Law and Contemporary Problems 9, 44; and Paul Waldau, 'Second Wave Animal Law and the Arrival of Animal Studies' in Deborah Cao and Steven White (eds), *Animal law and welfare: international perspectives* (Springer 2016) 40.

[3] Wissenburg and Schlosberg (n 1).

[4] ibid 1; Manuel Arias-Maldonado, 'Rethinking the Human-Animal Divide in the Anthropocene' in Wisenburg and Schlosberg (n 1) 18.

[5] Francione (n 2) 46.

demonstrate proficiency in ethical thought in textbooks[6] and papers.[7] However, for a few reasons, this has proven insufficient to promote transparent conversation regarding the ethical leanings of animal law.

First, animal law scholars typically present animal ethics as the precursor to or explanation for the rise of animal law.[8] This succeeds in establishing a connection between law and ethics but falls short of providing ethics-based critiques of the law.[9] Second, most animal law scholars neglect the second wave concepts outlined in chapter I.[10] Consequently, animal law has grown with utilitarian and anthropocentric leanings.[11] This thesis fills this gap in the literature by providing a transparently ethics-based critique of the law. This chapter's goal is to analyse global animal law, policy and scholarship against the priorities and imperatives of second wave animal ethics.

Second wave animal ethics entails: a commitment to indistinction between the socially constructed categories of human and animal; an ambition to promote and safeguard flourishing as well as protecting against suffering; a renunciation of the constraints of the circle of moral concern in order to consider Others; a commitment to care (entailing deep listening and embracing connection) in place of liberal individualism; and a situated and intersectional approach to solving dilemmas as opposed to a universal imperative. The reflexivity, transparency and intersectionality of this analytical methodology should foster a more varied and honest conversation regarding the ethics that already exist unacknowledged in (animal) law. The ethics-based critique of this chapter is particularly significant in the global context. Global animal law scholarship and policy must foster transparent discussion regarding underlying ethics in order to achieve legitimacy amongst diverse local communities across the globe. This chapter reveals how the growing body of global animal law scholarship contains coloniality, treating diverse animal-relational ontologies as a

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[6] Simon Brooman and Debbie Legge, *Law Relating to Animals* (Cavendish Publishing Limited 1997); Lesli Bisgould, *Animals and the Law* (Irwin Law 2011); David Favre, *Animal Law: Welfare, Interests, and Rights* (2nd edn, Aspen Publishers 2011); Peter Sankoff, Vaughan Black and Katie Sykes, *Canadian Perspectives on Animals and the Law* (Irwin Law 2015).

[7] Maneesha Deckha, 'Animal Justice, Cultural Justice: A Posthumanist Response to Cultural Rights in Animals' (2007) 2 Journal of Animal Law & Ethics 189; Jessica Eisen, 'Beyond Rights and Welfare: Democracy, Dialogue, and the Animal Welfare Act' (2018) 51(3) Journal of Law Reform 469.

[8] For example, Brooman and Legge (n 6) 23.

[9] For example, ibid 27.

[10] For example, ibid 74; and Caley Otter, Siobhan O'Sullivan and Sand Ross, 'Laying the Foundations for an International Animal Protection Regime' (2012) 2(1) Journal of Animal Ethics 52, 62 et seq. Notable exceptions include Jessica Eisen, 'Feminist Jurisprudence for Farmed Animals' (2019) 5 Canadian Journal of Comparative and Contemporary Law 1; Maneesha Deckha, 'Teaching Posthumanist Ethics in Law School: The Race, Culture, and Gender Dimensions of Student Resistance' (2010) 16(2) Animal Law Review 287; and Yoriko Otomo, 'Law and the Question of the (Nonhuman) Animal' (2011) 19 Society & Animals 383.

[11] Limited exceptions: Eisen (n 10); and Otter, O'Sullivan and Ross (n 10) 61.

problem to be solved.[12] Second wave animal ethics would regard the homogenising tendencies of global animal law scholarship as morally deficient and marginalising.

This chapter will unfold as follows. First, this chapter will explore animal law at multiple locations (domestic law, regional agreements, international standards, treaty provisions) to identify what fills global animal law with its substance (insofar as the 'global' moniker can be regarded substantively).[13] These developments have led to the movement to recognise and realise global animal law. Second, this chapter will critically analyse the emerging narrative surrounding global animal law against an intersectional conception of globality. This will reveal that global animal law is lacking in key respects: it is ethically shallow, it is ethnocentric in design and operation, it conflates global law with universal law, and it overfocuses on international law instruments to the exclusion of other more connective, post-Westphalian modes of law-making. Finally, this chapter will conclude these analyses by introducing the link between global animal law and international trade law. This chapter maps and critiques global animal law in order to identify large governance gaps which international trade law has filled. Trade law has infiltrated global animal law's early development too heavily and this is detrimental due to trade law's normative and ethical underpinnings. This argument is proven with an analysis of trade norms and impacts of trade policy in chapter III and international trade law (and associated scholarship) in chapter IV.

2. Animal Law

Before exploring domestic and international animal law, there are two definitional questions that must be addressed. The first (deconstructing the 'animal law' nomenclature) is academic but necessary. The second (clarifying animals' legal status) colours the various legal instruments in this chapter.

2.1. Law *for* Animals

[12] For example, Thomas G Kelch, 'Towards Universal Principles for Global Animal Advocacy' (2016) 5(1) Transnational Environmental Law 81.

[13] See below at section 3.2.1.

'Animal law' is not an uncontested nomenclature. It is, in fact, rather Americanised to refer to animal law.[14] In the United Kingdom, we have preferred 'animal welfare law'[15] and, more recently 'animal rights law'.[16] This reflects the welfarist and utilitarian slant of the underlying ethics and a subsequent shift to rights-based thinking.[17] For those who transcend first wave animal ethics and who are critical of the liberal and colonial tendencies of that tradition, these terms don't work. So, we rely on the Americanised (and spreading) 'animal law'. Though some avoid the issue by referring to 'the law relating to animals',[18] I am not alone in using 'animal law' to refer to law that impacts animal welfare.[19]

I think animal law ought to be conceptualised as 'law *for* animals' as opposed to law *about* animals. Though, again, this would not be uncontested. Animal law has been categorised as an overarching law about animals with animal welfare law or animal protection law as the relevant subset dealing with animals' interests.[20] This wide conceptualisation of animal law normalises ownership of animals and a prioritisation of the owners' interests over that of the animals.[21] This entrenches an anthropocentric vision of the legal treatment of animals. According to the second wave ethical framework, this would be an unacceptable basis upon which to build animal law.

Animal law cuts across so many legal disciplines that it is usually defined very broadly. For example, Schaffner describes animal law as 'the legal doctrine in which the legal, social or biological nature of nonhuman animals is an important factor'.[22] My view diverges for two reasons. First, Schaffner's view would restrict law centred on animals' interests to a subset of animal law. It would be preferable for animal-centricity to be regarded as a characteristic of animal law rather than a subset. This leaves open the possibility for all forms of legal interaction with animals to take animals' interests seriously. Indeed, if one accepts the moral considerability of animals, as the ethical framework does, there is no legal circumstance concerning animals in which it would be

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[14] For example, Favre (n 6). An exception: Margaret E Cooper, *An Introduction to Animal Law* (Academic Press 1987).

[15] Mike Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (Oxford University Press 2001).

[16] See 'Our Centre' (*The Cambridge Centre for Animal Rights Law*) <https://animalrightslaw.org/ourcentre> accessed 18 December 2020.

[17] For example, Ian A Robertson, *Animals, Welfare and the Law: Fundamental Principles for Critical Assessment* (Routledge 2015) ix.

[18] Brooman and Legge (n 6).

[19] Steven C Tauber, *Navigating the Jungle: Law, Politics, and the Animal Advocacy Movement* (Routledge 2016) 5.

[20] For example, Cooper (n 14) 68; Joan Schaffner, *An Introduction to Animals and the Law* (Palgrave Macmillan 2011) 4–5; and Neli Sochirca and Tero Kivinen, 'Special Section on the Definition of Animal Law' (2019) 7 Global Journal of Animal Law <https://ojs.abo.fi/ojs/index.php/gjal/issue/view/170> accessed 18 December 2020.

[21] In agreement, see Pamela D Frasch, 'The Definition of Animal Law' (2019) 7 Global Journal of Animal Law 1 <https://ojs.abo.fi/ojs/index.php/gjal/issue/view/170> accessed 18 December 2020; and Joyce Tischler, 'The History of Animal Law, Part I (1972-1987)' (2008) 1 Stanford Journal of Animal Law & Policy 1.

[22] Schaffner (n 20) 4–5.

inappropriate to centre upon the animals' interests. Second, Schaffner's definition has tended to encourage a mapping of the legal disciplines (the doctrinal spaces) in which animals are a subject of discussion. Joe Wills, in one of the best reflections on animal law definitions I have read, proposes an alternative teleological understanding of animal law in which the defining feature of animal law is not the body of law but, rather, its mode of enquiry, the focus and perspective of those doing the looking.[23] I believe that this aligns with my proposal that animal law be considered law *for* animals.

Posthumanism promotes the indistinction of the categories of the human and the animal. Additionally, feminist deep listening and situatedness require paying regard to individual circumstances which may be frustrated by generalising the category of the 'animal'. These considerations point to the efficacy of doing away with the category of animal law altogether, integrating the animal subject and their interests into law at large. I am sympathetic to this goal; I think law at large ought to take non-human subjects' interests seriously. However, I also regard the growth of disciplines like 'animal law' and 'environmental law' as being integral to this eventual goal. Thus, I recommend employing 'animal law' and 'animal centricity' in a way which works toward eventual indistinction. This requires centring animal law on animal interests, affording them legal care that has only been awarded to humans so far. This also requires taking the distinct needs and desires of individuals seriously with regard to flourishing. This will blur species divides because intra-species variations and inter-species commonalities will be identified. The question of balancing competing interests of, for example, human, animal, and non-animal nature can only be tackled when a more level playing field is achieved through the achievement of legal subjectivity for non-human Others.

At present, animal law is much too anthropocentric to achieve these goals. Animal law is subdivided according to the use humans put animals to: companion animals, farm animals, animals in research, and captive wild animals.[24] Animal law seriously reprimands harm caused to companion animals but not to farm animals, begging the question of what interest is really being protected here.[25] And law governing animals' lives has historically served to establish human dominion over animals: a stream in the 'river of injustice'.[26]

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[23] Joe Wills, 'What Is Animal Law?' (2019) 7 Global Journal of Animal Law 2 <https://ojs.abo.fi/ojs/index.php/gjal/issue/view/170> accessed 18 December 2020.

[24] Schaffner (n 20) 5; Robert Garner, *Animals, Politics and Morality* (2nd edn, Manchester University Press 2004) chs 3-6.

[25] Luis E Chiesa, 'Why Is It a Crime to Stomp on a Goldfish - Harm, Victimhood and the Structure of Anti-Cruelty Offenses' (2008) 78 Mississippi Law Journal 1, 13.

[26] Steven M Wise, *Rattling the Cage: Towards Legal Rights for Animals* (Profile 2000) 40.

2.2. Animal Objects

> *[L]aw is central to the very process of profanation – that is, the process of taking something that is sacred (potentially everything that is non-human) and turning it into something worldly, available for human consumption.*[27]

The quality of the lives of animals who encounter humans turns on their legal status. In this regard, it is rather difficult to make law *for* animals when animals fall on the wrong side of the 'most fundamental classification in law': the person/property divide.[28] Animals' legal status as property is a dismissive and destructive falsity which permits dominium[29] (/dominion) and which lies at the heart of animal law.[30] This property status was spread by colonisers from the west to the rest of the world through seventeenth century animal theft crimes which were used to assert 'English rule'.[31] By propertising animals, the law labels animals as the 'quintessential "other"'.[32] These same marginalising tactics were used to animalise (which has been synonymous with Othering) people of colour in western legal systems.[33]

Some leading animal law scholars, like David Favre, argue that a property status less tied to dominium could be workable for animals.[34] I tend to diverge here, agreeing with the majority of animal law thinkers who regard legal subjectivity as integral to animals' liberation.[35] Propertising the Other permits repetitive, regenerating marginalisation. Animal law scholars oppose this Othering but frequently fall into the trap of relying upon similarity theory to forward

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[27] Edward Mussawir and Yoriko Otomo, 'Thinking about Law and the Question of the Animal' in Andreas Philippopoulos-Mihalopoulos and Victoria Brooks (eds), *Research Methods in Environmental Law: A Handbook* (Edward Elgar 2017) 457.

[28] Wendy A Adams, "Human Subjects and Animal Objects: Animals as "Other" in Law' (2009) 3(1) Journal of Animal Law & Ethics 29, 32. Examples of animals' propertisation in law: Theft Act 1968 (UK) Art 4(4); Criminal Damage Act 1971 (UK) Art 10(1). In France, animals are recognised as 'living beings' rather than 'movable property', see Code Civil (France) Art 515-14.

[29] Peter Burdon, 'The Great Jurisprudence' in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press 2011) 62.

[30] Brooman and Legge (n 6) 50. On dominion, see Blackstone at 2 Bl Comm 321 et seq.

[31] Mathilde Cohen, 'Animal Colonialism: The Case of Milk' (2017) 111 AJIL Unbound 267, 268.

[32] Adams (n 28) 34.

[33] ibid 31 citing *Dred Scott v Sandford* 60 US 393, 393 (1856) and *Loving v Virginia*, 388 US.

[34] David Favre, 'Animals as Living Property' in Linda Kalof (ed), *The Oxford Handbook of Animal Studies* (Oxford University Press 2017); Angela Fernandez, 'Not Quite Property, Not Quite Persons: A "Quasi" Approach for Nonhuman Animals' (2019) 5(1) Canadian Journal of Comparative and Contemporary Law 155; Victoria Ridler, 'Dressing the Sow and the Legal Subjectivation of the Non-Human Animal' in Yoriko Otomo and Ed Mussawir (eds), *Law and the Question of the Animal: A Critical Jurisprudence* (Routledge 2013) 113.

[35] For example, Gary L Francione, *Rain without Thunder: The Ideology of the Animal Rights Movement* (Temple University Press 1996) 10.

counterproposals.[36] Founding animal subjectivity on the basis of shared qualities with humankind - in order to draw them into a closed circle of concern - is morally (and practically) deficient. This does not undo the Othering of law. It merely extends it. This tradition raises lawyers who are unable or unwilling to recognise and critique the boundaries of legal subjectivity: for example, it goes unnoticed that law applicable to animals invariably applies only to vertebrates.[37] This also tends to mean animal law scholars fail to engage with the anti-propertisation scholarship of Earth jurisprudence and other environmental ethics.[38] The sections that follow will set out the harm caused by the propertisation of animals in law, a legal fiction which facilitates the trade in animals and their bodies.

2.3. Animals in Domestic Law

2.3.1. Stagnant Welfarism in Law

The legal practice of Othering animals has restricted the development of animal law to a stagnant welfarism. Even enacting deficient welfarist law has been a monumental challenge in itself. Proving this requires western-centric historic scene-setting to contextualise the work of the (western) animal lawyers who largely constitute the current global turn. The western-centricity owes to the more horrific and elongated history of industrialising animal harm in the west.

Legislative leanings toward the protection of animals have surfaced in various forms throughout history and, predominantly, at the domestic level.[39] It is thought that the earliest record of such protective legal pronouncements is an edict to stop slaughter of all living beings by Indian emperor Ashoka in the third century BC.[40] Such a pronouncement would be radical even today! The modern age of animal law has been more anthropocentric and much less radical than this. In Ancient Greece and in the Middle Ages (primarily in Europe) animals were subjected to criminal trials for causing harm to persons, crops and the like.[41] This is a surprising, almost comical,

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[36] Adams (n 28) 36-37 and 41 et seq.

[37] Opi Outhwaite, 'Neither Fish, nor Fowl: Honeybees and the Parameters of Current Legal Frameworks for Animals, Wildlife and Biodiveristy' (2017) 29 Journal of Environmental Law 317, 322.

[38] See chapter I section 4.2.2.

[39] For more recent transnational efforts, see below at 2.4.

[40] 'Animal Rights History Timeline: Antiquity (BCE-C485) - Edicts of Ashoka' (*Web Archive*) <https://web.archive.org/web/20140819045227/http://animalrightshistory.org/animal-rights-antiquity-bce/asoka/edicts-of-asoka.htm> accessed 18 December 2020.

[41] Ridler (n 34) 102; Adams (n 28) 44 citing Jen Girgen, 'The Historical and Contemporary Prosecution and Punishment of Animals' (2003) 9 Animal Law Journal 97, 99; Brooman and Legge (n 6) 32.

iteration of the legal mistreatment of animals. These trials continued in some places until 1909.[42] They were thought to have been motivated by retributive revenge or the instillation of obedience.[43] From the perspective of second wave animal ethics, it is plainly unjust to hold animals accountable to a system of rules to which they have no means of consenting and which wholly disregards their interests. This eschews listening to animals or treating them as ethically considerable. Now that such trials no longer take place, animals are not even given the pretence of justice. They have 'absolute liability' for their behaviour towards humans, such as when a dog bites a child.[44]

In the modern age, animal protection in law typically arises only as a by-product of the rights of the relevant property owner.[45] Direct legal protection for animals is claimed to have first been enacted in the *Cruel and Improper Treatment of Cattle Act (Martin's Act)* in 1822.[46] This act was controversial at the time, having been preceded by a number of failed attempts (in 1800, 1802 and 1809) to enact protective legislation for animals in Britain.[47] Its enactment was monumental though, like much animal law, it was marred with enforcement problems.[48] Martin's Act prohibits cruelty. It does not go so far as to positively require welfare protection. Despite numerous intervening reformative acts,[49] it was not until the *Animal Welfare Act 2006* that the law in the UK took a broadly welfarist stance. This development can be traced back to Ruth Harrison's 1964 book *Animal Machines*.[50]

In the UK, Harrison has been described as 'the first person to open the doors of the factory farm to the public'.[51] Following millennia of wide-ranging animal suffering at human hands, the advent of factory farming tipped the scales and rattled the public conscience. And for good reason. Harrison describes factory farming as entailing the 'elimination of all enjoyment, the frustration of almost all natural instincts' and replacement of this with 'acute discomfort, boredom and the actual

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[42] Ridler (n 34) 102.

[43] Brooman and Legge (n 6) 38.

[44] Adams (n 28) 44.

[45] Brooman and Legge (n 6) 40.

[46] ibid 42; Robertson (n 17) 81. Earlier legislation does exist: Act Against Plowing by the Tayle, and Pulling the Wooll off Living Sheep 1635 (Ireland); Massachusetts Body of Liberties 1641 (US).

[47] Garner (n 24) 84.

[48] Enforcement problems led to establishment of the RSPCA: Gordon Hughes and Claire Lawson, 'RSPCA and the Criminology of Social Control' (2011) 55 Crime Law and Social Change 375, 381. Example of modern enforcement problems: Laura Donnellan, 'The Cat and Dog Fur Regulation: A Case Study on the European Union's Approach to Animal Welfare' (2018) 39 Liverpool Law Review 71, 78–80, 86.

[49] Cruelty to Animals Act 1876 (UK); Protection of Animals Act 1911 (UK).

[50] Ruth Harrison, *Animal Machines: The New Factory Farming Industry* (London Vincent Stuart 1964).

[51] Carol McKenna, 'Ruth Harrison' (*The Guardian*, 2000) <https://www.theguardian.com/news/2000/jul/06/guardianobituaries> accessed 18 December 2020.

denial of health' so that 'the animal is not allowed to live before it dies'.[52] Mary Midgley describes it as a 'lifelong deprivation of absolutely everything that makes life worth living or even endurable'.[53] Growing public awareness of this reality, coupled with the revelation that factory farming is a 'protein factory in reverse' (animals consume 6kg for every 1kg they produce),[54] inspired regulation of the industry. Harrison's work led to the Brambell Report.[55] This report investigated farm animal welfare in the UK and made various recommendations for improvement. This provided a normative footing for the beginnings of welfarist animal law in the UK and in Europe.[56] Other developments have led to legal protection for animals outside the farm. These include the tighter regulation of animals used in research in many jurisdictions, protection of pet animals, and some constitutional provisions referring to animal protection.[57] The welfarist model, enacted through a humane treatment imperative, is now widely evident in non-western animal laws in Africa, Asia and South America.[58]

Though a positive development (contesting 'hierarchies of violence' and providing a 'vocabulary' to address newly recognised problems),[59] the entrenching of the welfarist model has introduced a number of limitations to animal law. These include a neglect of wild animal welfare,[60] a neglect of city-dwelling wild animals,[61] and the freedom to kill healthy animals for no reason.[62] Nonetheless, animal law has continued to spread. It is now described as a rather 'sophisticated

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[52] Harrison (n 50) 3. For further mainstream recognition of the horrors of factory farming, see Yuval Noah Harari, 'Industrial Farming Is One of the Worst Crimes in History' (*The Guardian*, 2015) <https://www.theguardian.com/books/2015/sep/25/industrial-farming-one-worst-crimes-history-ethical-question> accessed 18 December 2020.

[53] Mary Midgley, 'Why Farm Animals Matter' in Marian Stamp Dawkins and Roland Bonney (eds), *The Future of Animal Farming: Renewing the Ancient Contract* (Blackwell publishing 2008) 30.

[54] Peter Singer, *Animal Liberation* (Harper Perennial ed, 4th edn, 2009) 178–179; Gary L Francione, *Animals as Persons* (Columbia University Press 2008) 174.

[55] UK Ministry of Agriculture, Fisheries and Food, 'Report of the Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems' (Cmnd 2836, 1967) (The Brambell Report).

[56] Isabelle Veissier and others, 'European Approaches to Ensure Good Animal Welfare' (2008) 113 Applied Animal Behaviour Science 279, 280.

[57] For a recent comprehensive overview, see Charlotte E Blattner, *Protecting Animals Within and Across Borders: Extraterritorial Jurisdiction and the Challenges of Globalization* (Oxford University Press 2019) ch 2.

[58] ibid 74–75.

[59] Otomo (n 10) 384.

[60] Stuart Harrop, 'The Dynamics of Wild Animal Welfare Law' (1997) 9 Journal of Environmental Law 287, 287. See further below at 2.4.4.

[61] Yoriko Otomo, 'The End of the City and the Last Man: Urban Animals and the Law' (2016) 42 Lo Squaderno 47, 49. Otomo does not infer causation between welfarist law and this neglect, but I regard the two as intertwined.

[62] Joe Wills, 'A Nation of Animal Lovers? The Case for a General Animal Killing Offence in UK Law' (2018) 29(3) Kings Law Journal 407.

discipline'[63] and as having 'arrived' as a 'field' of study (in some jurisdictions at least).[64] The United States (US) in particular has over 150 law school courses on animal law, numerous animal law clinics, journals, publications, and conferences.[65]

I argue the most pressing limitations of animal law stem from its stagnation in welfarism and its reluctance to embrace second wave thinking. The hallmarks of welfarist animal law are incremental reform[66] and a utilitarian balancing of animal and human interests focused on the principle of "unnecessary suffering".[67] This entrenches a humanist moral superiority in law, treating the instrumentalisation of animals as unproblematic[68] and leaving the question of animal suffering to the whims of the courts.[69] This has been critiqued as, in practice, permitting just about any use of animals, 'however abhorrent'.[70] Second wave animal ethics could not accept such a sharp dichotomy between humans and animals in law. Welfarist law also fails to problematise the propertisation of animals.[71] Some welfarists go so far as to describe animal welfare law as 'specialist property law';[72] a trivialising, marginalising depiction when one considers animals' abilities to flourish. A final restriction to animal law entrenched by welfarism is that it frequently applies only to a narrow subset of animals due to similarity theory.[73]

Despite these restrictions, welfarist animal law remains a step in the right direction. However, some like Francione regard such laws as normalising animal use and, thus, working counterintuitively toward animal liberation goals.[74] This concern is worth taking seriously and will be explored as this thesis tackles questions of utopianism and reform. Nonetheless, animal welfare law has started a process of legally recognising and protecting animals that ought to continue and improve. It has also provided useful legal commentary on 'animal welfare', simplifying the

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[63] Tauber (n 19) 20.

[64] Waldau (n 2) 14.

[65] Tauber (n 19) 20. On animal law education in the UK, see Simon Brooman, 'Creatures, the Academic Lawyer and a Socio-Legal Approach: Introducing Animal Law into the Legal Education Curriculum' (2017) 38 Liverpool Law Review 243.

[66] Anne Peters, 'Introduction: Animal Law - A Paradigm Change' in Anne Peters, Saskia Stucki and Livia Boscardin (eds), *Animal Law: Reform or Revolution?* (Schulthess 2015) 21.

[67] Garner (n 24) 85–86.

[68] ibid 109.

[69] Radford (n 15) 247.

[70] Gary L Francione, *Animals, Property, and the Law* (Temple University Press 1995) 4 and 20 et seq.

[71] Francione (n 2) 56.

[72] Robertson (n 17) x and 87 et seq.

[73] ibid 156.

[74] Francione (n 35) 113–114.

overabundance of sometimes contradictory scientific welfare indicators.[75] The most oft-cited animal welfare definition is set out by the World Organisation for Animal Health (OIE). This includes reference to five freedoms,[76] and a more illustrative definition:

> *how an animal is coping with the conditions in which it lives. An animal is in a good state of welfare if (as indicated by scientific evidence) it is healthy, comfortable, well nourished, safe, able to express innate behaviour, and if it is not suffering from unpleasant states such as pain, fear and distress.*[77]

These principles have been distilled down to a central theme which would identify animal welfare as being good when 'animals are healthy and have lives in which they have most of the things they want'.[78] This is a useful benchmark for second wave-inspired animal law if one adds positive considerations of flourishing. I will reference animal welfare throughout this thesis in this way, meaning whether an animal fares well and flourishes, not as a reference to utilitarian welfarism.

2.3.2. Movements Towards Animal Rights

Humans are awarded rights in all legal systems, but animals are not.[79] There has been a shift toward advocating for legal animal rights, to match their ethical rights,[80] in lieu of other forms of protection.[81] Legal rights are thought of as the 'paradigm tool' for legal protection because of their practical utility and psychological significance.[82] Rights are thought to signify an arrival on the political plain.[83] They are seen as essential to legal personhood[84] and legal standing,[85] and also as incompatible with property status.[86] Legal rights *are* capable of providing better protection than

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[75] Marian Stamp Dawkins, 'What Is Good Welfare and How Can We Achieve It?' in Marian Stamp Dawkins and Roland Bonney (eds), *The Future of Animal Farming: Renewing the Ancient Contract* (Blackwell publishing 2008) 75.

[76] World Organisation for Animal Health, 'Terrestrial Animal Health Code' (28th edn, 2019) s 7.1.2.2 <https://www.oie.int/standard-setting/terrestrial-code/> accessed 18 December 2020.

[77] ibid Art 7.1.1. For historical and scientific commentary, see Radford (n 15).

[78] Dawkins (n 75) 73–74.

[79] Anne Peters, 'Liberte, Egalite, Animalite: Human-Animal Comparisons in Law' (2016) 5 Transnational Environmental Law 25, 42.

[80] Arguing that moral rights make it possible to point to gaps in legal rights for animals, see Brooman and Legge (n 6) 24.

[81] For example, Peters (n 79) 14.

[82] Otter, O'Sullivan and Ross (n 10) 64.

[83] ibid 37.

[84] Peters (n 79) 45.

[85] Alexia Staker, 'Should Chimpanzees Have Standing? The Case for Pursuing Legal Personhood for Non-Human Animals' (2017) 6(3) Transnational Environmental Law 485, 485.

[86] Brooman and Legge (n 6) 50–51.

the welfarist, utilitarian legal treatment of animals that is currently favoured.[87] Animal rights would forbid many 'frivolous' uses of animals that animal welfare law justifies.[88] But calls from academics for the recognition of animal rights are growing exponentially[89] and, although rights are not the only path, second wave alternatives are not widely discussed in the literature.[90]

Second wave animal ethics invites exploration of alternative tools that may be better for both animals and humans. I admit to being in a conundrum: I do not think legal rights are the best tool, but I think they are likely a necessary tool in the short term. The legal strength of rights is undeniable, and the omnipresence of human rights means that pursuing some other legal tool for animals would likely result in weaker protection.[91] However, the legal protection of rights frequently turns on a competition between different rights and rights-holders. It is very difficult to imagine animals coming out on top in such competitions. I see much more potential in care for Others rather than rights-based conceptions of justice, and deep listening rather than competitive ring-fencing. I think animal law scholarship ought to encourage a shift to law that prioritises Others, perhaps supporting animal rights in the interim. This means departing from mechanisms like similarity theory that are harmful to this eventual goal.

Turning to the law, animals have been granted rights in a few rather sensational recent cases. A bear has been granted *habeas corpus*[92] in Colombia[93] and the Islamabad High Court of Pakistan has ruled to affirm animals have rights.[94] In India, amongst other developments,[95] animal rights were invoked for captive animals in *NR Nair et al v Union of India* in 2000[96] and birds were

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[87] Peters (n 79) 43.

[88] Francione (n 54) 7.

[89] Otter, O'Sullivan and Ross (n 10) 37; and Peters (n 79) 42.

[90] A prominent exception is Otomo and Mussawir (n 34).

[91] On comparative strength of rights and other forms of protection, see Peters (n 79) 43, 47–48.

[92] The right of persons not to be detained on unlawful grounds.

[93] *Judgement STC18085-2017 / 2017-00637 of 2 November 2017* (2017) (Colombia); Carmen Mandel, 'Chucho, the Spectacled Bear, Triumphs in the Supreme Court of Justice' (*Nonhuman Rights Project*, 2017) <https://www.nonhumanrights.org/content/uploads/Chucho-Semana-news-translation-Carmen-Mandel.pdf> accessed 18 December 2020. For further on a Supreme Court reversal and ongoing Constitutional Court challenge, see Lauren Choplin, 'NhRP Addresses Highest Court in Colombia in Chucho Bear Rights Case' (*Nonhuman Rights Blog*, 2019) <https://www.nonhumanrights.org/blog/chucho-supreme-court-hearing-colombia/#:~:text=On%20August%208%2C%202019%2C%20NhRP,the%20writ%20of%20habeas%20corpus.> accessed 18 December 2020.

[94] *Islamabad Wildlife Management Board and ors v Metropolitan Corporation Islamabad and ors* (2020) WP No 1155 (Pakistan).

[95] Bhumika Sharma et al, 'Rights of Animals under Indian Legal System: A Judicial Perspection' (2017) 4(5) International Journal of Trend in Research and Development.

[96] *NR Nair et al v Union of India (UOI) et al* (2000) AIR Ker 34 (India).

granted the right to fly by the Gujarat High Court in 2011[97] and by the Delhi High Court in 2015.[98] However, rights theorists argue that animals need basic rights, like the right to physical security, in order to enjoy non-basic rights, such as the right to fly.[99] Thus it is significant that in India, all animals have been deemed to be legal persons or entities by both the High Court of Uttarakhand[100] and the High Court of Punjab and Haryana.[101] Most significantly, the Supreme Court of India has extended a constitutional protection of the right to life to animals.[102] It is also worth noting that a growing number of rulings have attributed rights to nature, in a parallel development in environmental law.[103]

Western legal systems have shown less willingness to afford rights to animals. In the US, the Non-Human Rights Project, discussed above, is leading the charge for legal recognition of animals' rights. As noted previously, the project argues for the legal rights of chimpanzees and bonobos on the basis of *habeas corpus*.[104] So far, the project has been unsuccessful[105] and attempts, more widely, to demand standing for animals before courts in the US have also been unsuccessful.[106] These attempts nonetheless have normative value.[107] Contrastingly, animal welfare laws in the US have been interpreted as affording rights to animals,[108] humans have been allowed to represent animals in court,[109] and animals have been named as plaintiffs alongside human plaintiffs[110] (though in a more limited fashion).[111] In Europe, the European Court of Human Rights refused to take on a case arguing for a chimpanzee to be appointed a guardian because it

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97 *Abdulkadar v State* (2011) SCRA/1635 (India).

98 *People for Animals v MD Mohazzim & another* (2015) CRL MC No 2051/2015 (India).

99 Francione (n 54) 194–195.

100 *Narayan Dutt Bhatt v Union of India & Others* [2018] Writ Petition (PIL) No 43 of 2014 (India).

101 *Karnail Singh and Others v State of Haryana* (2019) CRR-533-2013 (India).

102 *Animal Welfare Board of India v A Nagaraja and Others* (2014) (4)ABR556 (India).

103 'Timeline' (*Global Alliance for the Rights of Nature*) <https://therightsofnature.org/timeline/> accessed 18 December 2020.

104 Tauber (n 19) 2 citing *Case transcript, In the matter of a Proceeding Under Article 70 of the CPLR for a Writ of Habeas Corpus v. Patrick C. Lavery*, accessed from the Non-human Rights Project.

105 Lauren Choplin, 'Fight for Elephant Rights Continues in New York' (*Nonhuman Rights Blog*, 2020); Tauber (n 19) 2. For discussion, see Staker (n 85) 494–496.

106 Staker (n 85) 506.

107 ibid 487. Also see Blattner (n 57) 246 on the encouraging tone of some judgements.

108 Stacey L Gordon, 'The Legal Rights of All Living Things: How Animal Law Can Extend the Environmental Movement's Quest for Legal Standing for Non-Human Animals' in Randall S Abate (ed), *What can Animal Law learn from Environmental Law?* (Environmental Law Institute 2015) 212 citing *Cetacean Cmty v Bush* 386 F.3d 1169, 1175 (9th Cir. 2004); Cass R Sunstein, 'Standing for Animals (With Notes on Animal Rights)' (2000) 47 UCLA Law Review 1333, 1334.

109 *United States of America v Approximately 53 Pitt Bull Dogs* (2007) 3:07CV397 (ED Va) (USA).

110 Staker (n 85) 489.

111 ibid citing *Cetacean Community v Bush 386 F 3d 1169* (9th Cir, 2004) 1176.

lacked jurisdiction,[112] after the case was similarly rejected at the domestic level for technical reasons.[113] Some scholars have argued that animal protection law could be regarded as creating rights in some circumstances, but this is debated.[114] In most cases, the inability to apply legal rights to animals has stemmed from a 'stubborn unwillingness to expand legal categories' from the courts, rather than from an unmalleability of the concepts themselves.[115]

It is problematic that rights-based approaches like that of Steven Wise rely so heavily upon similarity theory.[116] Such an approach is inherently restrictive.[117] Entrenching similarity theory in animal legal protection will lead to the long-term justification of oppressing those animals that are less like us. This also makes coordinated development between animal law and environmental law more difficult because the movement to award rights to nature focuses on inherent value and distinct flourishing as opposed to similarity.

2.3.3. A Second Wave Animal Ethics Critique

The preoccupation of animal lawyers with rights has been defined by Paul Waldau as a typical feature of what he refers to as first wave animal law.[118] Waldau provides a rare legal critique that aligns in many (but not all) ways with second wave animal ethics. He believes we may be poised to move into a second wave animal law which would be 'enriched by an imaginative, humble, ethics-sensitive and interdisciplinary engagement with other living beings'.[119]

First, Waldau somewhat rejects similarity theory, arguing that first wave animal law has a 'too heavy preoccupation with cognitive complexities' in order to justify legal protection.[120] This is evident, as noted above, in animal law's various species gaps or inconsistencies and a general neglect of wild animal welfare (in favour of conservation). Waldau diverges from second wave animal ethics by recommending a focus on suffering.[121] Second wave animal ethics prefers focusing on flourishing. Second, Waldau argues that second wave animal law ought to move

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[112] Peters (n 79) 44.

[113] John Maher, 'Legal Technology Confronts Speciesism or We Have Met the Enemy and He Is Us' in Patricia MacCormack (ed), *The Animal Catalyst: Towards Ahuman Theory* (Bloomsbury, 2014) 54–55.

[114] Blattner (n 57) 304–305.

[115] Staker (n 85) 500.

[116] Wise (n 26) 131 et seq.

[117] Chapter I sections 4.1.1 and 4.2.1.

[118] Waldau (n 2) 16.

[119] ibid 160.

[120] ibid 167.

[121] ibid 19.

beyond doing law 'on *our human terms*'.[122] However, he falls short of recommending boundlessness in scope. Legal concepts borrowed from environmental law, such as the precautionary principle, would be helpful in enacting a second wave-inspired law.[123] Third, Waldau appears to align with the ethical framework's rejection of liberalism and rights as an ideal basis for animal law.[124] However, and fourthly, Waldau neglects considerations of situatedness. A critique of non-situated animal law will feature more heavily in the parts of this chapter to follow, starting with a mapping of the treatment of animals in international law.

2.4. Animals in International Law

2.4.1. An Empty Legal Landscape?

Animal lawyers are vexed and fixated on the absence of a treaty on animal welfare.[125] Treaties exist that address animals, but they do not protect animal interests.[126] Nevertheless, international law exists in a multitude of forms beyond treaty law. In those spaces, international law has developed to recognise that animals have a welfare we ought to protect. However, these developments are normatively and ethically deficient from a second wave perspective. Animal law at the international level features diverging treatment depending on human use, rather than animal capabilities and interests. It also brings a distinction between welfare, health and conservation to the fore which leaves problematic governance gaps such as wild animal welfare.[127] These international law developments are also sporadic, sparse and shallow, leaving significant space for trade law and policy to dominate many forms of animal governance. International law on animal welfare has typically arisen to respond to three realities: some problems are international in nature (trade, zoonotic diseases, food security), some animals are international in nature (migratory species);[128]

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[122] ibid 21.

[123] See chapter V section 3.1.

[124] Waldau (n 2) 16.

[125] Charlotte Blattner, 'An Assessment of Recent Trade Law Developments from an Animal Law Perspective: Trade Law as the Sheep in Wolf's Clothing' (2016) 22 Animal Law Review 277, 280; David Favre, 'An International Treaty for Animal Welfare' (2012) 18 Animal Law 237, 237; Harrop (n 60) 289; Peters (n 79) 29; Sophie Riley, 'Wildlife Law and Animal Welfare: Competing Interests and Ethics' in Werner Scholtz (ed), *Animal Welfare and International Environmental Law: From Conservation to Compassion* (Edward Elgar 2019) 150; Katie Sykes, '"Nations Like Unto Yourselves": An Inquiry into the Status of a General Principle of International Law on Animal Welfare' (2011) 49 Canadian Yearbook of International Law 3, 22; Steven White, 'Into the Void: International Law and the Protection of Animal Welfare' (2013) 4(4) Global Policy 391, 391.

[126] Bruce A Wagman and Matthew Liebman, *A Worldview of Animal Law* (Carolina Academic Press 2011) 279.

[127] Outhwaite (n 37) 317, 320–321.

[128] Wagman and Liebman (n 126) 24.

and some normative claims are international in scope (concerns for animal welfare and disinterested legislators span the globe).[129] These legal developments are recounted in numerous animal law texts and so they will be explored here only briefly.[130]

First though, to tackle definitional imprecision in the literature, global law must be distinguished from international law. This distinction will be fully unpacked below.[131] Many developments in international spaces contribute towards a global type of animal law (they are 'precursor and platform').[132] Yet, they do not constitute all of global animal law. Nor are they synonymous with it. International law occurs between nations; it is often (somewhat narrowly) defined as the law that the International Court of Justice (ICJ) is directed to apply in its founding statute.[133] In actuality, it is wider and capable of further growth.[134] International law need not be global in scale: it encompasses global treaties, smaller multilateral treaties, and even bilateral treaties. Global law, contrastingly, can be found in an even wider range of spaces. International instruments, national law, industry standards, and even academic legal proposals can all be regarded as a global kind of law. However, the purpose of identifying global law is not to demarcate a legal domain. Rather, global law is 'adjectival'; it describes a quality of many kinds of law and colours law with a global dimension.[135] Global law is law that tracks with globalisation and it exists because of the 'interconnectedness' of everything, including 'global humanity and intervention'.[136] Conflating international and global law misappropriates the global label and facilitates coloniality.[137] The subsections that follow explore the governance of animals' lives in international law before the following section embarks on a critical reflection of globality and global law.

2.4.2. Regional Legislation

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[129] See below at section 2.4.5.

[130] Scholtz (n 125); Sykes (n 125) 22–35.

[131] See below at section 3.2.

[132] Neil Walker, *Intimations of Global Law* (Cambridge University Press 2015) 51.

[133] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 59 Stat 1031 Art 38.

[134] Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003) 89.

[135] Walker (n 132) 19.

[136] Shavana Musa and Eefje de Volder, 'Interview with Professor Neil Walker – Global Law: Another Case of the Emperor's Clothes?' (2012) 17 Tilburg Law Review 135, 141.

[137] See examples of conflation in Charlotte Blattner, 'Global Animal Law: Hope beyond Illusion: The Potential and Potential Limits of International Law in Regulating Animal Matters' (2015) 3 Mid-Atlantic Journal on Law & Public Policy 10, 279–280; Sabine Brels, 'The Evolution of International Animal Law: From Wildlife Conservation to Animal Welfare' in Abate (n 108) 365; Otter, O'Sullivan and Ross (n 10) 53; Peters (n 79) 51; and Robertson (n 17) 185 et seq.

Regional developments in Europe include some of the earliest international efforts to protect animal welfare. Despite limitations to the European approach, other regional groupings (such as the Association of Southeast Asian Nations and the African Union) do not prioritise animal welfare as clearly.[138] In this context, some regional grassroots initiatives are beginning to flourish.[139] The Council of Europe took on the task of regulating animal welfare from the 1960s in the belief that 'respect for animals was a common heritage of European countries closely linked to human dignity' and that harmonisation was required.[140] Five key conventions protecting animal welfare were passed under the Council of Europe's leadership, with a further convention on conservation that has some limited incidental impacts on animal welfare.[141]

A number of these conventions reference a 'moral obligation' to respect animals, noting their 'capacity for suffering'.[142] However, other conventions are much shallower. The slaughter convention only justifies its protective stance as a means to protect the 'quality of the meat'.[143] The farming convention 'adopt[s] common provisions' for harmonisation's sake alone.[144] The pets convention references the way pets improve 'quality of life' and, thus, contribute to society, as a key driving motivation.[145] This anthropocentrism limits the normative impact these conventions may have on the development of international law for animals. Even those conventions that focus

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[138] For recent but limited developments, see ASEAN-Australia Development Cooperation Program, 'ASEAN Good Animal Husbandry Practices (GAHP) Animal Welfare and Environmental Sustainability Module, Layers, Broilers and Ducks' (2016) <https://asean.org/storage/2016/10/ASEAN-GAHP-for-Animal-Welfare-and-Environmental-Sustainability-Module_final.pdf> accessed 18 December 2020; 'ASEAN Animal Law Conference - Chiang Mai 2018' (*University of New England*, 2018) <https://www.une.edu.au/about-une/faculty-of-science-agriculture-business-and-law/school-of-law/public-events-and-seminars/conferences/asean-animal-law-conference> accessed 18 December 2020; African Union, 'Animal Welfare Strategy in Africa (AWSA)' (2017) <http://worldanimal.net/images/stories/documents/Africa/AWSA.pdf> accessed 18 December 2020; Interafrican Bureau for Animal Resources, 'Final Communique - Animal Welfare Continental Consultative Stakeholders Conference' (2015) <http://www.au-ibar.org/2012-10-01-13-08-42/press-releases/170-au-ibar/864-final-communique-animal-welfare-continental-consultative-stakeholders-conference> accessed 18 December 2020.

[139] For example, 'The Comparative ASEAN Animal Law Library' (*CAALL*) <https://www.caall.net/> accessed 18 December 2020.

[140] Blattner (n 137) 28.

[141] European Convention for the Protection of Animals during International Transport (revised) (adopted 6 November 2003, entered into force 14 March 2006) CETS No 193; European Convention for the Protection of Animals kept for Farming Purposes (adopted 10 March 1976, entered into force 10 September 1978) CETS No 087; European Convention for the Protection of Animals for Slaughter (adopted 10 May 1979, entered into force 11 June 1982) CETS No 102; European Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes (adopted 18 March 1986, entered into force 1 January 1991) CETS No 123; European Convention for the Protection of Pet Animals (adopted 13 November 1987, entered into force 1 May 1992) CETS No 125; Convention on the Conservation of European Wildlife and Natural Habitats (adopted 19 September 1979, entered into force 01 June 1982) CETS No 104 (Bern Convention); Blattner (n 137).

[142] Ibid (Transport Convention), preamble; ibid (Pets Convention), preamble; ibid (Vertebrates Convention), preamble.

[143] European Convention for the Protection of Animals for Slaughter (n 141), preamble.

[144] European Convention for the Protection of Animals kept for Farming Purposes (n 141), preamble.

[145] European Convention for the Protection of Pet Animals (n 141) preamble.

on suffering present ethical limitations. These conventions avoid the idea of animal flourishing. In the case of the slaughter convention, the provisions therein reflect a primitive anti-cruelty type regulation. These offer a harrowing insight into factory farming practices. Most disturbingly, the convention states: '[a]nimals' tails shall not be crushed, twisted or broken and their eyes shall not be grasped. Blows and kicks shall not be inflicted.'[146] Positively framed welfare protection exists in other conventions, but these remain restricted by the welfarist balancing act to be conducted between human and animal interests.[147]

The EU has followed in the footsteps of the Council of Europe; it introduced animal welfare into its work from the 1970s.[148] One of the EU's primary (quasi-constitutional)[149] treaties, the Treaty on the Functioning of the European Union (TFEU), requires that, 'since animals are sentient beings', 'full regard' must be paid to the 'welfare requirements of animals'.[150] This provides the EU with the necessary competence to legislate on animal welfare issues.[151] It also entrenches animal welfare as a priority issue amongst EU policy objectives.[152] In practice, this has inspired the 'aims, principles and scope of the EU animal welfare policy'.[153] However, this requirement only applies to the implementation of a discrete list of policy areas, leaving important competence gaps like the common commercial policy.[154] Thus, the EU frequently justifies its secondary legislation that restricts trade in order to protect animal welfare on the basis of internal market harmonisation

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146 European Convention for the Protection of Animals for Slaughter (n 141) art 5.2.

147 European Convention for the Protection of Animals kept for Farming Purposes (n 141) arts 3-7; European Convention for the Protection of Pet Animals (n 141) arts 3-13; European Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes (n 141) arts 5-12.

148 Council Directive 74/577/EEC of 18 November 1974 on stunning of animals before slaughter [1974] OJ L316/17.

149 White (n 125) 392 citing Wagman and Liebman (n 126).

150 Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2008] OJ C115/1 (TEU, and TFEU), art 13.

151 Food and Rural Affairs UK Department for Environmental, 'Review of the Balance of Competences between the United Kingdom and the European Union: Animal Health and Welfare and Food Safety Report' (2013) 11; European Commission, Impact Assessment on the European Union Strategy for the Protection and Welfare of Animals 2012-2015 SEC(2012)55 final 10.

152 Diane Ryland, 'Animal Welfare in the Reformed Common Agricultural Policy: Wherefore Art Thou' (2015) 17(1) Environmental Law Review 22, 26; Peter Stevenson, 'European Union Legislation on the Welfare of Farm Animals' (*CIWF*, 2012) <www.ciwf.org.uk/media/3818623/eu-law-on-the-welfare-of-farm-animals.pdf> accessed 18 December 2020.

153 European Commission, Impact Assessment on the European Union Strategy for the Protection and Welfare of Animals 2012-2015 SEC(2012)55 final 10.

154 European Commission, 'Answer to Written Question E-004111/16 by Piernicola Pedicini (EFDD) and Eleonora Evi (EFDD) to the Commission on Stray Animals and the Management of Kennels' (2016) <http://www.europarl.europa.eu/doceo/document/E-8-2016-004111-ASW_EN.html?redirect> accessed 18 December 2020.

rather than animal welfare protection.[155] This makes it difficult to hold trade policymakers accountable for failing to prioritise animal welfare protection.

Nonetheless, the EU has come to be considered a global leader in animal welfare policy.[156] Besides the treaties, the EU has enacted secondary legislation (directives and regulations) on farm animal welfare, animals in research, wildlife protection, and the welfare of pet animals.[157] The EU is also the only legislator to include animal welfare in its trade policy as a matter of course, and more widely in its external policy.[158] However, like the Council of Europe, the EU's approach to animal law is welfarist: it focuses upon unnecessary suffering and it accepts, without question, the use of animals for human ends. Further, several gaps exist in the EU's legislative framework,[159] particularly in the case of fish.[160] It is critiqued for poor consistency, reactive legislating and an unprincipled approach to welfare regulation.[161] The EU has also failed to enact the simplified, overarching welfare framework it sets out to consider in its 2012-2015 Strategy on Animal Welfare.[162] The strategy also entirely neglects wild animal welfare.[163] This is the second of two strategies, which have suffered from serious implementation difficulties.[164] Thus, while the EU

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[155] Cat and Dog Fur Regulation 1523/2007 [2007] OJ L 343/50, preamble; Seals Regulation 1007/2009 [2009] OJ L 286/36, preamble; Cosmetics Regulation 1223/2009 [2009] OJ L 342/52, preamble.

[156] Peter L Fitzgerald, '"Morality" May Not Be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law' (2011) 14 Journal of International Wildlife Law & Policy 85, 88; Lenke Wettlaufer, Felix Hafner and Jakob Zinsstag, 'The Human-Animal Relationship in the Law' in Jakob Zinsstag et al (ed), *One Health: The Theory and Practice of Integrated Health Approaches* (CABI Publishing 2015) 31; Food and Agriculture Organization of the UN, 'Review of Animal Welfare Legislation in the Beef, Pork, and Poultry Industries' (2014) <https://internationanimals.files.wordpress.com/2015/11/fao_report.pdf> accessed 18 December 2020.

[157] Farming Directive 98/58/EC [1998] OJ L221/23; Slaughter Regulation 1099/2009 [2009] OJ L303/1; Transport Regulation (EC) 1/2005 [2005] OJ L3/1; Broilers Directive 2007/43/EC [2007] OJ L 182/19; Calves Directive 2008/119/EC [2008] OJ L 10/7; Pigs Directive 2008/120/EC [2008] OJ L 47/5; Animal Testing Directive 2010/63/EU [2010] OJ L 276/33; CITES Regulation 338/97/EC [1997] OJ L 61/1; Pet Imports Directive 2013/31/EU [2013] OJ L 178/107.

[158] European Commission, 'Report on the impact of animal welfare international activities on the competitiveness of European livestock producers in a globalized world' (2018) COM(2018) 42 final. For further, see chapter IV.

[159] Including specific rules for cattle, ducks, geese, rabbits, and animals farmed for their fur.

[160] 'Looking Beneath the Surface: Fish Welfare in European Aquaculture' (*Eurogroup for Animals*, 2018) 33–34 <https://issuu.com/eurogroupforanimals/docs/efa-fish-welfare-report-screen> accessed 18 December 2020.

[161] Katy Sowery, 'Sentient Beings and Tradable Products: The Curious Constitutional Status of Animals under Union Law' (2018) 55(1) Common Market Law Review 55, 74–75.

[162] European Commission, 'Communication on the European Union Strategy for the Protection and Welfare of Animals 2012-2015' (2015) COM/2012/6 final/2 2. Commission avoided discussing this when questioned about implementing the strategy in European Commission, 'Answer to Written Question E-006506/2016 by Jeppe Kofod (S&D) to the Commission on A European Animal Welfare Strategy for 2016-2020' (2016) <https://www.europarl.europa.eu/doceo/document/E-8-2016-006506_EN.html> accessed 18 December 2020. This was confirmed as a dropped action in European Court of Auditors, 'Special Report: Animal Welfare in the EU: Closing the Gap between Ambitious Goals and Practical Implementation' (2018) annex I, 1 and annex IV, 7 <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=47557> accessed 18 December 2020.

[163] Steven White, 'Shifting Norms in Wild Animal Protection and Effective Regulatory Design' in Scholtz (n 125) 184.

[164] European Court of Auditors (n 162).

demonstrates a maintained interest in policy-setting for animal welfare through legislative reform, a new platform on animal welfare and ongoing work of a parliamentary intergroup,[165] it appears not to be a high priority. These regional developments, particularly with regard to the EU's trade policy, will be of significance when discussing trends within global animal law scholarship.

2.4.3. Animal Welfare as a Component of (Animal) Health Law

In addition to regional developments, human and animal health is a particularly significant globally scaled policy issue that provides some substance to discussions of global animal law. The spread of zoonotic diseases, in particular, is facilitated by trade in and increasing transport of animals and animal products. Regulation of this problem has occurred at the international level and has facilitated some discussions of animal welfare.

The work of the World Organisation for Animal Health (OIE) and its 181 members is particularly significant. The OIE's main objects are to promote and coordinate experiments and research concerning contagious diseases of livestock and to disseminate information about the spread and control of epizootic diseases.[166] Its work is motivated by threats to agricultural production and trade, not to animals themselves.[167] Though, in practice, the OIE is the international organisation with the most to say on animal welfare. The OIE maintains a set of standards for terrestrial and animal health in two separate codes.[168] The OIE incorporated animal welfare into the scope of its work in 2002, after a unanimous vote,[169] with the adoption of a mandate on animal welfare and the establishment of an Animal Welfare Working Group.[170] This has resulted in the inclusion of a new chapter in the terrestrial and aquatic health codes on animal

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[165] 'Green Deal Puts Animal Welfare Back on the EU's Agenda' (*Eurogroup for Animals*, 2020) <https://www.eurogroupforanimals.org/news/green-deal-puts-animal-welfare-back-eus-agenda#:~:text=It also makes a commitment,be organically farmed by 2030.> accessed 18 December 2020; Commission Decision establishing the Commission Expert Group "Platform on Animal Welfare" [2017] OJ C 31; 'Intergroup on the Welfare and Conservation of Animals' (*Animal Welfare Intergroup*) <https://www.animalwelfareintergroup.eu/> accessed 18 December 2020.

[166] International Agreement for the Creation of an Office International Des Epizooties in Paris (adopted 25 January 1924, entered into force 12 January 1925) CTS 1959 No 13, appendix (Organic Statutes of the Office International Des Epizooties) art 4.

[167] Otter, O'Sullivan and Ross (n 10) 56 and 68.

[168] OIE, Terrestrial Animal Health Code (n 76); World Organisation for Animal Health, 'Aquatic Animal Health Code' (22nd edn, 2019) <https://www.oie.int/en/standard-setting/aquatic-code/access-online/> accessed 18 December 2020.

[169] Marina AG Von Keyserlingk and Maria José Hötzel, 'The Ticking Clock: Addressing Farm Animal Welfare in Emerging Countries' (2015) 28 Journal of Agriculture and Environmental Ethics 179, 185.

[170] 'World Organisation for Animal Health, Resolution No XIV Adopted on 29 May 2002 on Animal Welfare Mandate of the OIE (2002) <https://Www.Oie.Int/about-Us/Key-Texts/Basic-Texts/New-Mandates/> Accessed 18 December 2020'.

welfare.[171] These standards are not binding on the OIE membership, thus avoiding a regulatory approach to animal welfare.[172] However, they do bring animal interests before WTO members because the OIE is recognised as a reference body in the WTO's SPS Agreement.[173] The OIE hosts workshops and conferences to build capacity of national regulators to adopt the relevant standards.[174] It also has a series of cooperation agreements with regional bodies aimed at developing regional animal welfare strategies.[175]

These developments have been opined to signify a shift whereby animal welfare has become an issue 'for official attention at a global level'.[176] However, the OIE's standards have been critiqued for being too broad and aspirational in tone.[177] Further, the broad membership and unified approach of the OIE results in a set of standards that represent the lowest common denominator. There is a risk that these will not require any changes of countries with some welfare legislation and they will represent an aspiration for other countries which they will not seek to elevate beyond. Nonetheless, there is normative significance to these developments. However, the standards are only applicable to farmed animals. Thus, the norms created promulgate a harmful dichotomy in approaches to domestic and wild animal protection. Of course, reparative law would diverge in this way because the harms to domesticated and wild animals have, in many instances, been distinct. However, such a dichotomous approach relies on anthropocentric conceptions of animals based on the ways they are used and, thus, cannot form a basis of future legislative programmes compliant with second wave animal ethics. These problems tend to materialise with

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[171] OIE, Terrestrial Animal Health Code (n 76) s 7; OIE, Aquatic Animal Health Code (n 168) s 7.

[172] Anne Peters, 'Global Animal Law: What It Is and Why We Need It' (2016) 5(1) Transnational Environmental Law 9, 14.

[173] Agreement on the Application of Sanitary and Phytosanitary Measures (15 April 1994) LT/ UR/A-1A/12 <http://docsonline.wto.org> (SPS Agreement), art 12(3) includes the OIE as a reference body. Art 3(1) requires that SPS standards developed by WTO members be based on relevant international standards. Art 3(3) permits members to aim for higher levels of protection than what is required by the relevant international standards. See also Otter, O'Sullivan and Ross (n 10) 57.

[174] World Organisation for Animal Health, '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/> accessed 18 December 2020.

[175] World Organisation for Animal Health, 'Cooperation Agreements between the OIE and Intergovernmental Organisations and Other International Nongovernmental Organisations' <https://www.oie.int/about-us/key-texts/cooperation-agreements/> accessed 18 December 2020.

[176] Fraser David, 'Toward a Global Perspective on Farm Animal Welfare' (2009) 113(4) Applied Animal Behaviour Science 330, 331.

[177] White (n 125) 394.

voluntary industry standards too.[178] Despite its shortcomings, the OIE has been posited as a potential site for further development of the international protection of animal welfare.[179]

2.4.4. Animals in Environmental Law

Environmental law instruments contribute to the governance of animals.[180] However, deeply anthropocentric and British colonial[181] roots within environmental law have facilitated its general disregard of animal welfare.[182] Even the naming of 'environmental law' as such (instead of 'nature law') has arguably obfuscated its history associated with the loaded concept of nature which evokes natural law, Christian concepts of dominion, the nature-culture divide, and colonialism.[183] Nonetheless, fruitful convergence and mutual reinforcement of environmental law and animal law are possible.

The two are best regarded as sister subjects.[184] Yet, they have been needlessly divorced due to supposedly diverging normativities or cosmic visions.[185] Legal actors overemphasise regulatory circumstances that overemphasise tensions:[186] environmental pest control (supposedly compassionless by nature) requires culling[187] to facilitate ecosystem flourishing; ballooning population levels necessitate intensive animal farming (but the livestock industry is a protein factory in reverse);[188] and mass adoption of vegan diets is unsustainable[189] (but breeding and feeding billions of mutated, mutilated, and overgrown farm animals is hardly the answer). The narrative surrounding environmental 'pests' is particularly concerning because animals' fates are

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178 For discussion of private standards, see Diane Ryland, 'Animal Welfare Governance: GLOBAL G.A.P. and the Search for External Legitimacy' (2018) 30(3) Journal of Environmental Law 453.

179 See below at section 3.4.1

180 Peters (n 172) 13.

181 Mario Prost and Yoriko Otomo, 'British Influences on International Environmental Law: The Case of Wildlife Conservation' in Robert McCorquodale and Jean-Pierre Gauci (eds), *British Influences on International Law, 1915-2015* (Brill Nijhoff 2016).

182 Andrew Long, 'The Expanding Circle of Dignity: Unifying Animal Rights and Ecosystem Protection in the Law' in Abate (n 108) 443.

183 Stephen Humphreys and Yoriko Otomo, 'Theorizing International Environmental Law' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 800–805.

184 Brooman (n 65) 246.

185 David Favre, 'Foreword' in Abate (n 108); Stuart Harrop, 'From Cartel to Conservation and on to Compassion: Animal Welfare and the International Whaling Commission' (2003) 6 Journal of International Wildlife Law & Policy 79.

186 For example, Laura Nielsen, *The WTO, Animals and PPMs* (Martinus Nijhoff Publishers 2007) 6.

187 Werner Scholtz, 'Injecting Compassion into International Wildlife Law: From Conservation to Protection?' (2017) 6(3) Transnational Environmental Law 463, 469.

188 Emily S Cassidy et al, 'Redefining Agricultural Yields: From Tonnes to People Nourished per Hectare' (2013) 8 University of Minnesota Environmental Research Letters 1, 1.

189 Untrue. See Colin Tudge, *Feeding People Is Easy* (Pari Publishing 2007) 66.

dictated by their usefulness as determined by humans.[190] Language of 'invasion'[191] encourages violence and an utter disregard for welfare of animals deemed to be pests.[192]

Scholars increasingly link environmental protection and animal welfare in legal studies[193] and environmental law has gradually shifted toward ecocentrism.[194] However, environmental law still largely neglects sentient animals' interests.[195] The recognition of intrinsic value, in the Bern Convention, the 1982 World Charter for Nature and the Convention on Biological Diversity (CBD), arguably introduces wildlife protection for its own sake.[196] The Bern Convention also offers incidental welfare protection by prohibiting 'indiscriminate means of capture and killing' (art 8 and appendix IV). While the CBD provides incidental welfare protection (art 8), it does not expressly address it and its encouragement of eradicating alien species frustrates welfare protection (art 8(h)). The incorporation of 'ethical and humane use of biodiversity' through the Addis Ababa Principles and Guidelines may lend space for welfare-like developments.[197]

The Convention on International Trade in Endangered Species (CITES) provides the most extensive, though incidental,[198] treatment of animal welfare in a conservation treaty.[199] CITES references cruelty, requiring preparation, transport formalities and shipping be conducted so as to 'minimize the risk of injury, damage to health, or cruel treatment'.[200] A CITES resolution also requires ranching activities be conducted humanely.[201] The Gambia proposed extending welfare considerations to removal from the wild but this was rejected as being outside the terms of

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[190] Riley (n 125) 148.

[191] Arian D Wallach et al, 'Summoning Compassion to Address the Challenges of Conservation' (2018) 32(1) Conservation Biology 1255, 1263.

[192] Michael Bowman, 'Animals, Humans and the International Legal Order: Towards an Integrated Bioethical Perspective' in Scholtz (n 125) 149; Riley (n 125) 168.

[193] See below at section 3.4.1.

[194] Compare with anthropocentrically framed conventions. For example, Convention on the Conservation of Migratory Species of Wild Animals (adopted 23 June 1979, entered into force 1 November 1983) 1651 UNTS 333 (CMS), preamble.

[195] Scholtz (n 187) 464–466; Wallach et al (n 191) 1256; White (n 163) 182.

[196] Convention on the Conservation of European Wildlife and Natural Habitats (adopted 19 September 1979, entered into force 01 June 1982) CETS No 104 (Bern Convention), preamble, third recital; UNGA Res 37/7, World Charter for Nature (1982) UN Doc A/37/51, preamble; Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD), preamble.

[197] CBD Secretariat, Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity (2004), principle 11; Riley (n 125) 163.

[198] Harrop (n 185) 87.

[199] Convention on International Trade in Endangered Species (adopted 3 March 1973, entered into force 1 July 1975) 993 UNTS 243 (CITES); Michael Bowman, 'Conflict or Compatibility - The Trade, Conservation and Animal Welfare Dimensions of CITES' (1998) 1(1) Journal of International Wildlife Law & Policy 9, 10; Harrop (n 185) 85 et seq.

[200] ibid (CITES), arts 3(2)(c), 4(2)(c), 5(2)(b), 3(4)(b), 4(5)(b) and 8(3).

[201] CITES, 'Ranching and trade in ranched specimens of species transferred from Appendix I to Appendix II' (2010) Resolution Conf 11.16 (Rev CoP15), para d(iii).

reference of the Conference of the Parties.[202] Unfortunately, the welfare provisions have never been clarified by the members in the way that many other provisions have.[203] Their proper implementation is also rare.[204]

The other most prominent trace of welfare protection in environmental law resides in whaling regulation. The International Convention for the Regulation of Whaling aims to use conservation efforts to develop the whaling industry.[205] It is transparently anthropocentric, with welfare neglected during drafting and left out of the convention.[206] However, opposition to commercial whaling combines welfarist and conservation concerns.[207] Arguments brought before the International Whaling Commission (IWC)[208] regularly include welfarist arguments.[209] A handful of other treaties (and court decisions)[210] also draw links between conservation objectives and welfare protection.[211] For example, the 1997 Agreement on Humane Trapping Standards is considered the first treaty dealing primarily with welfare issues.[212]

Noting this landscape, animal lawyers conceptualise conservation law as anthropocentric (as do critical environmentalists), utilitarian and lacking in compassion.[213] Environment law currently conceptualises conservation as the 'preservation, maintenance, sustainable utilization, restoration, and enhancement of a natural resource or the environment'.[214] This orients species

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[202] Harrop (n 185) 87.

[203] David Favre, 'Humane Treatment of Wildlife' in Thierry Auffret Van Der Kemp and Martine Lachance (eds), *Animal Suffering: From Science to Law: International Symposium* (Thomson Reuters 2013) 315.

[204] Bowman (n 199) 18.

[205] International Convention for the Regulation of Whaling (adopted 12 February 1946, entered into force 10 November 1948) 161 UNTS 2124 preamble. Also see Malgosia Fitzmaurice, *Whaling and International Law* (Cambridge University Press 2015).

[206] Werner Scholtz, 'Killing Them Softly? Animal Welfare and the Inhumanity of Whale Killing' (2017) 20(1) Journal of International Wildlife Law & Policy 18, 18.

[207] Keely Boom, 'Lessons for Animal Law From the Environmental Law Governing the Kangaroo and Whaling Industries: Australian Successes and Failures' in Abate (n 108) 320.

[208] Created by Whaling Convention (n 205), art 3(1).

[209] Harrop (n 185) 92; Scholtz (n 206) 21.

[210] *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* (2016) ZACC 46 (South Africa) paras 54-57. For discussion, see Werner Scholtz, 'Trading Rhinoceros Horn for the Sake of Conservation: Dehorning the Dilemma through a Legal Analysis of the Emergence of Animal Welfare' in Scholtz (n 125) 255–256.

[211] Convention on the Conservation of Antarctic Seals (adopted 1 June 1972, entered into force 11 March 1978) 1080 UNTS 175, annex, para 7(a); International Convention for the Protection of Birds (adopted 18 October 1950, entered into force 17 January 1963) 638 UNTS 185, art 5; Protocol on Environmental Protection to the Antarctic Treaty (adopted 4 October 1991, entered into force 14 January 1998) 30 ILM 1455, annex II, art 3(11).

[212] See chapter III section 3.4.1

[213] David Bilchitz, 'Why Conservation and Sustainability Require Protection for the Interests of Animals' in Scholtz (n 125) 212; Joan E Schaffner, 'Value, Wild Animals and Law' in Scholtz (n 125) 28.

[214] Scholtz (n 187) 468.

preservation only as a tool to safeguard the health and enjoyment of future generations of humans.[215] Animal welfare is merely 'peripheral' to this.[216] Thus, choosing conservation as a tool to regulate animals currently entails conceptualising animals as resources.[217] This is irreconcilable with animals' intrinsic value[218] and with second wave animal ethics. Conservation ought to promote respect for individuals that are integral to a species' survival.[219] Conservation that neglects individuals is self-defeating because it facilitates dispositions towards treating animals instrumentally.[220] Compassionate conservation is viewed as a necessary alternative from both an animal ethics perspective and also, pragmatically, to effectively pursue conservation goals. This is elaborated below.[221]

2.4.5. General Principle of Law for Animal Welfare

The discussion of international law has so far focused on treaty law and soft law. Additionally, there has been some limited discussion regarding the development of a general principle of law, and customary international law, for animal welfare. To my knowledge, the only sustained attention given to customary international law and animal welfare is Katie Sykes' LLM thesis. Sykes concludes that humane treatment is not yet developed enough to be considered a norm of customary law.[222] However, a well-known argument by Michael Bowman, Peter Davies and Catherine Redgwell posits that there is now convergence around a general principle of law concerning animal welfare.[223]

General principles of law are regarded by the ICJ as reflecting the 'conscience of the international community', providing its moral foundation.[224] Bowman, Davies and Redgwell find evidence for this in recognition of animal welfare in national legal systems, cultural and religious

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[215] Schaffner (n 213) 12.

[216] Werner Scholtz, 'Introduction' in Scholtz (n 125).

[217] Schaffner (n 213) 8.

[218] Defined as the value 'an entity possesses of itself, for itself, regardless of the interests or utility of others' in Michael Bowman, Peter Davies and Catherine Redgwell (eds), *Lyster's International Wildlife Law* (2nd edn, Cambridge University Press 2010) 63.

[219] Bilchitz (n 213) 211, 230.

[220] ibid 221–222, 227.

[221] See below at section 3.4.1.

[222] Catherine Sykes, 'The Beasts in the Jungle: Animal Welfare in International Law' (LLM Thesis, Dalhousie University 2011) 128. Also see Laura Yavitz, 'The WTO and the Environment: The Shrimp Case That Created a New World Order' (2001) 16 Journal of Natural Resources & Environmental Law 203, 237.

[223] Bowman, Davies and Redgwell (n 218) 672–699.

[224] Sykes (n 125) 18 citing *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 135 para 39.

tradition, and in other international legal contexts.[225] This argument has been acknowledged and supported by many academics working on international issues in animal law and policy.[226] However, it is thought that we need 'more robust, consistent practice' before this principle is definitively established.[227] For now, there is only a pre-positive 'convergence' around a principle for animal welfare.[228]

The precise content of a general principle has not been settled upon. Bowman, Davies and Redgwell posit that the principle would simply note the importance of protecting animal welfare.[229] Indeed, animal welfare is widely recognised across legal systems but convergence around more progressive principles remains elusive.[230] Thus, a general principle may be restricted by utilitarian welfarism. The operation of a general principle would be primarily as an 'interpretive meta-principle' for other norms, such as those developed through international trade law.[231] This is because general principles are 'inherently broad and open-textured' and are secondary to treaties and customary norms.[232] Its operation would be akin to other general principles, such as sustainable development, that add colour to interpretations of legal provisions.[233] This would be useful as a means to fill gaps. Until such a general principle of law for animal welfare arrives, the international law governance of animals retains its glaring gaps.

2.4.6. A Second Wave Animal Ethics Critique

Domestic legal developments for the protection of animals fail to align with second wave animal ethics. International law is similarly deficient. Further, international law fails even to tackle animal welfare head-on in the way many domestic legal systems do. International law tackles animal

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225 Bowman, Davies and Redgwell (n 218) 674–680. Also see the comparative study in Wagman and Liebman (n 126).

226 Sykes (n 125) 40–41. See also Blattner (n 57) 82; Clara Gobbe, 'Is Animal Cruelty Prohibited Worldwide? Towards a General Principle of International Law on Animal Welfare' (LLM Thesis, Université Libre de Bruxelles 2016); Vincent Chapaux, 'Animal Welfare as a General Principle of International Law? What the Animal Protection Index Can Teach Us' (*Internationanimals blog*, 2015) <https://internationanimals.wordpress.com/2015/01/13/19/> accessed 18 December 2020; and Scholtz (n 210) 255. For a brief, parallel claim that does not reference Lyster's Wildlife Law, see Brels (n 137).

227 Sykes (n 125) 46. See also Peters (n 172) 12.

228 Scholtz (n 206) 23.

229 Bowman, Davies and Redgwell (n 218) 673–680. For further discussion, see Sykes (n 125) 42.

230 Otter, O'Sullivan and Ross (n 10) 53.

231 Bowman, Davies and Redgwell (n 218) 678–682. For discussion, see Katie Sykes, 'Sealing Animal Welfare into the GATT Exceptions: The International Dimension of Animal Welfare in WTO Disputes' (2014) 13 World Trade Review 471, 472–473.

232 Pauwelyn (n 134) 127–129.

233 Bowman, Davies and Redgwell (n 218) 680. On the operation of sustainable development, see Antonio Cardesa-Salzmann and Endrius Cocciolo, 'Global Governance, Sustainability and the Earth System: Critical Reflections on the Role of Global Law' (2019) 8(3) Transnational Environmental Law 437, 2.

welfare tangentially or accidentally. The international governance of animals is fragmented and dichotomous regarding domestic and wild animals. This betrays an ethical leaning that favours similarity theory and a circle of moral concern. Those animals that are offered protection are similar to us or are charismatic or endangered. This falls short of an approach that prioritises marginalised Others and that would be capable of redressing systemic oppression. International regulation of animals is also strictly bound to liberalism. Indeed, there is no evidence of a willingness to elevate beyond a welfarist approach. Finally, the problem of coloniality and universalised approaches to animals in law rears its head in discussion of global animal law. Additionally, signs of this emerge in international law. For example, some EU animal welfare legislation has extraterritorial effect. Critiquing coloniality is central to the critique of global animal law below and, specifically, discussion of various proposals for the further development of international law relating to animals.[234]

A further significant problem is that there are substantial gaps in the international governance of animals which provides barely any law *for* animals. While there are some rules relating to animal welfare at the international level, these do not 'meet the hallmarks of an effective global protection regime, including comprehensiveness and enforceability'.[235] These gaps have inspired the genesis of the global animal law debate. These gaps have also allowed space for trade law to creep in and fill the space. This, in turn, has led to a skewed development of global animal law which often incorporates economic priorities and concerns regarding legal fora rather than the interests of animals. This will be unpacked in the remainder of this chapter and throughout the thesis.

3. Global Animal Law

In order to illuminate the content, meaning, and direction of global animal law, this section will first expand upon the globality of the animal question. The motivators for international governance of animals will be elaborated here because they contribute significantly to the substance of global animal law. Then, specific considerations that give globality to the animal question will be introduced to distinguish global law from international law, transnational law, and law that applies universally.

[234] See chapter IV section 3.2.2.

[235] White (n 125) 391. See also, Peters (n 172) 15.

Secondly, having situated global animal law, this section will critically analyse the 'global' in order to determine (normatively, theoretically, and ethically) the soundness of current global animal law (scholarship) responses to animal problems, including trade and animal welfare. This requires detailing an intersectional, second wave-compliant conception of the global. This is proposed as a normative underpinning for global animal law scholarship, drawing upon metatheories of global law.

For this critical analysis, I will focus on the practice and research of global animal law and, then, scholarly visions of global animal law futures. This will reveal coloniality and a neglect of intersectionality in practice, with global animal law spaces dominated by western scholars. This will also reveal the visions of these academics to be incompatible with the first three components of second wave animal ethics: indistinction and rewarding flourishing, boundlessness and prioritisation of marginalised Others, and a focus on alternatives to liberalism such as feminist care theory. These two conclusions (procedural and substantive western dominance) are true of global animal law scholarship generally and of that discipline's response, in law and scholarship, to the trade and animal welfare issue.

3.1. The Globality of the Animal Question

This chapter has introduced three reasons why the animal question has become a subject of international law: international problems, international animals, and normative trends. However, these are not the only reasons why the animal question is a global issue that has resulted in global law. The globality of the animal question derives from distinct considerations which will be set out here. These ought to be core to the global animal law project. This section will first elaborate upon the realities that have inspired international law on animals and which have formed the substance of many global animal law debates. Then, this section will introduce the unique globality of the animal question.

Animal law issues have traditionally been typified as domestic issues due to their significance for culture and religion.[236] This domestic focus also owes to the duality between domestic and wild animals, the former typically finding a home within domestic legal regimes.[237] However, there is growing recognition that animal issues are not (merely) domestic issues and they require more collaborative legal responses. This has inspired recommendations towards

[236] Abate (n 108) xxx.

[237] Thomas G Kelch, 'CITES, Globalization, and the Future of Animal Law' in Abate (n 108) 284.

developing international law on animal welfare. Globalisation and growing interest in international law and animals have inspired the development of global animal law as a distinct legal subdiscipline and area of research.

A number of internationally-scaled problems give rise to a need for international animal law. For example, 'animal experimentation is heading east and animal agriculture is moving south'.[238] However, the issue frequently identified as the prime international animal issue is the trade of animals and their bodies across borders.[239] Free trade is argued to create economic incentives to cause animal harm.[240] This, it has been argued, creates a need for harmonisation and unity in standards.[241] Trade is also intricately tied up with food production and, thus, the spread and shape of livestock farming. Feeding a growing population is a problem of global scale that impacts upon animal welfare. For example, China has become the largest pork producer in the world but also neglects animal welfare in policy setting.[242] The pressures to make profit in globalised free markets has incentivised harmful intensification of livestock farming practices.[243] But by 2050 we will be feeding enough food for four billion people to livestock animals.[244] Plant protein is vastly more efficient to produce.[245] And yet we constantly pit people against livestock in a competition for food, causing particular detriment to the poorest countries.[246] Multi-scaled discussions, from global dialogues to local committees, are required to tackle the food crisis whilst avoiding further animal harm.

A second problem that attracts international regulation and which demonstrates the globality of the animal question is that of animal health and zoonotic diseases.[247] Due to trade, transport and the natural movement of animals, such diseases carry across borders. For example, African swine fever has led to animal welfare atrocities, particularly as production shifts in the

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[238] ibid 284–285.

[239] Bowman (n 192) 57; David Favre, 'An International Treaty for Animal Welfare' in Deborah Cao and Steven White (eds), *Animal law and welfare: international perspectives* (Springer 2016) 92–96; Wagman and Liebman (n 126) 24.

[240] Bowman (n 192) 57; Favre (n 239) 94–96; Garner (n 24) 86–87; Peters (n 79) 51–52. See further in chapter III.

[241] Garner (n 24) 86–87; Peters (n 79) 51–52; Robertson (n 17) 13.

[242] Von Keyserlingk and José Hötzel (n 169) 191.

[243] Kelch (n 237) 180. Globalised markets are argued to be bad for agriculture at large in Tudge (n 189) 117 et seq.

[244] Tudge (n 189) 107.

[245] ibid 66.

[246] ibid 107.

[247] Favre (n 239) 92–96.

wake of export restrictions due to outbreaks.[248] This is also true of the current COVID-19 pandemic, discussed briefly in chapter V.

A third problem attracting international regulation is environmental protection.[249] The interlinkages of animal protection and environmental protection justify more elaborate incorporation of animal welfare into international environmental law.[250] Second wave animal ethics also encourages international governance cooperation to rectify climate change impacts on animals and incorporating animal interests into discussions of law in the Anthropocene and holistic approaches to environmental law like Earth System Governance.[251] Global animal law practice and scholarship could learn various lessons from global environmental law[252] and the emerging incorporation of global law metatheory therein.[253]

Moving on from international problems to international animals, one sees this justification for international law governing animals' lives most frequently in the case of migratory species. Indeed, this is something of a catch all category, encompassing all those animals that move across borders of their own accord.

Regarding normative justifications, international law is useful where animal protection standards diverge between states and there is desire to share best practices.[254] Second wave animal ethics does not support coloniality in approaches to such cooperation. For example, a second wave view regards literature that critiques non-western states as lagging behind in animal welfare legislation to be unfair.[255] This is because such states usually cause less harm to animals than western states with industrialised farming.

These motivators of international law are relevant for global animal law but do not distinguish it from international law. Three core concepts are adopted here to distinguish global animal law from other kinds of law: connectivity, future-orientation, and decentring the state in post-Westphalian governance models. These three concepts are borne of globalisation and are

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[248] Phillip Lymberry, 'Has African Swine Fever Led to Animal Welfare Atrocities?' [2019] Grocer 31 <https://link.gale.com/apps/doc/A604749262/ITOF?u=ustrath&sid=ITOF&xid=32af83f1> accessed 18 December 2020; Ashifa Kassam, 'Shocking Footage of "Severely Injured" Pigs on Spanish Farms Released' (*The Guardian*, 2020) <https://www.theguardian.com/environment/2020/nov/16/shocking-footage-of-severely-injured-pigs-on-spanish-farms-released#:~:text=Shocking footage of 'severely injured' pigs on Spanish farms released,-This article is&text=Footage that appears to show,animal welfare campaigners in Spain.> accessed 18 December 2020.

[249] Peters (n 172) 19.

[250] See above at section 2.4.4.

[251] See below at section 3.2.1.

[252] Abate (n 108).

[253] See, for example Kati Kulovesi, Michael Mehling and Elisa Morgera, 'Global Environmental Law: Context and Theory, Challenge and Promise' (2019) 8(3) Transnational Environmental Law 405.

[254] Bowman (n 192) 57; Favre (n 239) 92–96; Peters (n 172) 19; Von Keyserlingk and José Hötzel (n 169) 186.

[255] For example, Von Keyserlingk and José Hötzel (n 169) 186; and Peters (n 79) 94.

defining features of the (global) law that seeks to order a globalised world. Globalisation is frequently tied to the intensification of 'global communication flows' from the 1960s with new technologies like 'container shipping, satellite communication, and the Internet'.[256] In actuality, globalisation's roots lie much deeper than this, stemming back to the establishment of 'world time' from the 1850s following vast technological change and imperialist expansion. Even further back, globalisation has roots in the 'European discovery of the world as a singular globe'.[257] Globalisation, in current times, has been construed, contrastingly, as spreading 'market-oriented policies' (as a response to state-decentring) but also as shifting power to a 'moral sphere' reclaimed by civil society.[258]

Evidently, globalisation is multifaceted. Global animal law (scholarship) should undertake serious reflexion about the kinds of (global) law and legal normativity that will respond to circumstances of globalisation. I propose second wave animal ethics as the basis for this reflexion and, with regard to trade and animal welfare, that animal law reclaim a governance and normativity-building role from trade law. The following section elaborates these three defining concepts of global animal law through global law metatheory. I recommend centring global animal law on these concepts and second wave animal ethics.

3.2. A Proposal for an Intersectional Conception of the Global

Metatheories of global law are beginning to be adopted by global environmental lawyers[259] and can combine with second wave animal ethics to redirect global animal law away from its sometimes narrow focus on universally applied international law instruments.

3.2.1. Metatheorizing Global Law

Yoriko Otomo provides a feminist, imagined account of the signing of the Treaty of Westphalia which portrays it as a 'constitutive moment' and perhaps a 'founding myth' of international law which catalysed states' 'jurisdictional independence from the Roman Catholic Church'.[260] Today, globalisation 'has outgrown traditional Westphalian patterns of international governance' which

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[256] Poul F Kjaer, 'Constitutionalizing Connectivity: The Constitutional Grid of World Society' (2018) 45(1) Journal of Law and Society 114, 118.

[257] ibid.

[258] Robert Lee and Elen Stokes, 'Environmental Governance: Reconnecting the Global and Local' (2009) 36(1) Journal of Law and Society 1, 4–5.

[259] Kulovesi, Mehling and Morgera (n 253) 412.

[260] Yoriko Otomo, *Unconditional Life: The Postwar International Law Settlement* (Oxford University Press 2016) 137–144.

are centred on the state's exclusive sovereignty over its territory and which maintain that the state is the primary, central actor of international law.[261] It no longer makes sense to talk of 'the global political arena, social movements, markets and multinational corporations' within the constraints of international law.[262] Law is required in order to deal with globalisation. Global law seeks to bring some 'coherence' to this 'post-national' normative landscape.[263] Global law entails unearthing and developing the global iterations of law without overly concerning ourselves about the strictures of the Westphalian model.[264]

This post-Westphalian condition provides the context for global law's connectivity. Ideas assume mobility in a globalised world. In the realm of law, this results in an increase in cross-fertilisation of legal concepts, or 'connectivity'.[265] Connectivity is the most important feature of global law and, indeed, has been described as the most crucial 'question of our time' in the context of the 'implosion of the Eurocentric world' and consequent 'decentring of the world'.[266] Global law recognises the way that 'legal concepts travel globally between jurisdictions and other normative systems'.[267] Global lawyers practice in interconnected[268] liminal spaces, providing insights of international law to domestic law, vice versa, and etcetera.[269]

Global law has been described as a 'decentred, universally applicable legal phenomenon of the 'in-between', or 'inter-legality', thus transcending 'the classical conceptual trichotomy between the legal realms of the international, the transnational and the domestic'.[270] By transnational law is meant "'all law which regulates actions or events that transcend national frontiers", including public and private international laws, as well as other rules which do not wholly fit into these categories.'[271] Global law helps us to 'rethink and reorganize the legal worldview to reflect and

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[261] Cardesa-Salzmann and Cocciolo (n 233) 6–7 citing Eugenio Maria Battaglia, Jie Mei and Guillaume Dumas, 'Systems of Global Governance in the Era of Human-Machine Convergence' (2018, preprint) <https://arxiv.org/abs/1802.04255> accessed 18 December 2020. Also see Kulovesi, Mehling and Morgera (n 253) 408.

[262] Cardesa-Salzmann and Cocciolo (n 233) 9.

[263] Kulovesi, Mehling and Morgera (n 253) 411.

[264] Hans Somsen, 'In Pursuit of the Global within: A Structure for the Global Law Project' (2012) 17 Tilburg Law Review 250, 252.

[265] Kjaer (n 256).

[266] ibid 123.

[267] Kulovesi, Mehling and Morgera (n 253) 415.

[268] ibid 407.

[269] ibid 415.

[270] Cardesa-Salzmann and Cocciolo (n 233) 4 citing Kjaer (n 256).

[271] Elisa Morgera, 'Global Environmental Law and Comparative Legal Methods' (2015) 24(3) Review of European, Comparative & International Environmental Law 254, 256 citing Philip Jessup, *Transnational Law* (Yale University Press 1956), 136.

capture' upheavals due to globalisation.[272] Poul Kjaer conceptualises the connectivity of global law as a 'transfer' which, relying upon Rudolf Stichweh's definition, entails: (1) an object of meaning, such as a legal judgement or product, capital or knowledge; (2) which has 'informational value' that causes impact upon arrival; (3) which crosses boundaries; (4) which bridges distances in space or time; (5) and which has a 'certain permanence' through, for example, repeated transfers.[273] Scholars of global constitutionalism recognise a central role for 'economic transfers' in particular, such as trade, in colonisation and new post-Westphalian governance.[274]

Animal lawyers increasingly find inspiration from animal law within other jurisdictions, particularly due to the relative immaturity of the discipline. Global animal law practice sees domestic law put into conversation with regional law, international law put into conversation with industry standards, and so on. This results in a webbed interaction that centres upon an exchange of ideas, norms, legal concepts and practices. Global animal law, as a subdiscipline, has not recognised these theoretical reflections on connectivity and has, instead, focused heavily upon universally scaled international law instruments. Misaligning 'global' with 'universal' is a misunderstanding regarding global law.[275] Hans Somsen's remarks on external and internal understandings of global law are helpful in overcoming this. He describes external notions of the global as 'referring to some all encompassing legal system or principle spanning the globe' while internal notions denote 'the basic building blocks of which all legal systems are made up'.[276] On this latter conception, Somsen regards the global law project as one seeking to 'unearth the global within'.[277] Thus, global law is 'an adjectival, not a nominal category'.[278]

Neil Walker's metatheory of global law may help global animal law scholars to adopt such an adjectival understanding of globality in law. He regards global law as a 'category of law which operates at the external "global" edge of the transnational domain'.[279] A necessary, uniting feature of global law is its 'practical endorsement of or commitment to the universal or otherwise global-in-general warrant of some laws or some dimensions of law'.[280] This conceptualises global law as

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[272] Kulovesi, Mehling and Morgera (n 253) 407.

[273] Kjaer (n 256) 124–125.

[274] ibid 116.

[275] Kulovesi, Mehling and Morgera (n 253) 414.

[276] Somsen (n 264) 252.

[277] ibid 253.

[278] Walker (n 132) 19.

[279] ibid 18.

[280] ibid.

'wider than mere neighbourly or regional' but 'narrower than literally world-wide'.[281] It is 'a sort of meta law' that 'lies above international and transnational law and draws together the many ways in which law and globalization overlap'.[282]

Walker defines global law as including both law that will 'overcome difference' and which will 'accommodate difference'.[283] He refuses to take a normative stance regarding these two approaches.[284] This contrasts with crude conceptions of global as equivalent to universal, entailing the homogenisation of norms. Second wave animal ethics would elaborate by opposing global law that stands against difference through colonial power structures. The global animal law debate has facilitated ethnocentric proselytising by adopting an external conception of globality, focused upon universality. This first lesson of global law metatheory for global animal lawyers ought to encourage more grassroots law and policy recommendations with global colour.

A second lesson involves the future-oriented leaning of global law: it is normative, aspirational and has directionality.[285] For Neil Walker, global law is located 'in the active domain of constructive discovery or creative projection'.[286] This means the task of analysing the law adds heightened significance to 'trend-spotting' and 'challenging or rethinking our very ideas of legal order' on top of its roots in 'settled doctrinal analysis'.[287] This does not mean that global law does not have 'current applicability' or a 'rule-like quality'.[288] It does have these things. It is just that they are 'tentative' and 'fragile'.[289] Global animal law has indeed, thus far, presented as widely future-oriented, aspirational and normative.[290]

A third lesson of global law metatheory is that the future-orientation of global law lends heightened significance to the role of academics as 'jurisgenerative'.[291] Global law is more dispersed than international and transnational law (which are state-centric): it recognises the increasingly important norm-creating roles of 'non-governmental organizations (NGOs), law firms, financial

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[281] William Twining, 'Publication Review – Intimations of Global Law, Neil Walker' [2016] Public Law 540, 542.

[282] David Kenny, 'Book Review – Neil Walker: Intimations of Global Law' (2015) 63 American Journal of Comparative Law 1053, 1053.

[283] ibid 1054. For full elucidation of these ideas, see Walker (n 132) 55–56.

[284] Walker (n 132) 178.

[285] Kulovesi, Mehling and Morgera (n 253) 418.

[286] Walker (n 132) 22.

[287] ibid 205.

[288] ibid 171.

[289] ibid.

[290] See 3.4.

[291] Morgera (n 271) 236 citing Neil Walker, 'The Jurist in a Global Age' in R van Gestel et al (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2017) 84-111.

markets, and multinational corporations'.[292] This stems from a view of legal development's 'center of gravity' as 'in society itself' and that pluralist globalised society will permit peripheral legal normative developments to grow.[293] Global law's 'growing role in rulemaking and implementation' for non-state actors entails growing normative challenges to the Westphalian legal order.[294] Global animal law has restricted itself by debating mostly international law solutions to global animal problems.

Walker argues that 'practitioners and academics are crucial sources of global law'.[295] They are 'jurisgenerative',[296] contributing to 'fashioning and shaping of global law'[297] by 'moulding it, nudging, infiltrating and reshaping actual laws'.[298] Global law treats established sources of law as 'a mere starting point' of legal normativity.[299] Observations have also been made regarding the jurisgenerative nature of indigenous peoples and the transformation of human rights law owing to their influence.[300] This speaks to the potential benefits of recognising jurisgenerative potential outside of traditional sources of international law. This view lends legitimacy to legal proposals and pre-positive developments that dominate discussion of international law and animals. This also presents animal lawyers with a warning to act responsibly in publishing, theorising and advocating on global animal law issues because they may be 'inadvertent or strategic norm entrepreneurs'.[301] There is potential for this to introduce 'deliberative democracy' to a world where sources of law are all accused of having a 'democratic deficit'.[302] But, this also entails democratic risks because non-Westphalian legal normativity generates 'legitimacy from within' because it cannot rely on, for example, a constitution.[303] Questions of democracy and legitimacy remain open in global law scholarship. From the perspective of second wave animal ethics, this means global animal law scholarship must be ethically reflexive.

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[292] Kulovesi, Mehling and Morgera (n 253) 408.

[293] Gunther Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in Gunther Teubner (ed), *Global Law Without a State* (Brookfield 1997) 6.

[294] Kulovesi, Mehling and Morgera (n 253) 417.

[295] Mihai Morar, 'Intimations of Global Law, by Neil Walker' (2016) 48(3) New York University Journal of International Law & Politics 1063, 1064.

[296] Morgera (n 271) 236 citing Walker (n 291) 84-111.

[297] Walker (n 132) 31.

[298] Twining (n 281) 541.

[299] Kulovesi, Mehling and Morgera (n 253) 419.

[300] Kristen A Carpenter and Angela R Riley, 'Indigenous Peoples and the Jurisgenerative Moment in Human Rights' (2014) 102 California Law Review 173.

[301] A similar warning is given to global environmental lawyers in Kulovesi, Mehling and Morgera (n 253) 432.

[302] ibid 422–423.

[303] Gunther Teubner, 'Quod Omnes Tangit: Transnational Constitutions Without Democracy?' (2018) 45(1) Journal of Law and Society 5, 5–6.

The three concepts outlined in this section (connectivity, future-orientation, and decentring the state in post-Westphalian governance models) provide important lessons for animal law scholars. This thesis adopts global law metatheory to redirect global animal lawyers to a more theoretically sound understanding of global law.[304] Because of its adjectival nature, this thesis does not utilise global law theory as a means to map animal law.[305] Instead, this thesis uses global law metatheory to provide global animal law scholars with the ability to identify what global animal law is not. It is not an alias for international law (and thus ought not to be judged against the 'standards of national legal systems').[306] Neither is it transnational law in a new guise. Nor does it equate to universally applied laws. Global law's distinctiveness ought to be safeguarded.

3.2.2. Operationalising Intersectional Ethics to Critique Claims of Globality

There is tension between second wave animal ethics and the way global law has been operationalised by some global animal law scholars. This section identifies those tensions, establishing clear guidelines for global animal law's further development. This section highlights synergies between global law metatheory and the second wave imperatives of intersectionality and situatedness. This future-vision has heightened legitimacy because Earth System Governance (and Earth System Law scholarship) share a similar vision.

The domestic and international law that fills global animal law with its substance is deficient from a second wave perspective. It is welfarist in tone, reliant upon similarity theory and closed circles of moral concern and liberalistic. Global law metatheory has nothing to say on these points and so these deficiencies are elaborated below.[307] Conversely, second wave animal ethics and global law metatheory have conversational crossovers with regard to false universals and coloniality. William Twining is critical of the use and overuse of 'g-words' or 'globabble'[308] which he regards as leading to generalisations that are 'exaggerated, misleading, meaningless, superficial, ethnocentric, or a combination of all these'.[309] His critique aligns closely with my critique of universalistic global animal law rhetoric.

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[304] Given its 'sliperiness', this thesis does not utilise global law metatheory to resolve normative problems. See Richard Collins, 'The Slipperiness of "Global Law"' (2017) 37(3) Oxford Journal of Legal Studies 714, 717–718.

[305] The categories are so all-encompassing that such an effort has been described as somewhat meaningless. See Kenny (n 282) 1058.

[306] Teubner (n 293) 4.

[307] See below at section 3.4.

[308] Twining (n 281) 543.

[309] William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press 2009) 14.

Global law envisages a departure from western 'academic legal culture' which tends to be 'state-oriented, secular, positivist, "top-down", Northo-centric, unempirical, and universalist in respect of morals'.[310] However, in practice, global law narratives have been operationalised to further coloniality in legal traditions. This scholarship has presented as global when it is, in fact, dominated by western scholars and western ideas, thus contributing to coloniality.[311] The western legal tradition has dominated broader efforts at legal theory.[312] This approach is incapable of contributing significantly to solving 'pressing problems of the age'.[313] This is particularly pressing for animal law because 'colonists used animals to conquer ecosystems and their inhabitants'.[314] Mathilde Cohen argues there has been a hidden globality to animal law for centuries because the 'migration of ideas' associated with colonisation solidified global property status for animals where this was previously rare outside the west.[315]

Thus, animal lawyers must treat so-called "g-words" cautiously. There must be a clear case for attributing globality to something over describing it as transnational or international law. This view is supported by environmental law imperatives of deep and wide participation[316] and Third World Approaches to International Law (TWAIL),[317] discussed later. Failing to do so risks perpetuating the promulgation of western concepts and standards in a universal or global guise which, in fact, poorly fits non-western systems.[318] Uncritical global speak risks ethnocentrism and coloniality.

Animal law scholarship sometimes proclaims to be value-neutral whilst forwarding subjective views stemming from situated positionalities (which goes unaddressed).[319] Many animal law scholars express the view that a 'horse is a horse regardless of what country it lives in'.[320] This view is regarded to have spread across the globe due to globalisation.[321] Thus, animal welfare is considered an issue of global moral significance.[322] However, this globalised conversation resulting

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310 ibid 6.

311 See below at section 3.2.2.

312 Twining (n 309) 12.

313 ibid.

314 Cohen (n 31) 268.

315 ibid 267.

316 See chapter IV section 3.2.2.

317 See chapter V section 3.3.

318 Kulovesi, Mehling and Morgera (n 253) 427.

319 For example, Robertson (n 17) 31.

320 Favre (n 125); Peters (n 79) 51; Wagman and Liebman (n 126) 11.

321 Robertson (n 17) 10.

322 Bowman (n 192) 57.

from connective societal and legal transfer does not have homogenisation or unification as its natural or only consequence. Global law's connectivity results in 'contextual diversity', explained by postcolonial 'legal pluralism'.[323] Global law entails a shift from 'territorial to functional differentiation on the world level', not a shift to territorial and functional homogenisation (which is what a centralised universal legal regime would entail).[324] While globalisation may create certain identifiable shared moral principles across the globe, global law can accommodate diversity in responses to such moral principles. This speaks to second wave animal ethics values of diversity and situatedness. Of course, this can lead to difficulties associated with fragmentation in international and transnational law. This necessitates consideration of democracy and global governance to tackle, for example, trade law's 'tunnel vision' and consequent neglect of animal welfare.[325]

Many animal law scholars consider a 'global animal protection regime' as a 'logical progression' given the scale of domestic advancements.[326] Second wave animal ethics warns that such a regime would be unethical and ineffective if it were not built upon broad consensus and collaboration. Global convergence around certain animal protection priorities should not be used to justify coloniality in modes of animal welfare governance. Ostensibly neutral, objective, rational and universalizable animal law principles that are developed without engagement with other people, ideas or animals should be treated with suspicion. Indeed, international law itself is known to have an 'oppressive and hegemonic function' and global animal law ought not to follow in these footsteps.[327] Failure to seriously contemplate the risk of cultural imperialism lends credence to arguments that globally-scaled animal protection is necessarily hegemonic.[328] There is even hegemony at play in domestic animal protection laws that target minority groups and practices like the debate around halal and kosher slaughter.[329] Global animal lawyers must be particularly vigilant when interacting with institutions and legal histories that maintain the oppressive power of western nations.

This recommended imperative to avoid cultural imperialism contrasts with a perception expressed by animal law scholars of cultural sensitivity as a barrier to effective animal protection.

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[323] Kjaer (n 256) 115; Teubner (n 293) 4.

[324] Teubner (n 293) 5.

[325] See chapter V section 2.2.

[326] Otter, O'Sullivan and Ross (n 10) 59.

[327] Peters (n 79) 34.

[328] ibid 37.

[329] Joe Wills, 'The Legal Regulation of Non-Stun Slaughter: Balancing Religious Freedom, Non-Discrimination and Animal Welfare' (2020) 41 Liverpool Law Review 145, fn 1.

Those who adopt this perception argue that harm of animals is common in 'almost all cultures of the world' and so nothing is gained by offering cultural exceptions to animal protection efforts.[330] This misses the point and does not address the dangers for animals and humans posed by facilitating oppressive, colonial forces. Public opinion may sway toward animal protection at a particular historical moment. However, using hegemonic force to achieve this, rather than attentive listening and care, leaves ample space for oppression of animals to return. Animal law scholars have been sceptical of the debate around culture and coloniality because many have falsely claimed that animal welfare is a western value.[331] Chapter I denounced this view.[332] Second wave animal ethics requires exposing this view as false and avoiding coloniality in approaches to animal liberation. While animal liberation is not an inherently colonial value, it may be imposed in such a way.

Because animals have been deeply oppressed by the Westphalian legal order, the decentred, diverse legal normativity in globalised society offers an opportunity for second wave-consistent evolution. This vision of diverse, dispersed, non-state-centric, non-Anthropocentric normative legal landscapes is shared by emerging literature on Earth system governance and law. This thesis will not explore this scholarship deeply, but I will outline the overlaps here to add weight and legitimacy to the second wave legal future-vision. Earth system governance/law eschews the false nature-culture dichotomy.[333] It moves away from state-centrism and (utilitarian and neoliberal) anthropocentrism, toward 'Earth-centrism' and forward-looking governance.[334] This entails posthumanist democracy entailing deep listening to the 'earth system' and reflexive law-making.[335] This lends credence to second wave-inspired governance which similarly recognises interconnection and devolution of the individual and the 'human'. Thus, a second wave turn for animal ethics and law would expand their influence and compatibility with movements like Earth system governance that presently tend to ignore animal law and ethics scholarship.

The following section identifies misappropriation of global terminology by the global animal law community to forward ethnocentric objectives, contrary to the warnings of global law

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330 Peters (n 79) 38.

331 Examples from trade law literature include Ling Chen, 'Sealing Animal Welfare into Free Trade: Comment on EC-Seal Products' (2015) 15 Asper Review of International Business and Trade Law 171; and Yangzi Sima and Siobhan O'Sullivan, 'Chinese Animal Protection Laws and the Globalisation of Welfare Norms' (2016) 12(1) International Journal of Law in Context 1.

332 See chapter I section 4.4.

333 Louis J Kotzé and Rakhyun E Kim, 'Earth System Law: The Juridical Dimensions of Earth System Governance' (2019) 1 Earth System Governance 3 <https://www.sciencedirect.com/journal/earth-system-governance/vol/1/suppl/C> accessed 18 December 2020.

334 ibid 4–7.

335 John S Dryzek and Jonathan Pickering, *The Politics of the Anthropocene* (Oxford University Press 2018) chs 6-7.

metatheory and situatedness imperatives of second wave animal ethics. This thesis advocates for diversity in inclusion and in ideas.[336]

3.3. Assessing the Intersectional Credentials of Global Animal Law Practice

3.3.1. Conceptions of Globality in Practice

I will use two representative examples to elucidate common understandings of global animal law amongst practitioners and researchers. These will be assessed against global law metatheory and second wave animal ethics. The two examples are: from academia, the Max Planck Institute for Comparative Public Law and International Law section on global animal law (the MPI section);[337] and from the third sector, the Global Animal law Association (GAL Association).[338]

The MPI section's overarching objective is to 'shed light' on global animal law, which it refers to as a discrete branch of international law.[339] This is inconsistent with metatheories of global law. More detailed descriptions of global animal law by the MPI section seem to rectify this somewhat. The MPI section's website describes global law as transboundary and multi-level, arguing animal law must include global animal law to be effective.[340] Their research orients toward stimulating law reform and norm development, thus adopting a future-oriented direction.[341]

Anne Peters, head of the MPI section, describes global animal law as a 'regulatory mix combining a host of different types of norm' from 'national, international, and regional or sub-state law' plus 'norms made by states and by private actors, thus including standards emerging from industry, often in collaboration with governmental agencies' and including 'hard and soft law'.[342] This is very useful but contrasts with the official MPI definition of global animal law as a discrete branch of international law. The 'discrete branch' definition is repeated by Charlotte

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[336] See chapter V section 3.

[337] 'Global Animal Law' (*Max Planck Institute for Comparative Public Law and International Law*) <https://www.mpil.de/en/pub/research/areas/public-international-law/global-animal-law.cfm> accessed 18 December 2020.

[338] 'Global Animal Law' (*Global Animal Law Association*) <https://www.globalanimallaw.org/> accessed 18 December 2020.

[339] 'Global Animal Law' (n 337).

[340] ibid.

[341] ibid. See also Peters (n 172) 20.

[342] Peters (n 172) 20.

Blattner, an animal law academic and former PhD student of Anne Peters.[343] Putting this contradiction to one side for now, Peters' definition is largely compliant with a second wave-inspired conception of global animal law. Peters argues the corpus of global animal law is thin but has 'reached a critical mass' justifying its existence as its own legal field.[344] Thus, gap-filling is a critical task of the section.[345] Peters says this work must be mindful of 'Eurocentrism and legal imperialism'.[346] Second wave animal ethics would opt for a stronger imperative than mindfulness which implies that inaction would sometimes be acceptable.

The MPI section's conception of global animal law contrasts with that of the GAL Association. The GAL Association's goal is to 'help and create a new framework for the global discussion on animals in law'.[347] It is unclear whether it is the *issues* or *dialogue* that are deemed to be global here. Sabine Brels, manager of the GAL Association, notes how animal welfare law is 'present at every level of governance, from the national to the global level'.[348] Evoking a global-national spectrum suggests global is conflated with universal here.[349] Brels states the GAL Association's legislation database reflects multi-level animal law. The database excludes non-governmental standards and soft law, which perhaps neglects the post-Westphalianism of global law.

Contradicting these statements, Brels sometimes refers to global law as an alias for international law.[350] Putting this contradiction aside for now (though frequent contradiction in references to global animal law indicates confusion), it seems the GAL Association adopts two different uses of 'global'. First, it facilitates a global (meaning universal) discussion on animal issues. Second, it discusses law at the 'global level', regarded as law with universal application.

The GAL Association's objectives and projects indicate a normative view of globality, promoting a vision, ethics and proposed legal solutions to animal problems capable of application across the globe. For example, the GAL Association seeks to become the 'leading authority in ensuring global animal health and welfare through the law' by proposing legal solutions.[351] The

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[343] Blattner (n 137) 10. In places, Blattner goes so far as to list the ICJ Statute sources of international law as indicating the sources of global animal law. See: Blattner (n 125) 279–280.

[344] Peters (n 172) 20.

[345] ibid.

[346] ibid 22.

[347] 'Global Animal Law' (n 338).

[348] Brels (n 137) 376.

[349] ibid 366.

[350] ibid 365.

[351] 'Annual Report' (*Global Animal Law Association*, 2018) 16, 35 <https://www.globalanimallaw.org/gal/projects/annual-report-2018.html> accessed 18 December 2020.

GAL Association is also embarking upon globally scaled projects. For example, it intends to develop a database to rank domestic laws regarding animal welfare.[352] This understanding of globality seems akin to the global care Favre refers to when he says 'a horse is a horse regardless of what country it lives in'. This neglects consideration of coloniality which is integral to second wave animal ethics.

The MPI section and GAL Association have contrasting understandings of global animal law. Both, to varying degrees, fall short of second wave imperatives of intersectionality and avoiding coloniality. Both adopt a future-orientation but neglect the connectivity and post-Westphalian nature of global law. This situation may stem from the prominence of western perspectives within the global animal law movement.

3.3.2. Eurocentric Perspectives on Global Animal Law Masquerade as 'Global Animal Law'

Western animal law experts are vastly overrepresented in the global animal law debate. From the perspective of second wave animal ethics, this lack of diversity in participation is a problem. This is a systemic problem which does not speak to the individual intentions of global animal law actors. Diversity in ideas will be explored in the following section and throughout the remainder of the thesis. This is provided to promote reflexiveness amongst animal law scholars. I hope this internal critique is well received; it stems from a position of deep respect for the animal law scholars that have crafted our discipline. In this section, I provide demographical insights developed from online biographies and personal connections. This is cursory and excludes information regarding queer and disabled representation.

The GAL Association has an entirely Swiss and French team. Its patronage committees stem primarily from Switzerland but also the rest of Europe, America and Australia. The team and committees are entirely white and have a majority male representation. One of the key offerings of the project is a matrix of ideas for improving animal law contributed to by a community of experts. Of these experts, 42 stem from Europe, 25 from North America, 11 from Australasia, seven from Asia, seven from Africa (four in South Africa), five from South America, and one from the Middle East.[353] Female presenting experts make up the majority of the group but there are only around 12 people of colour. Similarly lacking in diversity, the MPI section on global animal law is staffed exclusively by white Europeans, though with a good gender balance.

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[352] ibid 20.

[353] As of 8 September 2020.

Another institutional example is the Center for Animal Law Studies at Lewis & Clark Law School in Portland, Oregon. The center considers itself a global institution working on a global phenomenon.[354] They acknowledge that animals 'don't necessarily recognize borders or cultures' and they imply that animal lawyers don't either.[355] While this may raise initial concern regarding extraterritoriality, the center clarifies that they engage with a 'global network of animal lawyers', doing particularly good work like introducing the Kenya Legal Project on animal law which aims to 'develop relationships with and offer assistance to Kenyan lawyers, judges, and other wildlife professionals'.[356] I spent a semester at the center during my PhD and can confirm their dedication to educating the next generation of animal lawyers from across the globe. However, I did find marginal perspectives were lacking in course syllabi.

It is consequential that two leading centres on global animal law (the GAL association and the MPI) are, in fact, largely Eurocentric. A similar pattern emerges in scholarly conferences and publications. The third iteration of the global animal law conference achieved a decent geographical spread of participants, though Americans and Europeans still outnumber all other participants.[357] However, the decent spread of participants likely owes to the fact that the conference took place in Hong Kong. Regarding publications, there are two published symposiums on global animal law in leading journals. The contributors stem from Europe (ten), North America (four), Australasia (one) and Asia (one).[358] Additionally, a Global Journal of Animal Law was founded in 2013. Between issues 1 (2013) and 8 (2020), the journal has presented works by authors with the following nationalities (excluding editors' forewords): 34 European, 13 North American, two Australasian, two Asian, two Middle Eastern, and one Central American. Additionally, this journal published a special section in 2019 with 13 contributors. This stemmed from a conference. The special section intended to present an international spread of ideas about what animal law is and ought to be. These thirteen scholars are all white and European or North American.

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354 Natasha Dolezal, Pamela Frasch and Kathy Hessler, 'Animal Law – A Global Phenomenon' (2014) 1 Global Journal of Animal Law 1.

355 ibid 3–4.

356 ibid 4.

357 'Confirmed Speaker List' (*III Global Animal Law Conference Hong Kong 2018*) <https://animallawconference.law.hku.hk/speaker-list/> accessed 18 December 2020.

358 'Global Animal Law Symposium' (2017) 111 American Journal of International Law; 'Global Animal Law Symposium' (2016) 5(1) Transnational Environmental Law.

This rather bleak picture of participatory diversity is replicated in wider animal studies and in the animal liberation movement.[359] I have two profound concerns. First, this problematic lack of diversity is blatantly evident in a scholarly endeavour that professes to be global in scope but, upon brief investigation, is revealed as deeply western-centric. Second, to my knowledge, no-one has recognised this is happening, let alone identified this as problematic. Returning to the Global Journal of Animal Law's special session, a journal professing to be global, pronouncing scholarship on such a fundamental question to our field as 'what is animal law', ought to do better at presenting diverse opinions or at least recognise the lack of diversity, which they did not. It is unsurprising that the editors found broad convergence amongst the definitions of animal law provided because every contributor shares many very similar life experiences due to their western, white and scholarly or activist backgrounds.[360] Of particular concern, one contribution entitled 'Global Definition of Animal Law' includes no reference to globality, no sense of why this definition ought to be regarded as global, and is openly prefaced by the author stating the piece is 'in my opinion'.[361] This suggests very little thought is given to using the word 'global'. It is surprising and harmful to global animal law's integrity for personal opinion to be published in a peer-reviewed journal, presented as a 'global definition'.

One might critique my conclusions here due to small sample sizes, perhaps suggesting cherry picking. These examples are not unrepresentative for two reasons. First, I focus upon the leading scholarly spaces within global animal law scholarship; those publications, organisations, scholars and research groups that position themselves as leaders on global animal law. Such leadership spaces and individuals are small in number; I have mentioned them all here. Second, my analysis would not be cherry-picked even if we were to look beyond leadership. The demographic of the entirety of the Global Journal of Animal Law's publications is evidence of this.

Another potential counterargument might state this scholarship does not profess global representation but rather takes 'global' animal law as its subject. My counterargument, based in global law metatheory and second wave animal ethics, identifies this view as harmful. First, the literature largely misconstrues what global law is, preferring a paternalistic version of Westphalian international law instruments stemming from the west and entailing coloniality. So, the literature is not actually talking about global animal law. It is mostly talking about an ethnocentric kind of

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[359] Corey Lee Wrenn, 'An Analysis of Diversity in Nonhuman Animal Rights Media' (2016) 143 Journal of Agricultural and Environmental Ethics 143.

[360] Sochirca and Kivinen (n 20).

[361] Jean-Marc Neumann, 'Global Definition of Animal Law' (2019) 7 Global Journal of Animal Law 2 <https://ojs.abo.fi/ojs/index.php/gjal/issue/view/170> accessed 18 December 2020.

international law. Second, global law metatheory reveals that global lawyers, including academics, are jurisgenerative. Thus, the demographics and practices of global animal law scholars cannot be neatly separated from their subject of study. Because of global law's future-orientation and post-Westphalian nature, the 'global' moniker attaches to norm-building scholarship as well as law.

In conclusion, a lack of diversity amongst leaders and wider participants of global animal law scholarship does not make for very global law. Animal law scholars believe animal liberation is not a western value. If true, globally spread, diverse representation should be possible for global animal law scholarship. But no one is encouraging this or identifying this lack. Diversifying scholarly representation will contribute to diversifying ideas, which will help tackle ethnocentric conceptions of globality in global animal law.

In the next section, I argue that the future-visions of most global animal law scholarship display a lack of diversity in ideas and deficiency in incorporating intersectionality and rejecting coloniality. I believe diversifying participation so as to diversify ideas should be central to global animal law and I make proposals in this regard in chapter V. If this is not immediately possible or practicable, I urge global animal law scholars toward transparency by labelling their work as 'Eurocentric/western perspectives on international animal law'.

3.4. Assessing the Intersectional Credentials of Global Animal Law Scholarship

The failure to prioritise diversity, intersectionality and a denunciation of coloniality is a problematic feature of global animal law's early development in and of itself. It has also led to a lack of diversity in ideas. Second wave imperatives inspired by marginal scholars are neglected because global animal law scholarship is dominated by more mainstream western ideology and practice. These imperatives include: indistinction and flourishing, boundlessness and prioritisation of marginalised Others, and feminist care theory over liberalism.

This section critically analyses proposals for future global animal law, noting there is a preoccupation with international law instruments without a consideration of connectivity and post-Westphalian legal normativity. Though this scholarship sometimes does not self-identify with global animal law, hindsight shows it falls within this (new) tradition. Human rights solutions are not included here due to their resistance to expansion to non-humans.[362] Trade proposals are discussed in the following chapters. The approaches analysed are: expanding existing frameworks

[362] See chapter I section 4.3.1. Notable exceptions include Bowman (n 192) 76–83 and Peters (n 172) 15.

(the OIE and compassionate conservation) and creating new frameworks (treaty-making and a UN declaration on animal welfare).

3.4.1. Expanding Existing Frameworks

Owing to its existing work, the OIE is a likely site of further development of international governance of animals.[363] Benefits to pursuing this option are that the OIE is politically powerful and it has near universal membership.[364] However, the OIE is a suboptimal choice. The OIE's codified standards merely list considerations, falling short of prohibiting harmful practices.[365] Relying on the OIE for international governance of animals may encourage domestic legislators to go no further than the OIE's welfarist, utilitarian norms that are incapable of opposing animal use for human ends and inconsistent with second wave animal ethics.[366] OIE animal welfare protection would be slow to develop or would stagnate because of the OIE's close relationship with industries and governments that benefit from permitting animal harm.[367] Additionally, the OIE's director general states it could not achieve significant animal welfare advancement acting alone.[368]

The OIE's scope is restricted to domesticated species, excluding wild animals and entrenching a harmful wild/domestic dichotomy which is inconsistent with second wave animal ethics.[369] Further, the OIE is conceptually restricted from tackling welfare issues that do not relate to health. Animal health is a subset of animal welfare: poor welfare may not impact health, but poor health always entails poor welfare. If an OIE-centric approach is pursued, governance gaps should be filled with improved legal responses to welfare issues facing animals living in the wild. Though, this pairing still leaves governance gaps through which vulnerable animals would fall because dichotomising wild and domestic animals and associated legal regimes is oversimplified.[370] This is why second wave animal ethics rejects such dichotomies.

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[363] Otter, O'Sullivan and Ross (n 10) 53.

[364] ibid 65.

[365] Favre (n 125) 252; White (n 163) 200.

[366] Otter, O'Sullivan and Ross (n 10) 67. Also see chapter I section IV.A.1 and IV.B.1.

[367] White (n 163) 200.

[368] Bernard Vallat, 'Putting the OIE Standards to Work' (*OIE*, 2008) 3 <http://www.oie.int/fileadmin/Home/eng/Media_Center/docs/pdf/AW_Conference_BV_speech_final.pdf> accessed 18 December 2020.

[369] See above at section 2.4.3.

[370] Outhwaite (n 37).

There is growing scholarly support for a compassionate turn in conservation to enable individual organisms to flourish[371] and as a moral imperative due to animal sentience.[372] This would recognise the significance of ecosystems as well as 'the value of the individual', mandating that individuals not be harmed for the sake of the collective.[373] It would require that 'no harm' be done, that 'individuals matter', and that we strive for 'peaceful coexistence'.[374] Compassionate conservation has a deliberative function, aiming to resolve tensions between individual and species interests 'in the best way possible'.[375] While compassionate conservation complies with many second wave imperatives, its potential to take animal interests seriously, in practice, remains to be seen.

Compassionate conservation is critiqued for imposing normativity on marginalised groups.[376] However, such arguments rely on incorrect assumptions negated in this thesis: compassion for animals is not antagonistic to human rights; animal ethics and law need not be universal and non-contextual; and current conceptualisations of conservation are not immune to reconstruction. Such critiques typically stem from traditional conservationists who fail to acknowledge that such a colonising impact has already been imposed through conservation law. This critique is too weak to condemn compassionate conservation.

Compassionate conservation is a favourable response to welfare issues facing animals living in the wild for three reasons. First, it recognises the artificiality of the wild/domestic dichotomy. This dichotomy's prevalence owes, in part, to a gendering of animals. Wildlife is regarded with male 'ruggedness and autonomy', domestic animals with female 'dependency and interconnectedness'.[377] This conceptualisation results in the assumption that wild animals simply need to be left alone in order to flourish. However, wild and domestic animals are not dichotomous: house mice and wild animals kept as pets are liminal. Further, human impacts on wild animals' lives grow through climate change, wild encroachment and inappropriate domestication. It is insufficient to leave wild animals alone. No animal is untouched by human impacts on the environment. Thus, they all require consideration in environmental policy setting.

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[371] Bowman, Davies and Redgwell (n 218) 672.

[372] Wallach et al (n 191) 1255.

[373] Scholtz (n 187) 473–474; Wallach et al (n 191) 1262.

[374] Wallach et al (n 191) 1260.

[375] Bilchitz (n 213) 231.

[376] Meera Anna Oommen et al, 'The Fatal Flaws of Compassionate Conservation' (2019) 33(4) Conservation Biology 784, 785.

[377] Wagman and Liebman (n 126) 14 citing Karen Davis, 'Thinking Like a Chicken: Farm Animals and the Feminine Connection', in Carol J Adams and Josephine Donovan (eds) *Animals & Women: Feminist Theoretical Explorations* (1995), 192; Marti Kheel, *Nature Ethics: An Ecofeminist Perspective* (2008), 1-35.

Second, human concern regarding animal welfare and conservation naturally converge and normatively align more than is typically recognised.[378] In particular, conservation norms have evolved from assigning instrumental value to wildlife, to recognising and protecting wildlife's intrinsic value.[379] Both protect the 'non-human "other"'.[380] Both reconceptualise property to contest exploitative, entrenched social and legal norms.[381] Practically, most individuals who care about the environment also care about the welfare of animals; many animal advocates are also environmentalists, and vice versa.[382] The goals of each movement frequently align around overarching desires to 'allow species to live free in a natural state'.[383] It is practically beneficial to blend resources, political efforts, and legal reform on these two issues.[384] Consequently, arguments to prioritise 'protection' over 'conservation' are growing.[385] In law, 'protection' has wider scope than conservation.[386] It can be used to refer to 'meaningful conceptual connections between animal welfare and animal conservation'.[387] This conception would constitute 'elements of conservation-focused concerns, welfare concerns, and something that does not quite fit into either category: the value of the life of a charismatic individual animal'.[388]

Third, the neglect of wild animal welfare is increasingly inappropriate. The wild is shrinking, species' ranges are decreasing, and human-induced climate change is posing ever-increasing threats to wild animal welfare.[389] Blending welfare and environmental protection would be mutually beneficial.[390]

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[378] Katie Sykes, 'Globalization and the Animal Turn: How International Trade Law Contributes to Global Norms of Animal Protection' (2016) 5(1) Transnational Environmental Law 55, 67.

[379] ibid 59–62.

[380] Joyce Tischler and Bruce Myers, 'Animal Protection and Environmentalism: The Time Has Come to Be More Than Just Friends' in Abate (n 108) 388.

[381] Long (n 182) 426; Tischler and Myers (n 380) 399 et seq.

[382] Tischler and Myers (n 380) 388, 416.

[383] Harrop (n 185) 81.

[384] Tischler and Myers (n 380) 388.

[385] Sykes (n 378) 56; Schaffner (n 213) 28–29, 35. See also, Scholtz (n 187) 20.

[386] Bowman (n 199) 11; 'protection and preservation' in United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS), art 56(1)(b)(iii); . Contrasting interpretations include Donald M Broom, 'International Animal Welfare Perspectives, Including Whaling and Inhumane Seal Killing as a WTO Public Morality Issue' in Deborah Cao and Steven White (eds), *Animal law and welfare: international perspectives* (Springer 2016) 47; and Robertson (n 17) x.

[387] Sykes (n 378) 56.

[388] ibid 66–67.

[389] Stuart Harrop, 'Climate Change, Conservation and the Place for Wild Animal Welfare in International Law' (2011) 23(3) Journal of Environmental Law 441; Scholtz (n 187); Scholtz (n 216).

[390] Sykes (n 378) 68.

Another possible route for supplementing OIE-centric animal protection is to incorporate animal welfare into sustainable development policy. This would operate in the background, utilising sustainable development's hefty political and legal weight,[391] to normatively support compassionate conservation.[392] This could lead to welfare-conscious interpretations of sustainability objectives in a number of conservation treaties.[393] This could also be beneficial for domestic animals. The UN Food and Agriculture Organisation's (FAO) infamous response to livestock farming's contribution to climate change, set out in Livestock's Long Shadow, was to pursue sustainability through further intensive, indoor farming.[394] It was not until 2019 that the Intergovernmental Panel on Climate Change began to highlight the significant impact lower meat consumption could have on mitigating the effects of climate change.[395] Academic proposals have been made regarding incorporating animal welfare into sustainable development, though space does not permit exploration of that here.[396]

In conclusion, animal protection through the OIE and compassionate conservation demonstrates some consideration of second wave animal ethics. The OIE's broad membership facilitates diverse conversations on animal welfare and recognising wild animal welfare erodes a harmful dichotomy. However, relying upon existing legal mechanisms with anthropocentric roots is suboptimal from a second wave perspective. These frameworks present significant limitations. Offering welfare protection on the basis of domesticated or wild status, rather than flourishing, is harmful. Inter-institutional collaborations could somewhat rectify this, but the literature fails to propose this, due to dichotomous thinking. Dichotomous thinking is inherent to liberal thought; it is a component of similarity theory and harmfully exclusionary moral circles. Thus, these proposals ought to be reconsidered with second wave animal ethics in mind. Additionally,

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391 Emily Barrett Lydgate, 'Sustainable Development in the WTO: From Mutual Supportiveness to Balancing' (2012) 11(4) World Trade Review 621, 624; Maria Lee, *EU Environmental Law, Governance and Decision Making* (Hart Publishing 2014) 57.

392 Brels (n 137) 374.

393 For example, CBD (n 196), art 1.

394 Livestock Environment and Development (LEAD) Initiative and the UN Food and Agriculture Organization (FAO), 'Livestock's Long Shadow: Environmental Issues and Options' (2006) xx, 283 <http://www.fao.org/docrep/010/a0701e/a0701e00.HTM> accessed 18 December 2020.

395 Intergovernmental Panel on Climate Change, 'IPCC Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security, and Greenhouse Gas Fluxes in Terrestrial Ecosystems' (2019) <https://www.ipcc.ch/site/assets/uploads/2019/08/Fullreport-1.pdf> accessed 18 December 2020.

396 For example, Janet Cox, 'Sustainable Development Goals and Animal Issues: Preparing for the UN's High Level Political Forum' (*World Animal Net*, 2017) <http://worldanimal.net/world-animal-net-blog/item/439-sustainable-development-goals-and-animal-issues-preparing-for-the-un-s-high-level-political-forum> accessed 18 December 2020; Kate Rawles, 'Environmental Ethics and Animal Welfare: Re-Forging a Necessary Alliance' in Marian Stamp Dawkins and Roland Bonney (eds), *The Future of Animal Farming: Renewing the Ancient Contract* (Blackwell publishing 2008).

proposals for compassionate conservation stem from white western scholars and the impact of such proposals on minority groups of humans remains unknown. Wider, more diverse scholarly discussion would be required in order to move this idea forward.

3.4.2. Creating New Frameworks

A second proposed approach to fill gaps in animal protection in international law is to develop new frameworks. One prominent approach is to propose a treaty, international organisation or body responsible for animal welfare.[397] This would avoid the problem of gaps and dichotomisation between domesticated and wild species.[398] However, it presents problems of colonial false-globality because treaty proposals have stemmed exclusively from developed, western contexts with inadequate engagement with non-western stakeholders.

David Favre, a US-based animal law professor, is the driving force behind a draft International Convention on Animal Welfare: a framework treaty which would be supplemented with subsequent protocols.[399] Favre desires a more 'universal view about how to treat animals'.[400] This eschews second wave intersectionality and situatedness. Universalism is less effective than situatedness, considering local conditions and operationality. The draft treaty recognises the intrinsic value of life, opposes unnecessary killing and suffering of animals, and adopts a pragmatic, welfarist orientation.[401] Welfarism is deficient under second wave animal ethics. Further, with no country to sponsor it, the draft treaty has not garnered sufficient attention at the UN for implementation.[402] Thus, while other animal lawyers and activists have drafted new proposals, the problem is not the lack of treaty language.[403] The problem is the lack of sufficient buy-in from policymakers or powerful lobbying campaigns to spark lawmakers' interests.[404] Current proposals are concerningly western-oriented. For example, Favre's proposal universalises the western

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[397] On the latter, see Bilchitz (n 213) 250.

[398] In fact, one proposed treaty was inspired by the unwillingness of CITES to tackle welfare issues. See Favre (n 239) 99.

[399] ibid 97.

[400] ibid 91.

[401] ibid 100; White (n 125) 396.

[402] Favre (n 239) 97.

[403] 'Declaration of Rights for Cetaceans: Whales and Dolphins' (2011) 14 Journal of International Wildlife Law & Policy 75; 'The Universal Charter of the Rights of Other Species' (*All Creatures*, 2000) <https://www.all-creatures.org/articles/ar-universal-charter-rights-species.html> accessed 18 December 2020; 'UN Convention on Animal Health and Protection (UNCAHP)' (*Global Animal Law Association*, 2018) <https://www.globalanimallaw.org/downloads/Folder-UNCAHP.pdf> accessed 18 December 2020.

[404] See discussion at chapter V section 4.

welfarist model.[405] A draft treaty developed through cross-cultural, global discussion may find wider support. Second wave situatedness and intersectionality imperatives demand broader discussion in these drafting exercises.

Another proposal for a new framework rectifies some of the issues with treaty proposals. This proposal is the grassroots movement proposing adopting a UN declaration on animal welfare (UDAW) containing non-binding principles on animal welfare.[406] The UDAW, succeeding a proposed declaration of animal rights, was proposed by animal welfare organisations worldwide, led by World Animal Protection.[407] It applies to domestic and wild species, avoiding dichotomisation. The UDAW avoids flaws of the proposed treaties by garnering support from across the globe, including the EU's ministers of agriculture, the American Veterinary Medical Association, the Islamic Conference on Animal Welfare, the OIE, governments including Cambodia, Fiji, New Zealand, Palau, the Seychelles, Switzerland and the EU member states, as well as over two million individuals who have signed a petition.[408]

The UDAW has been critiqued as vague and unable to impact change in countries with established animal welfare regimes.[409] However, the instrument's power is primarily normative. This is significant for global animal law's growth. Despite wide support and a light-handed, non-binding approach, the UDAW remains unadopted and campaigning efforts have dwindled. This highlights the importance of wide, diverse support for such instruments. The UDAW is the proposal that best complies with second wave animal ethics. However, it neglects the multi-scale, relational operation of global law. Animal law scholars have been preoccupied with international law, particularly a uniting and universally scaled instrument. This alone is insufficient. Thus, the recommendations in this thesis will address universality as well as connectivity and multi-scale solutions to trade and animal welfare problems.

4. Conclusion

[405] White (n 125) 396.

[406] Otter, O'Sullivan and Ross (n 10) 66.

[407] 'Universal Declaration of Animal Rights' (*National Council for the Protection of Animals*, 1978) <https://constitutii.files.wordpress.com/2016/06/file-id-607.pdf> accessed 18 December 2020; Miah Gibson, 'The Universal Declaration of Animal Welfare' (2011) 16(2) Deakin Law Review 539, 539, 541, 548 et seq.

[408] Gibson (n 407) 542; Otter, O'Sullivan and Ross (n 10) 67; White (n 125) 395.

[409] Gibson (n 407) 546–547, 551.

Global animal law, thus far, presents various deficiencies from a second wave perspective. In its first part, this chapter explored animal law in domestic, regional and international law. This mapped those laws that one might consider attaching a global label to. This law also contextualises and inspires global animal law practice and scholarship. The conclusion was reached that animal law neglects second wave ideas. It relies upon similarity theory, forecloses consideration of non-sentient Others, neglects intersectional insights, acquiesces with the liberal tradition and neglects alternative concepts of care and deep listening. These are deficient roots from which global animal law grows.

In its second part, this chapter identified the global features of animal law. These features were built into a proposed intersectional conception of the global encompassing global law metatheory and second wave animal ethics. This achieved two objectives. First, a nuanced, precise conception of global law and critique of the use of global terminology to refer to universally applied international law. Second, a second wave-inspired rejection of coloniality and a requirement of diverse participation and ideas for global animal law. Because certain global law metatheory risks coloniality, this literature was treated carefully and combined with second wave animal ethics.

The ideas and frameworks within existing global animal law (scholarship) were revealed as relying on dichotomies (wild/domestic), advancing universalised conceptions of justice and neglecting connective and multi-scale global law. Charlotte Blattner's work on extraterritorial jurisdiction is an exception and its connective proposals for trade and animal welfare are explored in chapter IV.[410] Global animal law scholarship was also revealed as meritorious but focused on international law instruments and falling short of second wave standards due, in part, to a dominance of western scholarship on global animal law. Such narrowly conceptualised law is bound for illegitimacy and ineffectiveness when enforced across the globe. Animal law scholars must refrain from global language when talking merely about international law for animals. At present, global animal law is not global at all; it is western-driven and features coloniality.

These conclusions contextualise the discussion of trade and animal welfare that will follow. The following two chapters point to the deficiencies in the policy, law and scholarship that govern trade in animals and their bodies. International trade law and scholarship are shaping global animal law normativity, practice and policy. They are also case studies of global animal law's deficiencies. This is concerning because global animal law's second wave deficiencies are more greatly evident in international trade law. Trade law significantly impacts global animal law because it impacts consumption habits by permitting new products into markets, impacting the lives of consumed

[410] See chapter IV section 3.2.2.

animal.[411] Thus, tackling trade is essential to reorienting global animal law and improving the lives of animals who are traded.

Chapter III explores trade flows, normative underpinnings of trade, and evolving trade policy. This reveals the sources and impact of the deficiencies in international trade law and scholarship analysed in chapter IV. Chapter V maps an alternative road forward based on the intersectional conception of global animal law elaborated here. This relies upon second wave animal ethics and the connectivity, future-orientation and post-Westphalian features of global law. These are essential to resolve the issue of trade and animal welfare, introduced in the next chapter by opening the readers' eyes to the horrors which animals are subjected to due to trade policy.

[411] Trade's impact on consumption is significant for other governance issues like the nutrition transition. See Anne Marie Thow et al, 'Trade and the Nutrition Transition: Strengthening Policy for Health in the Pacific' (2011) 50(1) Ecology of Food and Nutrition 18.

Chapter III

Trading Animals and their Bodies:

The Norms, Trade Flows and Policies Undergirding the Business of turning Tortuous Lives and Untimely Deaths into Profit[1]

1. Introduction

> *To genuinely engage with a new frontier of justice, for animals or otherwise, requires what bell hooks calls a "radical openness" of mind, of being able to receive new, different, and challenging ideas from a space of learning, teaching, and humility.*[2]

Radical openness is sorely lacking in conversations regarding the trade in animals and their bodies. The norms, policies and laws that facilitate this trade are paternalistic, conservative and deeply anthropocentric. This means that they fail to respect and reflect animals' senses of what is in their best interest.[3] Indeed, there is little interest amongst traders, regulators and commentators to investigate what traded animals consider to be in their best interests in the first place. This problem is reflected in the disparity between liberal trade ideology and the normative and ethical underpinnings of the animal liberation movement. This is also reflected in neoliberal trade policy that promotes a laissez-faire attitude toward trading animals and their bodies.

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[1] Note that an adapted form of this chapter is published as: Iyan Offor, 'Animals and the Impact of Trade Law and Policy: A Global Animal Law Question' (2020) 9(2) Transnational Environmental Law 239

[2] Maneesha Deckha, 'Animal Justice, Cultural Justice: A Posthumanist Response to Cultural Rights in Animals' (2007) 2 Journal of Animal Law & Ethics 189, 198 citing bell hooks, *Teaching Community: A Pedagogy of Hope* (Routledge 2003) 48.

[3] Tom Regan, *The Case for Animal Rights* (University of California Press 2004) 104–105.

The practice of trading animals and their bodies has a deep-rooted history beginning with the export of wool from Crete to Egypt in 2000 to 1500 BC.[4] Animal trade has significantly benefited humankind, enabling us to evolve from hunter-gatherers to settled agriculturalists.[5] Trade in animal products particularly grew following the concentration of people into cities and towns.[6] However, just like animal agriculture, the exploitative dynamic of animal trade has evolved through periods of war, colonisation, and industrialisation, becoming increasingly harmful over time.[7] Ancient donkey-trodden trading routes are now found buried beneath modern road infrastructure or serving as hiking trails. The modern vision of trade in animal products is, instead, one of shipping containers filled with leather or seal skin, refrigerated trucks transporting chilled meat cuts, lorries carrying live animals across borders to slaughter, and air transport that is so frequent that JFK airport opened an 'animals only' terminal[8] in 2016. Animals, as ever, constitute a 'sort of zoo-proletariat', their bodies exploited for labour in life and for capital product in death.[9]

Trade in intensively farmed meat, dairy and fish is particularly troubling due to its volume and the suffering it forces upon animals.[10] Live sheep shipped for slaughter from Australia to Southeast Asia and the middle east regularly perish from heat stress.[11] Scottish salmon exports reached a record high in 2018[12] despite recent reports on the industry's negative impacts on animal welfare.[13] Ukraine has developed a battery cage egg industry for export to the EU, undermining the objectives of the EU's domestic ban on battery cage egg farming.[14] Trading animals and their bodies is inherently exploitative because it treats animals as property.[15] Further, the practices associated with modern animal trade resemble the vampiric, dystopian nightmare that is the

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[4] Clive JC Phillips, *The Animal Trade: Evolution, Ethics and Implications* (CABI Publishing 2015) 2.

[5] ibid 1.

[6] ibid 28.

[7] ibid 1–27 and 36.

[8] ibid 153.

[9] Rosi Braidotti, *Nomadic Theory: The Portable Rosi Braidotti* (Columbia University Press 2011) 70.

[10] Ruth Harrison, *Animal Machines: The New Factory Farming Industry* (London Vincent Stuart 1964).

[11] Calla Wahlquist, 'RSPCA Accuses Government of Backflip on Welfare for Live Exports from Australia' (*The Guardian*, 2019) <https://www.theguardian.com/australia-news/2019/sep/28/rspca-accuses-government-of-backflip-on-welfare-for-live-exports-from-australia> accessed 18 December 2020.

[12] 'Record Year for Scottish Salmon Exports' (*Scottish Salmon Producers Organisation*) <https://www.scottishsalmon.co.uk/news/business/record-year-for-scottish-salmon-exports> accessed 18 December 2020.

[13] Rob Edwards, 'Horror Photos of Farmed Salmon Spark Legal Threat' (*The Ferret*, 2018) <https://theferret.scot/pictures-diseases-farmed-fish/> accessed 18 December 2020.

[14] See below at section 3.3.

[15] Gary L Francione, *Rain without Thunder: The Ideology of the Animal Rights Movement* (Temple University Press 1996) 3 et seq.

western factory farming model.[16] Despite this, trade in animal products continues to grow. Extra-EU trade in animal products has increased by around 87% in value since 2002, amounting to over 73 billion euros in 2019 (about 1.78% of all extra-EU trade).[17] This is facilitated by trade policy which distorts animal trade through subsidies which have 'prop[ped] up an industry that would have failed a number of times on its own'.[18]

This reveals the overwhelmingly economic objectives of the actors involved and the great disparity between the objectives of free trade proponents and animal advocates. Trade in animal products occurs, regardless of the impact on animals, because imported products are cheaper, of better quality, or more readily available than comparable domestic products.[19] When disease outbreak or human health concerns are raised, various animal trades have 'frequently and quickly' halted.[20] Contrastingly, impairment of animal welfare has not, on the whole, disrupted this trade. This is reflective of the liberal ideology upon which international trade is based: it aims at achieving economic efficiency so as to improve economic growth for states, incomes for individuals, employment rates, and standards of living.[21] The liberal ideology upon which trade is based is anthropocentric and, insofar as it is concerned with welfare, it excludes the welfare of animals.[22] This is far removed from second wave animal ethics.

This chapter will explore both the underlying norms and the laissez-faire policy that combine to make the subject of trade one of utter horror from the animal perspective. This will elucidate the normative and policy links between trade and animal welfare, demonstrating that

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[16] See storied accounts of animal suffering in Peter Singer, *Animal Liberation* (Harper Perennial ed, 4th edn, 2009); Regan (n 3); and Jonathan Safran Foer, *Eating Animals* (Little, Brown and Company 2009). On the value of emotional response, see Josephine Donovan and Carol J Adams (eds), *The Feminist Care Tradition in Animal Ethics* (Columbia University Press 2007).

[17] Data sourced on 4 August 2020 from 'International Trade' (*Eurostat*) <http://epp.eurostat.ec.europa.eu/newxtweb/> accessed 18 December 2020 The dataset used is entitled 'EU Trade Since 1988 By HS2, 4, 6 and CN8 (DS-045409). The products included in the analysis are categorised by the Harmonized System (a tariff classification nomenclature developed by the World Customs Organization). See International Convention on the Harmonized Commodity Description and Coding System (adopted 14 June 1983, entered into force 1 January 1988) 1503 UNTS 167. The products included are HS categories 01, 02, 0301, 0302, 0303, 0304, 0305, 0502, 0503, 0504, 0505, 0506, 0507, 0508, 0509, 0510, 0511, 1501, 1502, 1503, 1504, 1505, 151610, 1601, 1602, 1603, 1604, 2301, 41, 4301, 4302, 51, 6701, 6702.

[18] Phillips (n 4) 31–34.

[19] Most commonly explained by reference to varying opportunity cost, division of labour and specialisation as posited by David Ricardo's theory of comparative advantage in David Ricardo, *The Principles of Political Economy and Taxation* (John Murray 1817).

[20] Phillips (n 4) 36–37.

[21] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (4th edn, Cambridge University Press 2017) ch 1.2. For the history of liberal and neo-liberal thought, see Rachel S Turner, 'The "Rebirth of Liberalism": The Origins of Neo-Liberal Ideology' (2007) 12(1) Journal of Political Ideologies 67, 67–83.

[22] See further below at section 2.1.2.

trade is a global animal law issue. Trade norms and policy negatively impact animals' lives and the development of global animal law. Chapter II concluded that global animal law is often not really global and often falls short of second wave animal ethics. This chapter builds on this conclusion by arguing the permeation of trade into global animal law has influenced and exacerbated these problems. This paves the way to identify the impact of international trade law and literature on global animal law in chapter IV, necessitating second wave-inspired recommendations for scholarship, policy and law in chapter V.

This chapter will proceed in two parts. First, this chapter will explore the normative, ideological underpinnings of trade law which have neglected the question of the animal. This necessitates an investigation into (neo)liberalism and, specifically, the culmination of the Geneva School of neoliberalism's practice in the establishment of the World Trade Organization (WTO).[23] This part will point out gaps and deficiencies in the normative underpinning of international trade law and policy both generally and from a second wave animal ethics perspective. This will flow into discussion of the linkage debate in literature on the WTO and how this has perpetuated a harmful dichotomy between trade and so-called 'non-trade concerns'.

Second, this chapter will set out how trade liberalisation policy negatively impacts animals' lives. This research fills a critical gap in the research on trade and animals: at present, we do not know, empirically, what the impact of trade on animal welfare is. Researchers are increasingly complacent regarding the heavy hand of international trade law in global governance for animals.[24] This is a consequence of adoption of neoliberal trade priorities, language and assumptions. Researchers are not asking fundamental empirical and critical questions regarding the impact of trade. Most researchers assert the negative impact of trade upon animal welfare without seeking to argue or evidence this.[25] A very small subset of the literature identifies and assesses correlation and

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[23] See below at section 2.2.

[24] See chapter IV, section 3.

[25] Lewis Bollard, 'Global Approaches to Regulating Farm Animal Welfare' in Gabriela Steier and Kiran Patel (eds), *International Farm Animal, Wildlife and Food Safety Law* (Springer International Publishing 2017) 99; Harald Grethe, 'High Animal Welfare Standards in the EU and International Trade - How to Prevent Potential "Low Animal Welfare Havens"?' (2007) 32(3) Food Policy 315, 316; Stuart Harrop and David Bowles, 'Wildlife Management, the Multilateral Trade Regime, Morals and the Welfare of Animals' (1998) 1(1) Journal of International Wildlife Law & Policy 64, 71; AL Hobbs et al, 'Ethics, Domestic Food Policy and Trade Law: Assessing the EU Animal Welfare Proposal to the WTO' (2002) 27(5–6) Food Policy 437, 439; Thomas G Kelch, *Globalization and Animal Law: Comparative Law, International Law and International Trade* (2nd edn, Kluwer Law International 2017) 265; Andrew Jensen Kerr, 'The Trans-Pacific Partnership and the Construction of a Syncretic Animal Welfare Norm' (2016) 27(1) Duke Environmental Law and Policy 155, 155; Andrew Lurié and Maria Kalinina, 'Protecting Animals in International Trade: A Study of the Recent Successes at the WTO and in Free Trade Agreements' (2015) 30(3) American University International Law Review 431, 433; Anne Peters, 'Global Animal Law: What It Is and Why We Need It' (2016) 5(1) Transnational Environmental Law 9, 17; Edward M Thomas, 'Playing Chicken at the WTO: Defending an Animal Welfare-Based Trade Restriction Under GATT's Moral Exception' (2007) 34(3) Boston College Environmental Affairs Law Review 605, 609.

causality between freer trade and low animal welfare.[26] Due to this research gap, insufficient critique is launched against policymakers who prove consistently comfortable with prioritising trade objectives over animal welfare protection. It is also impossible to design effective policy responses because we do not yet have a clear picture of the problem or how it has been impacted by existing policy on trade and animal welfare.

I will analyse four component parts of the impact of trade on animal welfare. These four parts consist of: (1) open markets, (2) low animal welfare havens, (3) a chilling effect, and (4) a lack of labelling.[27] In this way, this chapter demonstrates how deep listening to animals in global animal law research ought to be operationalised and utilised in building research methodologies. The empirical research in the second part of this chapter focuses on policy of the European Union (EU). The EU is the only legislator to include animal welfare in its trade policy.[28] The implementation of these policies, coupled with relevant trade data, provides the information necessary to work toward filling the research gaps on the impact of trade. The EU is also an attractive case study because it positions itself as a global leader on animal welfare.[29] I wish to dispel that notion in this chapter and in the chapters that follow. The EU may enact more animal welfare legislation than other legislators, but with regard to trade, the real-world impact of its policies is negligible and even harmful.

The two parts of this chapter will lead to the conclusion that a radical openness is needed which can be facilitated by transplanting the trade and animal welfare debate from the fringes of the trade linkage debate to the core of the emerging academic discourse on global animal law. This represents a methodological use of second wave animal ethics as a means to identify problems in practice and the associated literature in order to consider how to reconceptualise the problem and the literature by engaging in deep listening. This is essential in order to think about what kinds of policies might allow animals to live better lives, even when their bodies are traded.

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[26] See, for example, Erica Strader, 'The Future of Horse Slaughter: What Is Best' (2013) 15 Oregon Review of International Law 293.

[27] See below at section 3.1

[28] The UK looks unlikely to follow suit post-Brexit. See Michael Savage, 'Cabinet Unrest over U-Turn on Animal Welfare in US Trade Talks' (*The Guardian*, 2020) <https://www.theguardian.com/politics/2020/jun/06/uk-accused-u-turn-animal-welfare-us-trade-talks> accessed 18 December 2020.

[29] Peter L Fitzgerald, '"Morality" May Not Be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law' (2011) 14 Journal of International Wildlife Law & Policy 85, 88 citing European Parliament, 'Report on evaluation and assessment of the Animal Welfare Action Plan 2006-2010' 2009/2202(INI), 4; Rob Howse and Joanna Langille, 'Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values' (2011) 37(2) Yale Journal of International Law 367, 376; Lenke Wettlaufer, Felix Hafner and Jakob Zinsstag, 'The Human-Animal Relationship in the Law' in Jakob Zinsstag et al (ed), *One Health: The Theory and Practice of Integrated Health Approaches* (CABI Publishing 2015) 31.

2. Neoliberal "Free" Trade Ideology and the Cost Borne by Animals

2.1. The Origins and Operationalisation of Neoliberal Free Trade Ideology

Neoliberal free trade ideology and policy grew in response to the fact that 'historically, free trade is the exception and protectionism the rule'.[30] States have typically acted against their long-term economic self-interest by enacting protectionist policies in order to pursue short-term economic goals such as the protection of a fledgling domestic industry from foreign competition or in order to achieve or maintain self-sufficiency.[31] In some cases, states have also restricted trade to protect societal values such as environmental protection, labour rights, or animal welfare. States' protectionist policies include tariff barriers and, increasingly, non-tariff barriers (including, *inter alia*, quantitative restrictions on trade and technical barriers to trade). Neoliberal trade policy emerged in order to limit and, eventually, eradicate these restrictions on imports and exports of products and services.

Neoliberal free trade ideology and policy ground law on multilateral trade liberalisation, including the work of the WTO. This section will first set out the objectives and functions of the WTO, the culmination of growing trade liberalising multilateralism. Then, this section will set out the neoliberalism underpinning international trade law, which has given the WTO a reputation as the enemy of animal liberation. This will frame the discussion of trade law and shifting scholarly and advocacy narratives regarding the WTO (and other trade law mechanisms like bilateral free trade agreements) in chapter IV. This will also explain why the infiltration of trade law into global animal law is concerning, given the neglect of second wave animal ethics imperatives.

2.1.1. The Growth of Multilateral Trade Policy

The General Agreement on Tariffs and Trade 1947 (GATT)[32] was ratified following World War II in order to achieve two goals: 'keeping the peace, and expanding world economic development

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[30] Paul Bairoch, *Economics and World History: Myths and Paradoxes* (Harvester Wheatsheaf 1993) 16.

[31] What is in a state's best interests is deduced with reference to Ricardo (n 19). On self-sufficiency, see Boris Rigod and Patricia Tovar, 'Indonesia-Chicken: Tensions between International Trade and Domestic Food Policies?' (2019) 18(2) World Trade Review 219.

[32] General Agreement on Tariffs and Trade (15 April 1994) LT/UR/A-1A/1/GATT/1 <http://docsonline.wto.org> (GATT).

and world welfare'.[33] Increased inter-state cooperation would disincentivise conflict by increasing the costs of going to war.[34] The GATT would also work to eradicate European imperial tariffs.[35] Environmental concerns did not feature heavily in the work surrounding the GATT until the treaty founding the WTO, enacted in 1994, included reference to sustainable development.[36] The WTO surrounds the GATT with an institutional framework, providing its members with access to, amongst other things, dispute settlement and trade policy review. The GATT was also supplemented with a raft of other treaties or 'covered agreements' addressing issues including technical barriers to trade and sanitary and phytosanitary measures.[37] However, these new treaties, like the GATT, are silent on the issue of animal welfare.[38]

The WTO is the only international trade organisation of its kind. It now has near universal membership, with Afghanistan joining as the 164th member in July 2016. The WTO's objectives are economic in focus: increase standards of living; attain full employment; the growth of real income and effective demand; and the expansion in production of, and trade in, goods and services.[39] WTO law primarily uses two instruments to achieve the organisation's objectives with regard to trade in goods: the reduction of tariff barriers and other barriers to trade, and the elimination of discriminatory treatment in international trade relations. On reducing tariff barriers to trade, the WTO regards tariff barriers to trade as a legitimate instrument, although it facilitates negotiations in which members are often obliged to progressively lower their tariff levels.[40] Contrastingly, the GATT contains a prohibition on the use of quantitative restrictions to trade with certain exceptions.[41] It is worth noting that agricultural products, including animal-based food products, tend to be treated differently under WTO law with additional rules for these products set out in the Agreement on Agriculture.[42]

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[33] John H Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge University Press 2006) 85–86.

[34] Van den Bossche and Zdouc (n 21) 21.

[35] Thomas Cottier, 'International Economic Law in Transition from Trade Liberalization to Trade Regulation' (2014) 17(3) Journal of International Economic Law 671, 676.

[36] Marrakesh Agreement Establishing the World Trade Organization (15 April 1994) LT/UR/A/2 <http://docsonline.wto.org> (WTO Agreement) preamble recital 1.

[37] Agreement on Technical Barriers to Trade (15 April 1994) LT/UR/A-1A/10 <http:// docsonline.wto.org> (TBT Agreement); Agreement on the Application of Sanitary and Phytosanitary Measures (15 April 1994) LT/ UR/A-1A/12 <http://docsonline.wto.org> (SPS Agreement).

[38] But not, however, on animal health. See chapter IV section 2.1.1.

[39] WTO Agreement (n 36) preamble recital 1.

[40] GATT, Art XXVIII bis.

[41] GATT, Art XI and XX.

[42] Agreement on Agriculture (15 April 1994) LT/UR/A-1A/2 <http://docsonline.wto.org> (AoA). Annex 1 of the AoA lists the products to which the Agreement applies. See further below at chapter IV section 2.1.1.

The institutions, objectives and instruments of the WTO have a firm base in neoliberal trade ideology. It is important to develop a critical understanding of neoliberal trade ideology in order to comprehend the rationale underlying various trade policies. Also, investigating the contrast between neoliberal trade ideology and animal ethics will lead into a discussion of the linkage debate in which policymakers and academics have debated the interaction of free trade ideology with other norms and values in the context of the WTO.

2.1.2. Neoliberalism Obscuring Animals behind a Veil of Objecthood

In chapter I, I critique liberalism, which has roots stretching back to the Enlightenment and various revolutions. Liberalism has multiple iterations, connected by principles of individualism, egalitarianism, universalism, meliorism and individual freedom.[43] My critique focused on liberalism's individuality. The globalisation analysed in chapter II is also a product of liberalism. This chapter critiques neoliberalism which shares liberalism's core principles but which has other particularities. Neoliberalism itself has various conceptions. Neoliberalism's uniting core as an 'ideological system' with 'intellectual, bureaucratic and political' faces is its recognition of the 'superiority of individualized, market-based competition over other modes of organization'.[44]

Neoliberalism places considerable trust in markets. Under neoliberalism, markets naturally reward efficiency.[45] Thus, policy intervention should be minimal and should function mainly to create the free market and to eradicate market distortion or failure. Of course, some intervention continues and, indeed, was central to the post-war effort to use trade as a peacebuilding exercise.[46] John Gerard Ruggie has said that, within a (neo)liberal order, 'authority relations are constructed in such a way as to give maximum scope to market forces rather than to constrain them' and so the (neo)liberal order 'limit[s] the discretion of states to intervene'.[47] Thus, the role of the state is to 'institute and safeguard the self-regulating market'.[48]

The WTO has such a role and the neoliberalism practiced at the WTO will be explored here. An important initial observation of the WTO, based on these definitional statements, is that neoliberalism (generally, and the form of neoliberalism underpinning the WTO) does not

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[43] Luc Nijs, *Neoliberalism 2.0: Regulating and Financing Globalizing Markets* (Palgrave Macmillan 2016) 20.

[44] Stephanie Lee Mudge, 'What Is Neo-Liberalism?' (2008) 6(4) Socio-Economic Review 703.

[45] Henrik Andersen, 'Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions' (2015) 18(2) Journal of International Economic Law 383.

[46] Andrew Lang, 'Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime' (2006) 9(1) Journal of International Economic Law 81, 87.

[47] John Gerard Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36(2) International Organization 379, 381.

[48] ibid 386.

synonymise 'democracy and capitalism'.[49] It does not desire the 'disappearance of the state' and it does not act to reduce 'all human motivation to the one-dimensional rational self-interest of *Homo economicus*'.[50] Indeed, there are certain inroads within liberal theory for social goals such as the protection of animal welfare. However, as was concluded in chapter I, liberalism's potential in this regard is obscured by its practice and operationalisation. Thus, it is necessary to closely investigate claims that trade neoliberalism is a sufficient tool to incorporate social goals into trade policy.

Another initial observation is that trade is widely regarded as a subject that does not benefit from intense philosophical scrutiny.[51] Thus, the ethics of trade are thought to remain somewhat elusive. For example, it has been noted that there has been little philosophical investigation of what makes 'FairTrade' fair.[52] What exists in the place of philosophical scrutiny is political ideological work. Some of this work will be explored here and, as will be seen, it comes close to philosophising in places. The literature at least provides adequate insight into the normative underpinnings of trade policy in order to assess how this may impact upon animals' lives.

This section will focus on two streams of literature. The first is the exploration of 'embedded liberalism', a coin termed by Ruggie to describe post-World War II liberalism.[53] This literature dispels misconceptions and provides exceptional clarity regarding the normative ideology that was used to form and ground the work of the WTO. The second is the exploration of trade law as provisioner of public goods and its impact on human welfare via economic liberalisation and, consequently, growth. This literature highlights the dimension of trade that is most in alignment with an exploration of ethics.

2.1.2.1. Embedded Liberalism

Embedded liberalism is distinguishable from liberalism due to its multilateral character which is 'predicated upon domestic intervention' as opposed to deference to the market.[54] Embedded liberalism is also distinguishable from liberalism by its 'commitment to social protection'.[55]

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[49] Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press 2018) 8–9. Note that Slobodian's ebook does not have page numbers and so page references refer to the PDF.

[50] ibid.

[51] Nicole Hassoun, 'Making Free Trade Fair' in Thom Brooks (ed), *New Waves in Ethics* (Palgrave Macmillan 2011) 231.

[52] ibid 231–232.

[53] Ruggie (n 47) 392.

[54] ibid 393.

[55] Lang (n 46) 97.

Ruggie's 'embedded liberalism' has been described as an early iteration of the linkage debate because it deals with the interaction of free trade with domestic regulatory autonomy.[56]

Ruggie's exploration of embedded liberalism seeks to undo assumptions that 'the trade regime has orthodox (neo)liberalism as its philosophical underpinning'.[57] Andrew Lang has posited that undoing this assumption opens space for a more critical conversation about the 'shared social purpose' the trade regime is intended to fulfil.[58] This demonstrates that the trade regime's present formulation and operation are not 'necessarily' so, but are 'contingently so'.[59] Neoliberalism is, on this view, not the inevitable normative underpinning of trade and trade regimes.

Ruggie's concept and Lang's application of it to present day questions are useful in that they avoid the essentialisation of trade. Thus, one can regard trade as an activity and area of regulatory policy that does not have an inherent character, that can be shaped and moulded in order to accommodate new societal, normative and ethical concerns. However, the extent to which this is meaningful in the case of animal protection will be questioned here. On a theoretical level, Ruggie's embedded liberalism could be envisaged to evolve so as to exclude trade in animals. This could satisfy demands of second wave animal ethics. However, on a practical policy level, to try to decouple trade from essential characteristics may shift attention away from the real and significant harm it causes to animals every day. I will explore these two conflicting points in the paragraphs that follow.

I would agree that trade, like animal protection, can have a broad and evolving normative basis. I do not think it is impossible for a neoliberal set of norms underpinning trade policy to satisfy the demands of second wave animal ethics. Second wave animal ethics broadly takes the view that animals are not property and to treat them as such is to do wrong, ethically speaking. No matter the way in which a trade regime is (re)formed, if it encompasses trade in animals and their bodies, it is unethical. It may seem inconsistent with a neoliberal underpinning for trade law and policy to exclude animal trade on an ethical basis. And yet, it is entirely consistent with neoliberal trade policy to exclude trade in human slaves or other forms of human trafficking.[60] Thus, by extension, neoliberal trade ideology ought to be able to encompass an exclusion of trade in animals and their bodies on the basis that this is ethically unacceptable. Taking Lang's broader, adaptive view of liberalism would allow for this. Lang would argue that such a change could be facilitated

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[56] ibid 91.

[57] ibid 92.

[58] ibid.

[59] ibid.

[60] Indeed, trade law has always dealt with such issues. See Steve Charnovitz, 'Linking Topics in Treaties' (1998) 19 University of Pennsylvania Journal of International Economic Law 329, 330.

by discussing trade's 'shared social purpose' rather than conceptualising the problem as one of 'degree of openness'.[61] Indeed, Lang supports such a 'rethink' of international trade at large.[62]

The danger with this view is that it may lead to misinterpretation and misassumptions that will detract from animal advocates' goals. This is highlighted by two points made in the literature. Firstly, Lang has pointed out that much of the work on trade norms, embedded liberalism in particular, obscures the question of the objectives of free trade, the 'shared social purpose' on which it is predicated, and the liberal vision for a better society and what this would entail.[63] This means that while it is possible that trade could, hypothetically, be predicated upon a shared social purpose to respect animals' abilities to flourish, trade policy and literature obscure this as a possibility. It cannot be taken for granted that just because trade policy is theoretically capable of normative evolution, that this will be achievable.

Secondly, an argument by Joost Pauwelyn highlights flaws in the application of embedded liberalism. Pauwelyn has described trade policy as an 'instrument' rather than a 'value'.[64] This is in contrast with other policies like environmental protection or human rights which he regards as imbued with value.[65] There are important deficiencies here compared to Lang's work. Pauwelyn provides no evidence that trade is more value-neutral than environmental protection. I would argue that protecting free trade, the environment, human rights, or animal welfare are all potential policy decisions which may be pursued for a multitude of reasons. None of these policy directions have an essential ideological, normative or ethical core. It is harmful to conceptualise trade as value-neutral. Indeed, one could align the argument that trade is value-neutral (while environmental and human rights protection are value laden) with western, patriarchal societal structures which forward a view of the white, cis-gendered heterosexual male as the value-neutral norm while all other forms of life are value-laden deviations.

Pauwelyn describes trade as value-neutral because it is an 'instrument to increase the *economic* welfare of states'.[66] But Pauwelyn offers no explanation as to why economic welfare is value-neutral while environmental welfare is value-laden. Within this statement, Pauwelyn has identified an ideological underpinning for trade whilst simultaneously denying that it has such a thing. This is precisely the danger that may arise if Lang's conception of trade as lacking 'essential'

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[61] Lang (n 46) 97.

[62] ibid 101.

[63] ibid 96.

[64] Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003) 73.

[65] ibid.

[66] ibid.

qualities is misused or misarticulated. Policymakers and academics may try to emphasise the changeable nature of trade policy and its normative underpinnings which may, in turn, placate environmentalists or animal advocates. This is because these groups will see that the trade regime has the potential to accommodate their concerns. However, in reality, the trade regime is just as changeable, at its core, as is the environmental protection regime. Neither has a core, essential form. Each can evolve over time, as 'collective ideas' and 'legitimate social purposes' change.[67] But, each also has a normative foundation and evolutionary history which has determined its current form and which makes achieving change a slow and difficult process, particularly in multilateral settings. Indeed, Ruggie describes the trade regime as an 'intersubjective framework of meaning'.[68] It 'consists in part of a set of collectively agreed answers to questions about why the regime itself exists and what is its domain of operation'.[69]

Trade policy may lack essential value, but it is not value-neutral. A particular, and narrow, set of values have defined neoliberal (or 'embedded liberal', if you prefer) trade policy. Gunther Teubner describes this as 'tunnel vision' and argues that democratic governance requires such regimes to open to serious critique and normative evolution.[70] Thus, it could be misleading in certain circumstances to forward a view of trade law and policy as a vessel to be filled with the values and aspirations (toward certain common goods) that are desirable to those who draft, enforce and amend the policies. While evolution is possible, envisaging evolution toward an abolition of animal trade is almost unimaginable if one were to rely solely on the structures and law-making facilities of international trade law. For this reason, I will refer to the WTO's neoliberalism rather than its embedded liberalism.

So, in sum, trade policy may experience shifts in its normative underpinning. The neoliberal underpinnings that have defined trade policy to date have shifted in significant ways, which will be discussed in the context of the linkage debate below. But, second wave animal ethics tells us that liberalism has its limits and it is not clear that an evolved neoliberal normative underpinning for trade policy would be capable of respecting and protecting animals' abilities to flourish. Further, at this point in the thesis, we are concerned with what is (the problem) as opposed to what should be (the solution), which will be explored in chapter V. Reaching solutions requires deep democratisation of global governance in the WTO and means through which to do so are explored in chapter V, contextualised with Gunther Teubner's imperatives for democracy in global

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[67] Lang (n 46) 86 citing Ruggie (n 47).

[68] ibid.

[69] ibid 104.

[70] Chapter V section 2.2.

governance.[71] The scope for change within neoliberal normativity does not take away from the concrete impact that has been felt on animals' lives, as set out later in this chapter.

2.1.2.2. Trade as Provisioner of Public Goods

Various attempts have been made to describe the WTO as a provisioner of public goods or even as a public good in itself, even though its benefits are available to states, not individuals, and to members only, not populations at large.[72] For example, the economic growth that trade promotes has been conceptualised by Amartya Sen as 'valuable capabilities and functionings' including 'lifespan, nutrition, literacy, and opportunity to develop creativity'.[73] This supports a conception of trade liberalisation as a value-laden policy, with human welfare at its core.

With regard to the animal trade, it is notable that agricultural productivity is regarded as essential to development in so-called developing countries, particularly amongst the poorest populations.[74] Thus, animal farming has been closely linked with the liberation of people from poverty. Further, it has been argued that trade in agricultural products is required because 66 countries, or 16% (51% by 2050) of the global population, depend on trade in order to satisfy domestic requirements for food.[75] Thus, some defences of trade as a public good stack human welfare against animal welfare, promoting the WTO and trade policy more widely as necessary in the fight against global hunger.

However, this may be an idealistic view of trade policy. Liberalising trade is no guarantee of equal advances in welfare. Indeed, in many circumstances trade can be seen to enhance existing inequalities of wealth and welfare, enhancing existing oppressions and harming the development efforts of the world's poorest societies. In this regard, it has been noted that there is 'no consensus on whether developing countries themselves will benefit from their own trade reforms'.[76]

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[71] Chapter V section 2.2.

[72] Petros C Mavroidis, 'Free Lunches? WTO as Public Good, and the WTO's View of Public Goods' (2012) 23(3) European Journal of International Law 731, 731–733 and 741.

[73] M Ann Tutwiler and Matthew Straub, 'Reforming Agricultural Trade: Not Just for the Wealthy Countries' in Per Pinstrup-Andersen and Peter Sandøe (eds), *Ethics, Hunger and Globalization: In Search of Appropriate Policies* (Springer 2007) 239 citing Amarty Sen, *Resources, Values and Development* (Blackwell 1984).

[74] ibid 243–244. I refer to the Global South in place of developing countries owing to the colonialism and economy-centricity inherent in the developing/developed dichotomy.

[75] Celine Charveriat, 'SDG 2.4: Can Policies Affecting Trade and Markets Help End Hunger and Malnutrition within Planetary Boundaries?' (*ICTSD*) <https://ictsd.iisd.org/sites/default/files/achieving_sdg2-ictsd_compilation_final_ch4.pdf> accessed 18 December 2020.

[76] Tutwiler and Straub (n 73) 245.

A particularly strong conclusion on this was reached by Christian Aid, which stated that economic liberalisation has 'set poor communities back a generation' in developmental terms.[77] One iteration of this is the impact of trade on global hunger. Liberalised trade has led to a transition of land-use in the Global South. This transition is seeing increases in starvation caused by a shift from the production of cheap crops for local consumption to the production of more expensive products destined for export markets.[78] Global North countries are also able to strongarm Global South countries into agreeing to trade policies that are against their interests by blackmailing them with aid withdrawal.[79] This has enabled the Global North to, for example, push for subsidy restrictions that disproportionately impact the Global South whilst leaving the Global North with relative freedom.[80] For this reason, the human welfare benefits of trade liberalisation cannot be neatly stacked against the benefits of restricting trade to protect animals because the benefits to human welfare of increased economic development appear vastly uneven.

This highlights the dangers of relying on political ideology without giving due consideration to ethics. When negotiations for trade in agricultural products are not able to recognise and prioritise the right to 'national food sovereignty' in an effort to avoid raising hunger levels, there is clearly a serious problem with the normative framework of this law-making process.[81] When political ideology, as it invariably does, relies upon the 'pernicious myth of an infinitely expanding economy on a finite planet',[82] it is surely bound for failure. At present, the normative foundations of trade law are not capable of contemplating questions such as this, posed by John Stuart Mill: '[t]owards what ultimate point is society tending by its industrial progress'?[83] The intrinsic value in economic growth seems to be a myth, especially when such growth seems invariably to be coupled with increasing inequality (as in the case of trade liberalisation).[84]

On this basis, it is eminently unclear how trade policy might be regarded, with its current global impacts, as a provisioner of public goods. Or, at the very least, it must be deemed a poorly regulated and deeply dysfunctional provisioner of public goods due to its impact on wealth

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[77] Devinder Sharma, 'Agricultural Subsidy and Trade Policies' in Per Pinstrup-Andersen and Peter Sandøe (eds), *Ethics, Hunger and Globalization: In Search of Appropriate Policies* (Springer 2007) 263 citing Christian Aid, *Taking Liberties: Poor People, Free Trade and Trade Justice* (Christian Aid 2004).

[78] Deane Curtin, 'Toward an Ecological Ethic of Care' in Josephine Donovan and Carol J Adams (eds), *The Feminist Care Tradition in Animal Ethics* (Columbia University Press 2007) 99.

[79] Sharma (n 77) 267.

[80] ibid 270–271.

[81] ibid 277.

[82] Samuel Alexander, 'Earth Jurisprudence and the Ecological Case for Degrowth' in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press 2011) 294.

[83] John Stuart Mill, *Principles of Political Economy* (Augustus M Kelly ed, 1973).

[84] Alexander (n 82) 296.

disparity and hunger. There is a much wider debate to be had here and the literature on this issue is much wider than space allows for here. The sources drawn from here are sufficient for present purposes. These purposes are: to sow a seed of doubt regarding the marketing of the WTO as an institution that prioritises human welfare and which is necessary for the improvement of welfare; and to demonstrate that there is conflict and dissonance in discussion regarding the norms underlying trade policy. If development is at the heart of the WTO's normative justification, then why is inequality and harmful impact not taken seriously? Such questions are dealt with well by Lang, discussed below, when he argues for a wider reconception of the WTO's purpose rather than internal dispute regarding its appropriate boundaries. This accords with Teubner's proposals for democracy in global governance explored in chapter V.[85]

This discussion of public goods speaks to the linkage debate, which intensified in the 1990s.[86] The linkage debate has seen neoliberalism put in conversation/competition with alternative normative systems in order to determine the WTO's appropriate role in the provision of global public goods such as environmental protection and protection of labour rights. In this sense, the linkage debate appears as a natural home for a conversation regarding the interaction of neoliberalism and animal ethics and their policy implications. Yet, there are restrictions inherent in positioning this conversation within the linkage debate which will be elucidated here. The recommendation that will be introduced in the conclusion to this chapter and then fully realised in chapter V is that this conversation be held in critical global animal law spaces instead.

2.2. The Linkage Debate

The linkage debate is a conceptual battleground where the notion of free (or liberalised) trade (described as the 'normative justification for the WTO')[87] and the WTO's treatment of so-called 'non-trade concerns' (primarily environmental and labour concerns) have been dissected and scrutinised.[88] As a consequence of this, the WTO is opined to have witnessed the failure of neoliberalism with the normative changes that followed the Battle in Seattle.[89] The Battle in Seattle

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[85] Chapter V section 2.2.

[86] Andrew Lang, 'Reflecting on "Linkage": Cognitive and Institutional Change in The International Trading System' (2007) 70(4) Modern Law Review 523, 530.

[87] David M Driesen, 'What Is Free Trade? The Real Issue Lurking Behind the Trade and Environment Debate' (2001) 41 Virginia Journal of International Law 279, 284.

[88] WTO references 'non-trade concerns' in Agreement on Agriculture (15 April 1994) LT/UR/A-1A/2 <http://docsonline.wto.org> (AoA) preface. For a list of the core linkage debate literature, see Lang (n 86) 523.

[89] Slobodian (n 49) 9.

consisted of civil society protests surrounding a WTO Ministerial Conference held in that city, inspired by anti-globalisation sentiment.[90]

Slobodian identifies the Geneva School of neoliberalism as that which prevailed at the GATT.[91] Its 'high point' was the formation of the WTO.[92] He defines the Geneva School as recognising the need for 'various forms of international and even global governance', seeking to distance it from misconceptions of neoliberalism as favouring libertarian deregulation.[93] This is contrasted with other neoliberal schools and is distinct from the so-called Washington consensus that surrounded the 'Bretton Woods' era of trade.[94] Nonetheless, Geneva School ideology at the WTO provides useful context for the linkage debate. The Geneva School endorsed a philosophy of not just free markets but also 'double government' in the sense that global WTO governance is additional to domestic governance.[95] At the same time, the neoliberals and their trade policies sought to solidify the 'investor and the corporation' as the 'paradigmatic rights-bearing subject', in contrast to the growth of individual human rights in the 20th century.[96]

This normative foundation was found by linkage scholars to be at odds with other societal priorities. The linkage debate has critiqued the WTO for, at times, providing inadequate regulatory autonomy to its members to enact trade restrictive measures aimed at environmental protection or safeguarding labour rights.[97] Indeed, the WTO Appellate Body has identified this issue as one of the most challenging tasks in resolving disputes.[98] It has also come to define important elements of the WTO's legal culture which, as will be seen, have begun to seep into the structures and debates of global animal law. Neoliberal economic objectives are at the heart of the GATT - enacted in the Bretton Woods era of trade - and of the WTO. Consequently, the restriction of trade in order to protect, for example, animal welfare, goes against the substantive trade liberalisation rules of the WTO and has drawn the ire of many trade policy officials and

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[90] Kit Oldham, 'WTO Meeting and Protests in Seattle (1999) - Part 1' (*HistoryLink.org*, 2009) <http://www.historylink.org/File/9183> accessed 18 December 2020.

[91] Slobodian (n 49) 14.

[92] ibid 29.

[93] ibid 24.

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

[95] Slobodian (n 49) 29.

[96] ibid 120.

[97] Montserrat González-Garibay, 'The Trade-Labour and Trade-Environment Linkages: Together or Apart?' (2011) 10(2) Journal of International Trade Law & Policy 165.

[98] Inu Manak, 'Farewell Speech of Appellate Body Member Peter Van Den Bossche' (*International Economic Law and Policy Blog*, 2019) <https://ielp.worldtradelaw.net/2019/05/farewell-speech-of-appellate-body-member-peter-van-den-bossche.html> accessed 18 December 2020.

academics.[99] This dichotomy is perpetuated in WTO disputes and in much of the linkage debate literature.[100] This section sets out this dichotomous thinking before outlining a more critical, nuanced approach. This also frames the empirical research below.

In the first *US – Tuna* case before a GATT panel, a US dolphin-protection measure was found to discriminate against Mexican fishing fleets.[101] The panel dismissed the US conservation objectives, permitting members to pursue 'full use of the world's resources'.[102] The (unadopted) GATT panel decision was criticised for failing to give due deference to environmental objectives and for classifying environment-protecting trade restrictions as having an illegitimate extraterritorial effect.[103] However, over time a gradual shift has occurred. The WTO shows more deference to members' objectives regarding societal concerns, including the environment and animal welfare.[104] *US – Shrimp* diverged from the earlier GATT panel ruling in *US – Tuna* by stating that extraterritorial measures, which condition market access upon the exporting country adopting a particular policy, is probably a common feature of measures that fall within the scope of the article XX GATT exceptions.[105] Thus, WTO members are not barred *per se* from restricting trade in order to pursue environmental protection. The *US – Tuna* issue re-emerged in a saga of cases (*US – Tuna II*) that permit further space for members' trade restrictions with environmental objectives.[106] These disputes followed enactment of the 1995 WTO Agreement in which a reference to sustainable development is included.[107]

Extensive commentary on these disputes will not be repeated here.[108] In sum, the WTO, largely via its dispute settlement system, has come much closer to striking a good balance between

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[99] Jagdish Bhagwati, 'On Thinking Clearly About the Linkage Between Trade and the Environment' (2000) 5 Environment and Development Economics 485, 494.

[100] Eg, references to separate 'realms' in Daniel C Esty, 'Bridging the Trade-Environment Divide' (2001) 15(3) Journal of Economic Perspectives 113, 126.

[101] GATT Panel Report, *United States - Restrictions on Imports of Tuna* (unadopted, 1992) GATT BISD 39S (US - Tuna I).

[102] Catherine Jean Archibald, 'Forbidden by the WTO? Discrimination Against a Product When Its Creation Causes Harm to the Environment or Animal Welfare' (2008) 48(1) Natural Resources Journal 15, 18.

[103] Harrop and Bowles (n 25) 85–86.

[104] Robert Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary" (2016) 27(1) European Journal of International Law 9, 36–38.

[105] Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (1998) WT/DS58/AB/R (US - Shrimp) para 121.

[106] Robert Howse, 'Last Week's Tuna II WTO Panel Report: Happy Ending to a Hair-Raising Adventure on the High Seas' (*International Economic Law and Policy Blog*, 2017) <http://worldtradelaw.typepad.com/ielpblog/2017/11/last-weeks-tuna-ii-wto-panel-reporthappy-ending-to-a-hair-raising-adventure-on-the-high-seas-.html> accessed 18 December 2020.

[107] WTO Agreement (n 36) preamble recital 1.

[108] See chapter IV section 2.3.1 and overview in Van den Bossche and Zdouc (n 21) 544–557.

liberal free trade objectives and issues such as environmental protection.[109] It is notable that the dispute settlement body does not have a legislative mandate and while this evolution impacts the implementation of the rules, the rules themselves remain unchanged. The question of animal welfare has received less attention within the linkage debate, though this is changing. Chapter V will argue that this literature should be radicalised, moving it from the edges of the linkage debate to the centre of emerging animal-centric global animal law literature in order to avoid being taken over by the normative force of neoliberal trade norms.[110] Although, it is true that some trade and animal welfare literature already contributes to global animal law research and the divide between the two is not harsh. Rather, what I recommend is a normative and ideological shift which would facilitate inclusion of second wave animal ethics ideas. Despite the improving balance of free trade and other objectives, the evolving application of the WTO rules in disputes has revealed the potentially detrimental force of trade law and has given rise to concern amongst academics.[111] This has led to a critique of dichotomous thinking within the linkage debate.

Conducting a critical inquiry of the norms underpinning free trade requires asking what it is that 'free trade' is to be free from.[112] The current trade law regime amalgamates three conceptions of free trade: trade free from discrimination;[113] trade free from international coercion whereby one state may try to influence another to adopt particular policies;[114] and trade 'free of national regulation under a broad laissez-faire conception'.[115] So called 'non-trade concerns' such as animal welfare are permissible as exceptions to free trade rules rather than as encompassed within the scope of free trade.[116] This is true even though they may appear discriminatory, coercive or inappropriately regulatory. This conceptual dichotomy lies at the heart of the WTO's reluctance to legitimise 'non-trade issues'.

However, the meaning of free trade is not static or pure.[117] Rather, it is a highly contextual concept that 'varies in meaning across time and across political cultures'.[118] Law can be used to

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[109] ibid 544–57.

[110] See further at chapter V section 3.

[111] See particularly on the sprawling *US - Tuna* saga: Cary Coglianese and André Sapir, 'Risk and Regulatory Calibration: WTO Compliance Review of the US Dolphin–Safe Tuna Labeling Regime' (2017) 16(2) World Trade Review 327, 336.

[112] Driesen (n 87) 300.

[113] ibid.

[114] ibid 285.

[115] ibid.

[116] ibid 286.

[117] Lang (n 86) 523–549.

[118] ibid 524–525.

'renew and re-imagin[e]' that concept.[119] In this way, developments within global animal law could impact upon the normative underpinnings of trade law. Unfortunately, contributors to the linkage debate have largely embraced the dichotomous thinking introduced above, accepting concerns such as animal welfare to be 'non-trade issues'.[120] The WTO has also failed to offer an explanation as to why 'non-trade issues' are defined as such.[121] Andrew Lang has pointed out that 'it is not self-evident, of course, that the major international institution presiding over the global trade system has no business addressing the social and environmental impacts of that system, and that such impacts are not "trade issues"'.[122]

It is this thinking that has led to an erroneous and harmful approach to externalities in trade and commerce more broadly. Externalities consist of the impact of production on, for example, human rights, human health, the environment, and animal welfare. Externalities are often excluded from product prices, though they are an undeniable *cost*.[123] Thus, we develop misconceptions such as that low welfare animal products (derived from antibiotic-reliant, chemically toxic farming methods)[124] are cheaper when, in fact, they have far greater *costs* than higher welfare products. Incidentally, poor welfare practices often result in higher costs even when excluding consideration of externalities.[125]

Much of the linkage debate has sought to design frameworks to determine the boundaries of the WTO; which issues are in and which are out.[126] However, this decision has been described by WTO insiders as primarily one of politics rather than legal competence.[127] This has played out in the Doha Round of WTO negotiations.[128] Advancements into 'investment, competition policy

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[119] ibid 547.

[120] Andersen (n 45); Laurens Ankersmit, Jessica Lawrence and Gareth Davies, 'Diverging EU and WTO Perspectives on Extraterritorial Process Regulation' (2012) 21 Minnesota Journal of International Law Online 14; Esty (n 100).

[121] Steve Charnovitz, "Triangulating the World Trade Organization' (2002) 96(1) American Journal of International Law 28, 28.

[122] Lang (n 86) 537.

[123] Pamela A Vesilind, 'Continental Drift: Agricultural Trade and the Widening Gap between European Union and United States Animal Welfare Laws' (2010) 12(2) Vermont Journal of Environmental Law 223, 225.

[124] Kyle Ash, 'Why "Managing" Biodiversity Will Fail: An Alternative Approach to Sustainable Exploitation for International Law" (2007)' (2007) 13(2) Animal Law Review 209, 221.

[125] Michael Bowman, 'Conflict or Compatibility - The Trade, Conservation and Animal Welfare Dimensions of CITES' (1998) 1(1) Journal of International Wildlife Law & Policy 9, 15; Gaverick Matheny and Cheryl Leahy, 'Farm-Animal Welfare, Legislation, and Trade' (2007) 70(1) Contemporary Problems 325, 328.

[126] Eg Charnovitz (n 121); Jeffrey L Dunoff, 'Rethinking International Trade' (1998) 19 University of Pennsylvania Journal of International Economic Law 347; Philip M Nichols, 'Corruption in the World Trade Organization: Discerning the Limits of the World Trade Organization's Authority' (1996) 28 NYU Journal of International Law & Policy 711. See ch V for discussion, insofar as it is useful, on how animal welfare fits within these frames.

[127] Debra P Steger, 'Afterword: The "Trade and …" Conundrum—A Commentary' (2002) 96 American Journal of International Law 135, 135.

[128] Chapter IV section 2.1.

(i.e., antitrust), and government procurement' were more widely welcomed than social concerns like environmental protection.[129] The in-out debate has subsequently been recognised as largely missing the point.[130] It is better to ask 'whether the WTO and its substantive law fit within the larger picture of the legal construction of globalisation and how this legal development should proceed'.[131] After all, if the impact of trade could be deemed to be central to trade governance, such issues would be 'in' due to their very nature.[132] These issues relate closely to the questions of constitutionalisation and global governance raised in chapter II.

Regarding impact, trade in animals and their bodies naturally impacts upon their welfare and so this issue cannot be artificially divorced from trade policy. Joel Trachtman has an erroneous, diverging view here. He argues that linkage issues are always 'constructed' by a 'political decision' to link the subjects and the link is not 'otherwise determined by the nature of things'.[133] It is not political to state that animals' lives are impacted when their bodies are traded. It is a fact; it is the nature of things. It is not fruitful to weigh animal welfare against the various in-out frames developed. Rather, it will be argued in chapter V that animal welfare, by its very nature, is already a factor in WTO work. It has simply been neglected thus far.

It is not an inevitability that 'free trade' must exclude animal protection, permitting it only as an exception. It is simply that the current system of trade law and policy accepts and perpetuates this dichotomous thinking. Further, the literature on linkage unwittingly perpetuates this dichotomy by separating 'non-trade issues' from those trade values that are treated as 'natural and obvious' but which are, in actual fact, 'historically contingent' (like the inclusion of intellectual property as a trade issue).[134] This is in spite of strong indications that free trade, in its current formulation, will fail to remain a democratically viable concept if it continues to neglect fundamental ethical dilemmas within and amongst communities regarding the use and treatment of animals. This is reflected in the public opposition to the WTO at the Battle in Seattle[135] and, more recently, in the public backlash to the negotiations for the EU-US Transatlantic Trade and

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[129] Charnovitz (n 121) 28.

[130] Sara Dillon, 'A Farewell to Linkage: International Trade Law and Global Sustainability Indicators' (2002) 55(1) Rutgers Law Review 87, 91–92; Steger (n 127) 139 citing Robert Howse, 'From Politics to Technocracy - and Back Again: The Fate of the Multilateral Trading Regime (2002) 96 American Journal of International Law 94, 112.

[131] Dillon (n 130) 92.

[132] ibid 97.

[133] Joel P Trachtman, 'Institutional Linkage: Transcending "Trade and …"' (2002) 96 American Journal of International Law 77, 77.

[134] Lang (n 86) 538 and 543.

[135] Oldham (n 90).

Investment Partnership (TTIP).[136] Indeed, this thesis rejects the presupposition of a conceptual division between 'non-trade issues' and trade policy, as well as the presupposed economy-centric conception of what WTO trade policy is centrally and importantly *about*. For this reason, the thesis will refer to issues typically dubbed 'non-trade issues' as 'trade impact issues'.

2.3. Neoliberalism, Linkage and the Animal Question

The normative underpinnings of trade law and policy are not static or homogenous. In this section, we have seen that neoliberalism is not a unitary whole and that there exist schools of thought within it as well as alternative conceptions such as 'embedded liberalism'. We have also seen discussion within the linkage debate of academics and wider civil society about the normative shifts within the WTO. This section has countered misconceptions of the neoliberal normative underpinning to trade policy which tends to be regarded as a solely capitalist and laissez-faire endeavour. However, while the true picture is more diverse and shifting, this does not minimise the cavernous divide that exists between trade norms and second wave animal ethics.

Under any interpretation, the current normative underpinnings of trade law consider animals as no more than products. This is in tension with the more nuanced and conflicted status of animals in most legal systems. For example, the EU balances competing conceptions of animals as sentient beings and tradable products (to varying degrees of success).[137] This is also in tension with second wave animal ethics which rejects the propertisation of animals on account of their sentience and their varying capacities for flourishing.

It is true that trade norms may shift in order to exclude the trade in animals and their bodies. However, there are no indications that such a normative shift is on the minds of relevant policymakers. Further, the liberal conception of animals as property causes immeasurable harm. Some of that harm will be set out in the next section where the impact of trade on animals' lives is explored in detail. Further, harm is caused by the prevalence of these neoliberal norms in the governance of animals' lives in the sense that the law, policy and research on animals that are traded fails, for the most part, to regard these animals as ethical subjects. On this view, a work such as this thesis would not be taken seriously. It is already stretching the liberal imagination to discuss welfare-based restrictions on the way animals may be treated and traded. But, to centre a

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[136] Sharon Treat and Shefali Sharma, 'Selling off the Farm: Corporate Meat's Takeover through TTIP' (*Institute for Agriculture and Trade Policy*, 2016) <https://www.ciwf.org.uk/media/7428251/report-sellingoffthefarm-final-july-2016.pdf> accessed 18 December 2020.

[137] Katy Sowery, 'Sentient Beings and Tradable Products: The Curious Constitutional Status of Animals under Union Law' (2018) 55(1) Common Market Law Review 55, 55–57.

discussion of trade law on the animal mind and body is unthinkable from this perspective. The liberty at the core of liberalism is deeply anthropocentric. Thus, the liberty at stake in the animal liberation project does not fit comfortably with this worldview. Human liberty is taken to be in opposition to animal liberty; one must be sacrificed in order to achieve gains for the other. The intersectional explorations within second wave animal ethics demonstrate this to be false; economies of compassion are false. Nonetheless, this cavernous normative divide persists. This is despite the delicate shifts the WTO has made with regard to domestic social policies on environmental protection and animal welfare protection. Thus, the impacts of trade on animals' lives, set out below, cannot be seriously contemplated from a liberal worldview. This serious contemplation requires second wave animal ethics.

3. More Trade, More Problems: The Way in Which Liberalisation Policy Impacts upon Animals' Lives

3.1. Mapping the Impact of Trade

The impact of trade on animal welfare can be broken down into four component parts: (1) open markets, (2) low animal welfare havens, (3) a chilling effect, and (4) a lack of labelling.[138]

The open markets condition allows low welfare imports to enter a liberalised marketplace. This marketplace may itself enact more advanced animal welfare rules, but these rules do not apply to imported animals and animal products. This is a problem in itself if one takes consumer ethical concern for animal welfare seriously. Further, and more significantly, if production shifts to states with poor regulation, low animal welfare havens will arise.[139] This occurs because trade favours cheap, 'efficient' production.[140] Low animal welfare havens would reduce the effectiveness of animal welfare regulation because animal harm would be geographically moved rather than substantively reduced.[141]

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[138] For research on some of these impacts on environmental protection, which often come to pass, see Chris Wold, 'Taking Stock: Trade's Environmental Scorecard after Twenty Years of "Trade and Environment"' (2010) 45(2) Wake Forest Law Review 319, 323 et seq.

[139] On environmental pollution havens, see Steve Charnovitz, 'Trade and Environment' in Arvid Lukauskas, Robert M Stern and Gianni Zanini (eds), *Handbook of Trade Policy for Development* (Oxford University Press 2013) 898.

[140] Low welfare production often results from cost minimising practices. See Grethe (n 25).

[141] Pollution havens have largely not materialised but conditions materially differ with animal welfare protection because compliance costs are not a 'small percentage of total operating costs'. See Wold (n 138) 334.

Scale effects of trade are also a possible result of open markets: more open markets create more cross-border trade. This will not be included in the empirical research below. Scale effects pose a problem when the trade is harmful to animals' welfare, such as the livestock trade which has resulted in increased disease transmission.[142] Scale effects of trade also entail a quantitative increase in suffering as animal consumption grows along with increased wealth, countries without welfare protections produce and trade more animal products, and there is an increase in the farming of smaller animals such as poultry (meaning more harm-filled lives and untimely deaths per calories produced).[143] The literature references various examples of globalised agricultural value chains leading to more meat consumption,[144] trade leading to the slaughter of animals that were once worshipped as sacred,[145] and factory farming spreading as a result of liberalised trade.[146]

There are two forms of chilling effect that may follow from open markets, one of which will be investigated here. Firstly, domestic producers now find themselves in a situation where they must comply with high welfare standards, but at the same time they must compete with cheaper, low welfare imported products.[147] A chilling effect or even a race to the bottom may occur if strained domestic producers attempt to regain competitiveness by pressuring governments to halt development of, weaken, or abandon domestic welfare standards. The alternative would be to restrict trade in the products that harm the competitiveness of domestic producers. However, the culture of trade liberalisation has meant that this is not typically attractive to trade policymakers.[148] There is not enough space to tackle this chilling effect here. Instead, the focus will be on a second chilling effect: the pressure that has been felt by WTO members to refrain from restricting trade in order to protect animal welfare, thus facilitating low welfare imports. This facilitates the growth of low welfare practices. This also represents the normative impact of neoliberal trade ideology on law and policy regarding animal welfare and trade.

Finally, the lack of effective product labelling for animal welfare ensures that this negative cycle will continue.[149] Animal welfare labels on the market are ineffective because they are

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[142] Phillips (n 4) 122.

[143] ibid 153.

[144] Vandana Shiva, 'The Implications of Agricultural Globalization in India' in Jacky Turner and Joyce D'Silva (eds), *Animals, Ethics and Trade: The Challenge of Animal Sentience* (Earthscan 2006) 193.

[145] ibid.

[146] Ash (n 124) 221; Bollard (n 25) 100; Shiva (n 144) 194.

[147] Peter Stevenson, 'The World Trade Organisation Rules: A Legal Analysis of Their Adverse Impact on Animal Welfare' (2003) 8 Animal Law Review 107; Thomas (n 25) 609. This has not significantly materialised in environmental protection according to Wold (n 138) 327.

[148] See chapter IV section 2.3.2 for examples.

[149] Eg, Eggs Marketing Regulation 589/2008/EC [2008] OJ L 163 Art 32.

voluntary, with poor market capture and low recognisability.[150] Requiring labelling of imports is potentially compatible with WTO law but has rarely been pursued as part of WTO members' trade policies.[151] If consumers who are concerned about animal welfare do not know what conditions animals are reared in, they are more likely to unwittingly purchase cheap, low welfare products. This constitutes a market failure caused by insufficient availability of information.

The first three components of impact will be analysed empirically in the paragraphs that follow. This allows conclusions to be drawn regarding the dangers of trade liberalisation from a second wave animal ethics perspectives. The fourth component, the lack of labelling, is well documented and will not be analysed here. The analysis is conducted in a context where there is already some trade in animal products and some animal welfare protection. There is no zero-base position for either variable to be compared to. This empirical analysis is non-doctrinal in the sense that it looks at law in context and focuses upon a social problem which calls for a solution that may be legal, non-legal, or a combination thereof.[152] Care was taken to ensure that the research in this chapter meets the requirements for non-doctrinal types of legal research set out by Fink.[153] The analysis here takes on a qualitative form because the data collected is both quantitative trade data and qualitative policy-related data.

3.2. First Component: Open Markets

Three case studies were selected to quantify the problem of low welfare imports and low animal welfare havens. These are: the EU-wide bans on the use of battery cages for laying hens, on the use of sow stalls, and on the use of veal creates. The three case studies were selected because their

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[150] Food Chain Evaluation Consortium (FCEF) et al, 'Feasibility Study on Animal Welfare Labelling and Establishing a Community Reference Centre for Animal Protection and Welfare: Part 1: Animal Welfare Labelling' (*European Commission*, 2009) 14–17 <https://ec.europa.eu/food/sites/food/files/animals/docs/aw_other_aspects_labelling_feasibility_study_report_part1.pdf> accessed 18 December 2020; 'The Truth Behind the Labels: Farm Animal Welfare Standards and Labelling Practices: A Farm Sanctuary Report' (*Farm Sanctuary*, 2009) <https://faunalytics.org/wp-content/uploads/2015/05/Citation1051.pdf> accessed 18 December 2020. The EU is reportedly considering adding welfare to an EU-wide, mandatory label. See Gerardo Fortuna and Natasha Foote, 'Commission Bemused by Consumer Information Conundrum' (*Euractiv*, 2020) <https://www.euractiv.com/section/agriculture-food/news/commission-bemused-by-consumer-information-conundrum/> accessed 18 December 2020.

[151] My research on this is summarised in 'Method-of-Production Labelling: The Way Forward to Sustainable Trade' (*Eurogroup for Animals*, 2019) 9–14 <https://www.eurogroupforanimals.org/sites/eurogroup/files/2020-02/E4A-Policy-Paper-Labeling_and_WTO_04-2019-screen_0.pdf> accessed 18 December 2020.

[152] Ian Dobinson and Francis Johns, 'Qualitative Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2017) 1 and 9.

[153] ibid 36 citing A Fink, *Conducting Research Literature Reviews: From the Internet to Paper* (2nd edn, Thousand Oaks 2005), 138. The five requirements are: 'specific research questions, defined and justified sample, valid data collection, appropriate analytical methods, and interpretations based on the data'.

clear implementation dates facilitate assessments of changes in trade levels, as well as for their relevance to animal welfare policy. Close confinement systems impose lifelong suffering upon animals. Oppressive cages make most natural behaviours impossible, reducing unique sentient creatures to productive automatons. It should be noted that the imposition of these bans has communicative and normative impact, in spite of the impacts on trade that are set out here. However, it is also true that the EU is inconsistent in its legislation on animal welfare and it frequently undermines its own objectives and, thus, the normative force of such legislation.

On 1 January 2012, an EU ban on the use of battery cages for laying hens came into force.[154] The directive permits battery caged eggs to be imported from non-EU countries – thus prioritising trade objectives over animal welfare objectives - and it permits the continued use of 'enriched cages' in the EU.[155] Enriched cages provide slightly more space. In 2012, the first year of the ban's implementation, the EU imported 16,571 tonnes[156] of egg products (both in-shell and non-shell).[157] Available data does not indicate the production method of imported eggs. This masks the impact on animal welfare and supports arguments that trade policy is ill-suited as a primary driver of the governance for animals. It is possible, for our purposes, to extrapolate estimates based on the methods of production in the exporting states.

The US accounted for almost half of EU egg imports in 2012. In 2019, around 24% of the US laying flock were housed in cage-free systems.[158] This figure rose from 18% in 2018 and it represents a continued rise from a very marginal use of cage-free systems.[159] This change is a response to new regulations.[160] In comparison, 50.5% of EU hens are kept in non-cage ('alternative') systems.[161] The marginal production of cage-free eggs in the US coupled with the permissibility of exporting caged eggs to the EU would suggest that most US exports to the EU have been from battery caged hens. Following the US, the EU imported 2,362 tonnes of eggs from Albania, 1,745 tonnes from Argentina, 1,541 tonnes from India, and 1,133 tonnes from Bosnia &

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[154] Laying Hens Directive 99/74/EC [1999] OJ L203/53 Art 5(2).

[155] ibid Art 6. On EU competence in such situations, see Iyan Offor, 'The Chilling Effect of the World Trade Organisation on European Union Animal Welfare Protection' (LLM Thesis, University of Aberdeen 2017) ch III.B.

[156] All data sources are Eurostat (n 17) above, unless otherwise specified. I can only claim my figures to be as accurate as those published by the EU.

[157] Shell eggs align with category 0407 of the Harmonized System (n 17). Non-shell eggs here refers to 'birds eggs, not in shell, and egg yolks …', aligning with code 0408 of the Harmonized System.

[158] 'Facts & Stats' (*United Egg Producers*, 2019) <https://unitedegg.com/facts-stats/> accessed 18 December 2020.

[159] Ibid.

[160] Ibid.

[161] 'Eggs - Market Situation - Dashboard' (*European Commission*, 2020) <https://ec.europa.eu/info/sites/info/files/food-farming-fisheries/farming/documents/eggs-dashboard_en.pdf> accessed 18 December 2020.

Herzegovina. Compassion in World Farming cites a World Poultry study from 2008 that found 100% of Argentinian laying hens and 78% of Indian laying hens were reared in cage systems.[162] More recent data is hard to come by. As unenriched battery cages are the global standard in the absence of contrary legislative requirements, it is reasonable to assume that the caged systems used in these states are unenriched battery cages.

It was noted above that the problem of non-compliant imports is exaggerated where there is inadequate labelling. The EU requires labelling of imported shell eggs according to their farming method but it does not require this for non-shell eggs.[163] The requirement to label shell eggs is a departure from the status quo whereby most animal products do not require to be labelled according to their method of production. Due to the gap in the labelling requirement, consumers have no way of knowing that they are consuming battery-caged eggs when buying products with egg ingredients.[164]

Moving on to sow stalls, these house pigs individually, in a restrictive way to protect piglets from suffocation. The restrictions in mobility and socialisation entail poor welfare and the inhibition of natural behaviours. The EU imposed a partial ban on the use of sow stalls that came into effect on 1 January 2013.[165] This bans the use of sow stalls except for the first four weeks of pregnancy and for one week before farrowing. Although, some sows that are repeatedly impregnated may still be kept in sow stalls for most of their lives. The directive does not regulate imports. The EU imported 33,610 tonnes of pigmeat in 2013, the first year of the ban's implementation.[166] The majority of these imports come from Switzerland where sow stalls are banned completely.[167] Thus, the issue of low welfare imports of pigmeat to the EU is not pressing.

Finally, veal crates severely restrict the movement of calves so they cannot even turn around by tying their necks (in some cases, for their entire lives). The use of veal crates was banned

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[162] 'Statistics: Laying Hens' (*Compassion in World Farming*, 2013) 8 <https://www.ciwf.org.uk/media/5235021/Statistics-Laying-hens.pdf> accessed 18 December 2020.

[163] Eggs Marketing Regulation 589/2008/EC [2008] OJ L 163 Art 12(2); Cahal Milmo, 'Britain Importing Eggs from Countries Where Inhumane Battery Farms Remain in Production, Campaigners Warn' (*iNews*, 2017) <https://inews.co.uk/news/uk/britain-importing-eggs-countries-inhumane-battery-farms-remain-production-campaigners-warn-49395> accessed 18 December 2020.

[164] Concerns about this have been raised by the European Parliament and by civil society. See European Commission, 'Answer to Written Question E-010734/2012 by Patricia van Der Kammen to the Commission on Return of Battery Eggs' (2012) <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-010734&language=EN> accessed 18 December 2020; Milmo (n 163).

[165] Pigs Directive 2008/120/EC [2008] OJ L 47/5.

[166] This data, and all other pigmeat data in this chapter, is sourced from 'Pigmeat Trade Data' (*European Commission*, 2020) <https://ec.europa.eu/info/food-farming-fisheries/farming/facts-and-figures/markets/overviews/market-observatories/meat/pigmeat-statistics_en#trade> accessed 18 December 2020.

[167] Animal Welfare Ordinance 455.1 2008 (CH) Art 48.

from 31 December 2006 for all calves older than eight weeks in EU holdings.[168] This directive does not regulate imports. In 2007, the first year of the implementation of the veal crate ban, the EU imported 286,670 tonnes of beef and veal.[169] Amongst the top exporters to the EU are Brazil, Uruguay, Argentina, Australia, and the US. Veal crates are not used in Australia.[170] Industry in the US has also moved away from veal crates following a vote of the American Veal Association.[171] However, intensive farming methods such as veal crates are commonly used in the Latin American countries that provide the highest number of veal products to the EU.[172] Note, however, that beef and veal are treated as a single category in all the readily available trade data. This practice disregards and masks the suffering of animals that are reared in crates. On the basis of the available data, it is impossible to distinguish veal from beef or high welfare from low welfare meat. This frustrates research efforts aimed at exposing the extent of animal suffering in veal farming.

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

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168 Calves Directive 2008/119/EC [2008] OJ L 10/7.

169 Categories 0201 (fresh meat of bovine animals) and 0202 (frozen meat of bovine animals) of the Harmonized System (n 17).

170 'What Is Veal?' (*RSPCA Australia*, 2019) <https://kb.rspca.org.au/knowledge-base/what-is-veal/> accessed 18 December 2020.

171 Rod Smith, 'Veal Group Housing Approved' (2007) 79 Feedstuffs <https://go.gale.com/ps/i.do?p=AONE&u=ustrath&id=GALE%7CA169023539&v=2.1&it=r&sid=AONE&asid=a69b9b39> accessed 18 December 2020; 'AVA Confirms "Mission Accomplished"' (*American Veal Association*, 2018) <https://static1.squarespace.com/static/56b1263940261d30708d14b4/t/5a53ac7e53450a19f3a2fefb/1515433086810/AVA+Group+Housing+Mission+Accomplished+2018+.pdf> accessed 18 December 2020.

172 'EU Trade Commissioner Is Undermining EU Policies on Climate Change and Animal Welfare in MERCOSUR Negotiations' (*Irish Farmers Association*, 2018) <https://www.ifa.ie/farm-sectors/eu-trade-commissioner-is-undermining-eu-policies-on-climate-change-and-animal-welfare-in-mercosur-negotiations/> accessed 18 December 2020.

3.3. Second Component: Low Animal Welfare Havens

Production costs for enriched cage eggs in compliance with EU law are estimated to be 7% higher than for conventional battery-caged eggs.[173] Anticipating this, academics communicated concerns about low animal welfare havens arising due to the ban.[174] The trade figures demonstrate a slight stagnation in growth of EU egg production following the ban, which was offset by a compensatory rise in imports. However, both developments were modest in scope and temporary. EU egg production has been growing consistently. Some stagnation occurred in 2012, the first year of implementation of the battery cage ban.[175] Thereafter, production rates continued their long-term growth trajectory and amounted to 7 million tonnes in 2019.[176] Prior to the ban, EU imports had dropped from 16,176 tonnes of eggs in 2010 to only 9,730 tonnes in 2011. This number increased dramatically to 16,571 tonnes in 2012, the first year in which the ban was implemented. Imports then dropped again to 8,052 tonnes in 2013. However, this figure has gradually crept up, amounting to 12,633 tonnes in 2019.

These figures do not clearly support the assumption that the EU ban resulted in the immediate development of low animal welfare havens. However, they may support an argument that a low animal welfare haven is beginning to emerge as time passes. The immediate drop in imports following the implementation of the ban may have been caused by a number of intervening factors.[177] In any event, the subsequent rise in imports and other particularities that are masked by the overall figures are suggestive of the emergence of a low animal welfare haven in the case of eggs.[178]

One such particularity, and a strong contributing factor to the EU's rise in egg imports, is the EU's authorisation for Ukraine to begin exporting eggs to the EU after the ban's implementation. Ukraine can export eggs to the EU tariff free under two generous quotas granted following the ban's enforcement.[179] This is not conditional upon the eggs meeting EU welfare

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[173] PLM Van Horne, 'Competitiveness of the EU Egg Sector: International Comparison Base Year 2013' (*LEI Wageningen UR*, 2014) 20 <https://www.wur.nl/upload_mm/6/5/f/8f9e79f4-9f56-4149-ab6a-f9f718d8e934_2014-041 vHorne_web.pdf> accessed 18 December 2020.

[174] Grethe (n 25).

[175] Hans-Wilhelm Windhorst, 'The EU Egg Industry' (*Zootecnica International*, 2017) <https://zootecnicainternational.com/focus-on/eu-egg-industry/> accessed 18 December 2020.

[176] 'Eggs - Market Situation - Dashboard' (n 161).

[177] Including demand, price fluctuation (end product, animal feed etc), and impact of animal health and disease outbreaks.

[178] On hotspot pollution havens, see Wold (n 138) 336.

[179] Implementing Regulation (EU) 2015/2077 opening and providing for the administration of Union import tariff quotas for eggs, egg products and albumins originating in Ukraine [2015] OJ L302/57 annex 1.

standards and all Ukrainian laying hens are caged.[180] Welfare conditions at Ukrainian egg factories have been reported to be 'shocking' with an abundance of untended corpses and cannibalism left unchecked amongst the hens.[181] Controversially, Dutch companies and the Dutch government also began investing in the large-scale poultry company in Ukraine called Myronivsky Hilboproduct (MHP).[182] It is contrary to the spirit of the ban on battery cages that an EU member state benefits financially from battery farming outside of the EU, especially when those products are exported to the EU. Ukraine only began exporting eggs to the EU in 2014, but it is now the second biggest exporter of eggs to the EU. While Ukraine exported a modest 36 tonnes of eggs to the EU in 2014, these exports have increased to 6,414 tonnes in 2019. Thus, EU trade policy facilitates the growth of low welfare egg production outside the EU.

In other cases, the EU has acted more conscientiously regarding low-welfare egg imports. For example, the EU proposed to grant the US favourable trade terms in TTIP only for those eggs that met European welfare standards and the EU has reportedly imposed the same condition on imports of eggs in an agreement with the MERCOSUR countries.[183] There is no further evidence of particularities indicative of low animal welfare havens within the data analysed. However, further trade liberalisation could create more low animal welfare havens. At present, the tariff binding established as part of the EU's schedule of concessions is 7.7% for imported shell eggs and between €35.3 per 100 kg to €142.3 per kg for imported non-shell egg products.[184] The EU frequently reduces these tariffs to zero when negotiating bilateral trade agreements. In addition, a number of the other top egg exporters to the EU benefit from more preferential trading conditions than those set out in the EU's schedule of concessions.[185] Thus, the picture is mixed.

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[180] Nick Morton, 'Global Poultry Trends: Russia and Ukraine Produce One in Three of Europe's Eggs' (*The Poultry Site*, 2013) <https://thepoultrysite.com/articles/global-poultry-trends-russia-and-ukraine-produce-one-in-three-of-europes-eggs> accessed 18 December 2020.

[181] Natalia Datskevych, 'Undercover Footage Reveals Shocking Conditions for Hens in Ukrainian Egg Factory' (*Kyiv Post*, 2020) <https://www.kyivpost.com/business/undercover-footage-reveals-shocking-conditions-for-hens-in-ukrainian-egg-factory.html> accessed 18 December 2020.

[182] Tim Steinweg, 'Chicken Run: The Business Strategies and Impacts of Poultry MHP in Ukraine' (*SOMO*, 2015) 5, 12 and 21–22.

[183] 'Transatlantic Trade and Investment Partnershi: What's in It for Animals' (*Eurogroup for Animals*, 2016) 14; Mattha Busby, 'EU Imposes Hen Welfare Standards on Egg Imports for First Time' (*The Guardian*, 2019) <https://www.theguardian.com/environment/2019/oct/02/eu-imposes-hen-welfare-standards-on-egg-imports-for-first-time> accessed 18 December 2020.

[184] Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994 (15 April 1994) LT/UR/A-1A/1/GATT/3 <http://docsonline.wto.org, Schedule LXXX.

[185] For example, Albania (823,700 tonnes of eggs exported to the EU in 2016) is awarded a zero percent tariff on eggs (Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part' (2009) OJ L 107/166).

Moving on to the sow stall ban, the EU sources most of its imported pigmeat from Switzerland where pig welfare standards provide better legal protection than in the EU. Thus, low animal welfare havens have been avoided in this case because the EU has a reliable flow of group-housed pigmeat from Switzerland. If the EU further liberalises trade in pigmeat with other countries, this situation could change. As a representative example, Chile receives a preferential tariff quota which is duty free for 3,500 tonnes of pigmeat. This tariff rate quota was first awarded in 2003 and was to rise by 10% each year.[186] Chile provided the EU with 6.9% of its imported pigmeat in 2019. The EU is also negotiating a new trade agreement with Chile which could see trade in agricultural products liberalised further.

Regarding the veal crate ban it is impossible to closely scrutinise veal trade due to the combined category of beef and veal. Following implementation of the veal crate ban, production of beef and veal fell in the EU to a low of 7.2 million in 2013.[187] However, imports of beef and veal also fell in the first year following implementation from 365,713 tonnes in 2006 to 286,670 tonnes in 2007 and to 175,397 tonnes in 2008. Imports have remained low at 188,648 tonnes in 2019. Despite the inadequate data available, the fall in imports to the EU of beef and veal suggests that no animal welfare haven has arisen in this case. However, the EU's bilateral trade negotiations with the MERCOSUR countries creates a risk of increased low welfare imports.[188]

Overall, the data presented here fails to demonstrate a mass shift of production to non-EU countries following enactment of the bans discussed. However, while low animal welfare havens may not yet appear as a widespread problem, the case of Ukrainian egg production indicates that low animal welfare havens can arise within the existing regulatory environment. One might also worry of a post-Brexit race to the bottom. However, the available trade data, which does not specify method of production, makes it difficult to analyse this closely. It is fortunate that the EU has a reliable supply of high welfare Swiss pigmeat at present. However, the EU's ambitious bilateral trade policy puts this situation at risk. The EU routinely offers sizeable pigmeat tariffs in trade negotiations.[189] This may lead to new or enhanced export markets to the EU in pigmeat reared through intensive confinement.

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[186] Council Regulation (EC) No 312/2003 of 18 February 2003 implementing for the Community the tariff provisions laid down in the 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 (2003) OJ L 46/1.

[187] Data sourced from 'FAOSTAT' (*FAO*) <http://www.fao.org/faostat/en/#data> accessed 18 December 2020.

[188] European Commission, 'EU-MERCOSUR Trade Agreement: The Agreement in Principle' (2019) <https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157964.pdf> accessed 18 December 2020.

[189] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L 11/23 237; European Commission, 'EU Mexico Global Agreement in Principle' (2018) 2 <https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157964.pdf> accessed 18 December 2020.

Sophisticated economic modelling would be required to analyse all the forces acting upon the trade in animal products in order to determine why low animal welfare havens have not yet arisen.[190] This is neither possible nor necessary here. The fundamental conclusion to be drawn here regards the way in which the available data masks animal harm and the dangers posed by EU trade policy to animals, making precise analyses of trade impact impossible. This is true of the data for egg and veal trade. Tariff classification systems, relied upon to categorise trade data, are very precise.[191] They divide animal products according to weight, bone content, temperature (chilled, frozen, etc), and so on. And yet, these classifications ignore method of production and welfare considerations. This makes it impossible for researchers to observe the rate of low welfare imports and the occurrence of low animal welfare havens. In turn, this hinders the development of research aimed at improving the negative impact of animal welfare on trade.

On the basis of this conclusion, it is hoped that this initial investigation will inspire further research into the relevant trade data in order to predict how and when low animal welfare havens may arise. Indeed, it is possible that the various forces operating on this trade may change over time in a way that would further facilitate the proliferation of low animal welfare havens. This is deeply concerning from a second wave animal ethics perspective.

3.4. Third Component: Chilling Effect[192]

3.4.1. The Impact of Trade in the WTO's Formative Years

The establishment of the WTO in 1995 caused concerns in the animal welfare community that it would 'inhibit the development of animal welfare protection legislation'.[193] These concerns were swiftly validated when the US successfully challenged a series of EU directives[194] that prohibited

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[190] These forces include compliance costs of environmental and animal health regulations and potential cost offseting from the Common Agricultural Policy. On the CAP and animal welfare, see Francesca Porta, 'Position Paper: Common Agricultural Policy Post-2020' (*Eurogroup for Animals*, 2018).

[191] For example, International Convention on the Harmonized Commodity Description and Coding System (adopted 14 June 1983, entered into force 1 January 1988) 1503 UNTS 167.

[192] This section draws from my LLM thesis: Offor (n 155).

[193] Harrop and Bowles (n 25) 64; Christopher Fisher, 'Getting Animal Welfare on to the World Trade Agenda' in Robin Pedler (ed), *European Union lobbying: changes in the arena* (Palgrave Macmillan 2002).

[194] Council Directive 81/602/EEC of 31 July 1981 concerning the prohibition of certain substances having a hormonal action and of any substances having a thyrostatic action [1981] OJ L 222/32; Council Directive 88/146/EEC of 7 March 1988 prohibiting the use in livestock farming of certain substances having a hormonal action [1988] OJ L 70/16; and Council Directive 88/299/EEC of 17 May 1988 on trade in animals treated with certain substances having a hormonal action and their meat, as referred to in Article 7 of Directive 88/146/EEC [1988] OJ L 128/36.

the import of beef treated with hormones.[195] And so, it became that a chilling effect could be observed on the use of unilateral trade policy to protect animal welfare by the EU. This contrasts with the pre-WTO period in which welfare-related trade restrictions were enacted in the EU with little thought given to international trade law.[196] EU trade measures that were drafted around the time of the WTO's establishment and that directly addressed animal welfare were subject to renegotiation, delay, and limitation. Three examples in this regard are the 1999 Laying Hens Directive, the 1991 Leghold Traps Regulation, and the 2009 Cosmetics Regulation.

The 1999 Laying Hens Directive bans the use of battery cages for laying hens in the EU without restricting imports.[197] The EU knew this would competitively disadvantage its producers and it received warnings of this from governmental bodies and civil society.[198] At EU parliamentary questions, the Commission gave no clear indication as to how it would handle the threat of cheap, unregulated imports.[199]

The 1991 Leghold Traps Regulation bans the use of cruel leghold traps within the EU and the importation of particular furs, unless the exporting state regulates trapping methods to meet internationally agreed 'humane trapping standards'.[200] Leghold traps capture animals with a steel jaw that does not kill the animal but restrains them, causing severe injury and distress. The import restriction has had little practical effect. Enforcement of the regulation was delayed and weakened after the establishment of the WTO. The drafters of the regulation gave little thought to the pre-WTO GATT rules in force at the time.[201] The US and Canada threatened to challenge the regulation under the WTO rules.[202] In response, the European Commission postponed the start

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[195] Panel Report, *European Communities - Measures Concerning Meat and Meat Products* (1997) WT/DS26/R (EC - Hormones). The panel's ruling was upheld by Appellate Body Report, *European Communities - Measures Concerning Meat and Meat Products* (1998) WT/DS26/AB/R, WT/DS48/AB/R (EC - Hormones) para 123.

[196] Council Regulation (EEC) 348/81 of 20 January 1981 on common rules for import of whales or other cetacean products [1981] OJ L 377; Seals Directive 83/129/EEC [1983] OJ L 91/30; Habitats Directive 92/43/EEC [1992] OJ L 206/7.

[197] Laying Hens Directive 99/74/EC [1999] OJ L203/53.

[198] Harrop and Bowles (n 25) 80 citing: The Report on the Welfare of Laying Hens by the United Kingdom's Scientific Veterinary Committee DGVI/B1 1.2.

[199] European Comission, 'Answer to Written Question E-0546/2000 by William Newton Dunn (ELDR) to the Commission on Welfare of Laying Hens' (2000) <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2000-0546&language=EN> accessed 18 December 2020.

[200] Leghold Traps Regulation 3254/91 [1991] OJ L 308/1 Arts 2 and 3.1.

[201] Peter Stevenson, 'The Impact of the World Trade Organisation Rules on Animal Welfare' (*CIWF*, 2015) 2 <www.ciwf.org.uk/research/animal-welfare/the-impact-of-the-world-trade-organisation-rules-on-animal-welfare/> accessed 18 December 2020.

[202] André Nollkaemper, 'The Legality of Moral Crusades Disguised in Trade Laws: An Analysis of the EC "Ban" on Furs from Animals Taken by Leghold Traps' (1996) 8(2) Journal of Environmental Law 237, 238.

date of the ban from 1 January 1995 to 1 January 1996.[203] It proposed another year long delay.[204] This was apparently due to 'doubts as to the legality of the ban'.[205] The ban went into effect on 1 January 1996 but the Commission blocked implementation by 'asking customs authorities not to implement it'.[206] The Commission counterintuitively described implementation of the ban by member states as illegal.[207] Further, the EU failed to apply the fur import ban to the US, Canada, and Russia (the main fur exporting countries) for many species.[208] A tripartite agreement was negotiated instead. A multilateral measure would ordinarily be preferable. However, in this instance, this measure did 'little to discourage the use of leghold traps'.[209] These agreements permit the use of 'padded' leghold traps and only prohibit the use of 'steel-jawed' leghold traps after a three year phase-out period.[210]

The 1976 Cosmetics Directive (now re-implemented as the 2009 Cosmetics Regulation) bans the performance of animal testing for cosmetic products and ingredients in the EU or the placing on the market of such products (including imports).[211] Enforcement was postponed multiple times from 1 January 1998 to 11 September 2004, 11 March 2009 and 11 March 2013 for different parts of the regulation.[212] The proposal for the second postponement notes doubts regarding the WTO legality of the measure.[213] This reveals that the EU's reservations regarding the WTO rules impacted the decision to delay implementation. The literature is critical of the Commission's 'cautious analysis' of the WTO rules.[214] It has been argued that the EU could have

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

[204] Commission Proposal COM/1995/737 for a Council Regulation (EC) amending Council Regulation (EEC) No 3254/91 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards [1995] OJ C58/17.

[205] Nollkaemper (n 202) 243.

[206] ibid.

[207] ibid.

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

[209] Nollkaemper (n 202) 243.

[210] Harrop and Bowles (n 25) 77.

[211] Cosmetics Regulation 1223/2009 [2009] OJ L 342/52 Art 18(1)(a)-(d).

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

[213] Ibid.

[214] Gráinne de Búrca and Joanne Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (Hart Publishing 2001) 8.

argued for the WTO-compatibility of the cosmetics marketing ban more convincingly if it was 'committed' to banning products tested on animals.[215]

The EU was aware of the potential for diverging animal welfare standards to negatively impact high welfare producers in the EU. This was recognised in the preamble and article 8 to the 1998 Farming Directive.[216] However, the three examples discussed in this section suggest that concern regarding the GATT panel's history of unfavourable treatment toward environmental objectives and the potential for costly challenge under the WTO's new dispute settlement mechanism were strong enough to override concerns for the competitiveness of producers in the EU. In these cases, 'fear of the WTO [loomed] larger than the WTO itself'.[217]

3.4.2. The Impact of Trade in the Early 2000s

The chilling effect surrounding the WTO's establishment has persisted. This fact has been largely ignored by those commentators who were critical of the WTO's impact around the time of its establishment. Most EU animal welfare legislation enacted following the WTO's establishment does not contain trade restrictions.[218] For example, when proposing higher welfare standards for broiler chickens, the European Parliament proposed to regulate and prohibit imports that did not comply.[219] However, the final version of the measure contains no such import ban.[220] There are exceptions where the EU restricts trade to pursue conservation and animal health objectives.[221] Also, in two cases (cat and dog fur, and seal products), the EU enacted trade restrictions to protect animal welfare.[222] However, the EU displays an overall hesitance. This may have been caused, in part, by the EU's failed attempt to initiate a multilateral dialogue on animal welfare and trade through a proposal to the WTO.[223] As a result, the EU shifted its focus to including animal welfare

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[215] ibid.

[216] Farming Directive 98/58/EC [1998] OJ L221/23 Art 8.

[217] Búrca and Scott (n 214) 10.

[218] Farming Directive (n 216); Laying Hens Directive (n 197); Broilers Directive 2007/43/EC [2007] OJ L 182/19; Calves Directive 2008/119/EC [2008] OJ L 10/7; Pigs Directive 2008/120/EC [2008] OJ L 47/5; Animal Testing Directive 2010/63/EU [2010] OJ L 276/33.

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

[220] Broilers Directive (n 218).

[221] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2010] OJ L 20/7; Slaughter Regulation 1099/2009 [2009] OJ L303/1 Art 12; Pet Imports Directive 2013/31/EU [2013] OJ L 178/107.

[222] Cat and Dog Fur Regulation 1523/2007 [2007] OJ L 343/50; Seals Regulation 1007/2009 [2009] OJ L 286/36.

[223] Chapter IV section 2.1.

in its bilateral trade policy.[224] The EU's unilateral efforts to restrict trade in order to protect animal welfare have been left in an uneven state. The cat and dog fur import ban and the seal product import ban do not strike at the most pressing animal welfare issues impacted upon by trade. Intensive livestock farming for meat and dairy production causes more significant and long-lasting harm to welfare than the killing of wild seals for fur.[225] Further, the cat and dog fur import ban justifies its limited scope by reference to European perceptions of cats and dogs as pets.[226] This choice has nothing to do with welfare science.

The EU's inconsistent approach to animal welfare in trade policy has been found to be compliant with the WTO rules.[227] This leaves room for a xenophobic, colonial approach that targets foreign animal harms whilst ignoring more significant domestic harms. This is deeply problematic from a second wave perspective and I elaborate this critique in chapter IV.[228] Elsewhere, the EU's inconsistency has been regarded as extreme caution in the face of uncertainty regarding WTO law.[229] Peter Stevenson, Chief Policy Adviser at Compassion in World Farming, notes that EU officials often cite incompatibility with WTO rules as the reason for failing to take policy actions on animal welfare.[230] However, the EU's willingness to tackle some animal welfare issues more strongly has a xenophobic and colonial impact, even if motivated by ostensibly well intended desires to satisfy moral appetite for animal welfare without negatively impacting European farmers. In any event, I argue in chapters IV and V that unilateralism would not be effective even if enacted more widely. Multilateralism is the most viable solution to protect animals in trade in accordance with second wave animal ethics. Presently, the EU's trade and animal welfare policy displays little concern for what an animal would wish for itself. The EU's response to the legal certainty provided by *EC – Seal Products* is revealing in that respect.

3.4.3. The Impact of Trade after EC – Seal Products

EC – Seal Products is a landmark case for animal welfare. The dispute involved a challenge to the

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[224] European Commission, 'Communication on the European Union Strategy for the Protection and Welfare of Animals 2012-2015' (2015) COM/2012/6 final/2 10. See more on this below at chapter IV section 2.2.

[225] Harrison (n 10).

[226] Cat and Dog Fur Regulation (n 222) preamble recital 1.

[227] Chapter IV section 2.3.1.

[228] Chapter IV sections 2.3.2.

[229] Kate Cook and David Bowles, 'Growing Pains: The Developing Relationship of Animal Welfare Standards and the World Trade Rules' (2010) 19(2) Review of European, Comparative & International Environmental Law 227, 228; Steve Charnovitz, 'The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality' (2002) 27(1) Yale Journal of International Law 59, 76–80; Fitzgerald (n 29) 102.

[230] Stevenson (n 147) 1.

EU Seals Regime by Canada and Norway.[231] The regime prohibits the placing on the market of seal products, except those resulting from indigenous hunts, marine management hunts, and products in the private possession of travellers. In practice, the exceptions were not as readily available to Canadian Inuit as they were to Greenlandic Inuit. For this reason, the measure was held to be discriminatory and contrary to WTO rules.[232]

This case is the first to rule that public moral concern for animal welfare is a legitimate justification for trade restrictions under WTO law.[233] As such, *EC – Seal Products* provides a rebuttal of the EU's caution regarding trade restrictions for animal welfare. Academics have noted that *EC – Seal Products* opens 'the door to future animal welfare defenses'.[234] However, the EU has not used this legal clarity to reverse the chilling effect on animal welfare legislation that followed the establishment of the WTO. The EU has not amended the measures that were scaled back and no new welfare-based trade restrictions have been proposed. This suggests the EU used the WTO as a scapegoat.

Key officials have, at times, downplayed the significance of *EC – Seal Products*. In 2015, in the context of a debate concerning trade restrictions of horse blood products to alleviate animal suffering, Commissioner Vytenis Andriukaitis stated that the 'EU cannot impose its animal welfare standards on third countries due to very stringent requirements under WTO law'.[235] On the contrary, *EC – Seal Products* confirms that the EU *can* restrict trade to protect the public morality of its own citizens. It can use unilateral measures, such as the Seals Regime, to protect the welfare of animals both domestically and abroad in the pursuit of this objective. This does not amount to the imposition of standards on third countries. Of course, one cannot assume the outcome of *EC – Seal Products* would be replicable in disputes regarding other animal products. However, the EU has shown no ambition to explore what the outcome of this case might mean for other trade restrictions aimed at protecting public morality related to animal welfare.

A recent European Commission report on the impact of the EU's animal welfare international activities on the competitiveness of European livestock production highlights the limited role the EU envisages for trade policy in tackling animal welfare goals. It also highlights a

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[231] Seals Regulation (n 222).

[232] See chapter IV for details.

[233] Iyan Offor and Jan Walter, 'GATT Article XX(a) Permits Otherwise Trade-Restrictive Animal Welfare Measures' (2017) 12(4) Global Trade and Customs Journal 158, 158–166.

[234] Rob Howse, Joanna Langille and Katie Sykes, 'Pluralism in Practice: Moral Legislation and the Law of the WTO After Seal Products' (2015) 48(1) George Washington International Law Review 81, 113.

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

focus on bilateral trade policy as opposed to unilateral or multilateral mechanisms.[236] The limited role for trade policy is further evidenced by the neglect of trade policy demonstrated in the early work of the EU's new Animal Welfare Platform.[237] The EU has, in fact, inspired some improvements to animal welfare regulation through its bilateral trade policy, such as with the EU-Chile Free Trade Agreement.[238] However, the EU has demonstrated that it is not updating its policy regarding trade and animal welfare in the light of *EC – Seal Products* which, presently, perpetuates coloniality. It is disappointing that the EU has not taken this as an opportunity to raise multilateral discussions on animal welfare at the WTO given that the context is so vastly different compared to that which prevailed when the EU failed to successfully raise this issue in 2000.

In summation, trade, linked to the establishment of the WTO, has had a chilling effect on the EU's animal welfare legislation. This impact has persisted despite the *EC – Seal Products* dispute which provided regulatory autonomy for WTO members to restrict trade in order to protect animal welfare. Thus, arguably the EU continues to prioritise trade over animal welfare objectives, except with regard to foreign practices. The sporadic nature of the EU's legislation on animal welfare and trade could be attributed to the subjective nature of legislating on moral issues and the moral inconsistencies common in attitudes towards different species of animal.[239] It could also point to a problematic balancing of political priorities and legal objectives. Indeed, the persistence of the chilling effect supports arguments that the WTO has been used as a scapegoat to mask low political will for strong animal welfare protection in the EU.[240] The persistence of the chilling effect is revealing insofar as it exposes the EU's policies on animal welfare to lack conviction and consistency. However, while this section has critiqued the EU's inconsistency and ineffectiveness at protecting animal welfare through unilateral trade measures, this should not be taken as endorsement of a unilateral approach. Chapters IV and V will elaborate on the limits of unilateralism and bilateral trade agreements in efforts to protect animal welfare.

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[236] European Commission, 'Report on the impact of animal welfare international activities on the competitiveness of European livestock producers in a globalized world' (2018) COM(2018) 42 final 4.

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

[238] Cedric Cabanne, 'The EU-Chile Association Agreement: A Booster for Animal Welfare' (2013) 7(1) Bridges Trade & Biological Resources News Digest <https://ictsd.iisd.org/bridges-news/biores/news/the-eu-chile-association-agreement-a-booster-for-animal-welfare> accessed 18 December 2020.

[239] Howse, Langille and Sykes (n 234) 114–5; Gary L Francione, *Animals as Persons* (Columbia University Press 2008) 150.

[240] Fitzgerald (n 29) 102.

4. Conclusion

This chapter has revealed the dominance of trade objectives by critically analysing the impact of trade policy on animals' lives. Within this investigation, this chapter has reached two key conclusions. First, neoliberal norms underlying trade policy severely limit the protection available for animals. The norms underlying trade policy were also shown to be capable of evolution. However, in their current state, the WTO's neoliberal normative framework is far removed from the requirements of second wave animal ethics. Further, the evolution required in order to respect animals' abilities to flourish is so great that the WTO should not be relied on as a sole or primary means of governing animals' lives.

Second, attempted policy reconciliations of trade and animal welfare have not had a positive impact on the lives and wellbeing of animals. Because this policy failure has persisted despite the favourable ruling in *EC – Seal Products*, the normative roots of this problem lie deeper and remain unmoved. This chapter has shown that precise empirical research is difficult to conduct because of limitations in the trade data, owing to the paternalism inherent in trade policy practices and underlying neoliberalism. It was shown that imports of animal products clearly continue whether or not they fall below the welfare standards of the importing state. Trade data hides whether these imports include low welfare products, though it seems very likely. The issue of low animal welfare havens also suffers from the unavailability of important data. Nonetheless, particular cases such as the new egg export industry in Ukraine are deeply concerning. With regard to the chilling effect, WTO-wariness clearly persists amongst key officials within the European Commission and the resulting impact on regulation is observable.

These two conclusions can be taken to broadly demonstrate that trade norms and policy have a detrimental impact on the lives of animals. This problem is closely linked to the problem identified in chapter II: that global animal law is deficient from a second wave animal ethics perspective and that, in part, this is due to the influence that trade law, policy and literature has had on the early evolution of global animal law. The interaction of these two conclusions requires further elaboration to contextualise the analysis of trade law in literature in chapter IV.

This chapter has revealed that research on the impact of trade has been restricted by the force of trade law, its associated research tradition, and underlying normative structure. Important empirical gaps have persisted in the literature due to the masking of animal welfare information in trade data as well as a failure of researchers to ask some of the right questions. Traditionally, animal

law researchers were alert to the dangers posed to animals by trade policy, particularly the WTO.[241] However, as the WTO has proven itself capable of accommodating unilateral animal protection measures through dispute settlement proceedings, researchers have grown complacent. Most commentators avoid dwelling on the fact that, despite the favourable ruling in *EC – Seal Products*, trade policy continues to take precedence over animal protection.[242] This complacency is concerning given the negative impact that trade norms and policy are having on animals' lives.

EC – Seal Products has been hailed as a great success for animals which provides a strong footing for unilateral animal welfare protection in trade policy.[243] However, a strong critique ought to be launched against situating the development of animal norms within trade policy contexts so as to transcend the liberal conception of animal protection which goes no further than forbidding 'unnecessary' suffering. This liberal conception diverts attention from the harm that continues to be caused by animal trade. It is reasonable for animal welfare NGOs to seek to influence trade policy within the existing structures of EU policy as restricted by WTO law.[244] Chapter IV will investigate growing complacency in the literature following *EC – Seal Products* regarding trade law and policy driving governance of animals' lives and the global discussion regarding welfare.[245] However, they are inappropriate drivers for the following reasons.

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

Secondly, regulating trade of animals and their products presupposes and reinforces a cultural understanding of animals as property.[246] Trade policy fails to recognise the special status of animals afforded by other legal regimes. For example, the product classification systems relied

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[241] Peter Fitzgerald, *International Issues in Animal Law: The Impact of International Environmental and Economic Law upon Animal Interests and Advocacy* (Carolina Academic Press 2012) 172; Grethe (n 25) 318; Stevenson (n 147) 107–142.

[242] Appellate Body Report, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products* (2014) WT/DS400/AB/R, WT/DS/401/AB/R (EC - Seal Products) 26–27.

[243] Howse, Langille and Sykes (n 234) 113; Kelch (n 25) 265; Lurié and Kalinina (n 25).

[244] Eg 'Model Animal Welfare Provisions for EU Trade Agreements' (*Eurogroup for Animals*, 2017).

[245] Chapter IV section 3.

[246] For consequences, see Gary L Francione, *Animals, Property, and the Law* (Temple University Press 1995).

upon by trade policy categorise animal products according to their use by humans.[247] Trade in animals and animal products is also frequently measured by monetary value or by weight, not by headcount.[248] These practices act to brutalise, objectify and Other animals, encouraging a self-reinforcing culture of disregard for animal interests. Thus, trade law is dated compared to animal welfare laws which afford animals a *sui generis* legal status:[249] they are owned like property but they are also afforded certain special protections.[250]

For these reasons, it is harmful to animal welfare that trade law and policy have disproportionately impacted the normative underpinnings of global governance for animals and the emerging subject of global animal law. This was perhaps inevitable given the force of trade law and the absence of animal-centric international law.[251] However, the growing academic discourse on global animal law must build its own voice and worldview, distinct from the trade linkage debate, in order to counteract this. Otherwise, the pre-eminence of trade law is likely to result in a balancing of interests that weighs in favour of a liberal conception of free trade and a dismissal of animals' inherent value.

WTO law has attained a degree of legal enforceability that is unmatched by most other issues of global governance.[252] Its dispute settlement system has teeth that other dispute settlement systems do not.[253] Thus, it is not negative, *per se*, that animal welfare should find a place within the WTO whilst trade in animals and their bodies continues.[254] However, it is detrimental that the most influential pronouncements on animal welfare at the global level have emanated from trade officials using trade-centric language in pursuit of economic objectives. There is no expertise on issues of animal welfare at the WTO.[255] Literature written by trade experts on animal issues also present serious gaps.[256] Thus, the WTO legal structure should be rejected as the absolute limit and

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247 Harmonized System (n 17).

248 Ibid.

249 Eg Animal Welfare Act 2006 (UK) s 4.

250 Michael Bowman, Peter Davies and Catherine Redgwell (eds), *Lyster's International Wildlife Law* (2nd edn, Cambridge University Press 2010) 673–676.

251 See chapter II section 2.4.

252 Dillon (n 130) 94.

253 Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) LT/UR/A-2/DS/U/1 <http://docsonline.wto.org> (DSU) Art 22.

254 Katie Sykes, 'Globalization and the Animal Turn: How International Trade Law Contributes to Global Norms of Animal Protection' (2016) 5(1) Transnational Environmental Law 55.

255 Howse and Langille (n 29) 372.

256 For example Sharma (n 77) 267 compares subsidies for Western cows and Indian peoples' daily wages, ignoring farm animals' lack of autonomy and freedom; and poor understanding of animal protection concepts in Peter V Michaud, 'Caught in a Trap: The European Union Leghold Trap Debate' (1997) 6(1) Minnesota Journal of Global Trade 355, 359.

framework for research on trade and animal welfare.[257] Instead, the WTO system should be examined for 'evidence of its larger effects' in order to inspire reform,[258] incorporating democratisation through dissent.[259] This requires transplanting trade and animal welfare research into the global animal law academic space and centring deep listening to animals, as required by second wave animal ethics.

The pre-eminence of trade law and the linkage debate partly explains why empirical research on the impacts of trade on animals has not been forthcoming. Growing complacency amongst animal advocates regarding trade law has slowed the output of critical research. Further, the pre-eminence of trade policy and its negligible treatment of animal welfare has made empirical research on trade and animal welfare particularly difficult. Thus, future research on trade and animal welfare ought to be conducted within a research tradition separate from the linkage debate.

Situating such research within the global animal law discourse permits critical commentary on the treatment of animals as property and of the WTO as a governor of animal interests. It allows for deeper listening to animals. This perspective leads to a critical conception of free trade – a conception which includes trade impact issues – and the rejection of the centrality of economic stakeholders' objectives. This will be elaborated on in chapter V.[260] In conclusion, if animals are to be protected effectively from the risks set out in this chapter, we must begin debating the trade and animal welfare interface within the context of global animal law, with second wave animal ethics as a normative framework, and maintaining a radical openness of mind at every step.

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[257] Dillon (n 130) 91–92.

[258] ibid 97.

[259] Chapter V section 2.2.

[260] See chapter V section 3.

Chapter IV

International Trade Law and Scholarship: Coloniality in Animal Protection through Ethically Shallow Unilateralism

1. Introduction

Law that governs international trade is decisive in its treatment of animals as property. What little gestures towards animal protection it offers are but a splash in the ocean compared with the effect of trade law in facilitating and promoting the trade of animals and their bodies. Investigating this requires assessing trade law at multiple sites. Existing literature on trade law and animal welfare maintain sizeable and conceptually significant gaps. In two parts, this chapter analyses the law and literature through a second wave animal ethics lens in order to promote intersectionality, global approaches to law, and a conception of animal welfare as a trade impact issue rather than a 'non-trade issue'.

In its first part, this chapter investigates multiple sites of trade law which facilitate and even instigate the problems trade causes for animals. These sites are: multilateral trade law stemming from the WTO, bilateral free trade agreements, unilateral trade policies and WTO dispute settlement. Developments (and stagnation) at these sites have facilitated an outward spread of neoliberal trade norms, negatively impacting global animal law. Conversely, trade law tends to be somewhat closed to influxes of legal normativity due to its relatively constitutionalised state compared to other systems of international governance. Trade law's underlying norms neglect animals' interests, dichotomise domestic and wild animals, and eschew second wave deep listening and intersectionality. Thus, chapter V argues that second wave reform and second wave global animal law are required to improve animal protection in trade governance.

In its second part, this chapter critiques optimistic scholarly responses to the law on trade and animal welfare. The scholarship is based in first wave animal ethics and supports unilateral responses to trade and animal welfare problems. The scholarship also acquiesces with the WTO's

significant norm-building role for animal law. This risks entrenching animal commodification and paternalism into global animal law. This second part supports a normative shift of trade and animal welfare literature toward second wave animal ethics. Chapter V explores how this shift may occur.

To contextualise the analysis in these two parts, I will introduce key trends in the literature. The literature on trade and animal welfare is produced by academics, practitioners and activists from various fields. Lawyers, legal academics, law students, economists, welfare scientists, environmentalists and animal welfare NGO staffers make up the majority of authors. The geographical origin of the literature is varied, with the majority from the EU, the US, Canada and Australia. Scholarly output peaked around 1995 (WTO establishment) and 2015 (following *EC – Seal Products*).

The optimism of the modern literature analysed in this chapter's second part contrasts with earlier literature. Before *EC – Seal Products*, animal activists and academics worried that trade law would provoke a 'pull towards deregulation, or a race to the bottom', stymying regulatory progress on animal welfare.[1] This 'conventional view' spread in animal activist circles after their environmental protection colleagues began struggling with regulatory constraints emanating from the, at the time, newly established WTO.[2] The WTO seemingly provided little or no regulatory autonomy to protect animal welfare through unilateral trade measures.[3] Simultaneously, the WTO was requiring trade liberalisation that endangered animal welfare. The WTO came to be regarded

[1] Katie Sykes, 'Globalization and the Animal Turn: How International Trade Law Contributes to Global Norms of Animal Protection' (2016) 5(1) Transnational Environmental Law 55, 71; Jerry Anderson, 'Protection for the Powerless: Political Economy History Lessons for the Animal Welfare Movement' (2011) 4 Stanford Journal of Animal Law & Policy 1, 61; Charlotte Blattner, 'An Assessment of Recent Trade Law Developments from an Animal Law Perspective: Trade Law as the Sheep in Wolf's Clothing' (2016) 22 Animal Law Journal 277, 288; Christopher Fisher, 'Getting Animal Welfare on to the World Trade Agenda' in Robin Pedler (ed), *European Union lobbying: changes in the arena* (Palgrave Macmillan 2002) 157–158; Peter Fitzgerald, *International Issues in Animal Law: The Impact of International Environmental and Economic Law upon Animal Interests and Advocacy* (Carolina Academic Press 2012) 172; Stuart Harrop and David Bowles, 'Wildlife Management, the Multilateral Trade Regime, Morals and the Welfare of Animals' (1998) 1(1) Journal of International Wildlife Law & Policy 64, 64; Matthew Scully, *Dominion: The Power of Man, the Suffering of Animals, and the Call to Mercy* (Souvenir Press 2011) 183–184; Peter Stevenson, 'The World Trade Organisation Rules: A Legal Analysis of Their Adverse Impact on Animal Welfare' (2003) 8 Animal Law Review 107, 108; Edward M Thomas, 'Playing Chicken at the WTO: Defending an Animal Welfare-Based Trade Restriction Under GATT's Moral Exception' (2007) 34(3) Boston College Environmental Affairs Law Review 605, 608.

[2] Fisher (n 1) 157–158. See also Lewis Bollard, 'Global Approaches to Regulating Farm Animal Welfare' in Gabriela Steier and Kiran Patel (eds), *International Farm Animal, Wildlife and Food Safety Law* (Springer International Publishing 2017) 102.

[3] Robert Lee, 'World Trade Law and the Welfare of Animals' [2007] Journal of Animal Welfare Law 14, 14; Gary Miller, 'Exporting Morality with Trade Restrictions: The Wrong Path to Animal Rights' (2009) 34(3) Brooklyn Journal of International Law 999, 1017.

as the 'most important legal framework regarding animals'.[4] This view stemmed, in part, from the new WTO DSB which was forceful and 'self-contained', overemphasising trade interests.[5]

These concerns led to a surge in scholarship and a heavy emphasis on trade law within global animal law scholarship. Three key insights from this early literature contextualise the discussion in this chapter. First, WTO-induced fear was omnipresent within animal advocacy circles. Thus, the evolution to an optimistic and cooperative tone is noteworthy. This chapter argues new positivity is misplaced and may further entrench commodification of animals in law. Second, the literature's emphasis on domestic regulatory autonomy has persisted, entrenching a preference for unilateralism. This chapter shows unilateralism to be ineffective and inconsistent with second wave imperatives. I recommend shifting attention to forms of multilateralism, particularly given the connectivity of law in a globalised age. Third, the literature neglects second wave animal ethics imperatives. Promoting unilateralism is antithetical to second wave situatedness, facilitating coloniality. Of course, international law is also critiqued for perpetuating coloniality and this has inspired moves towards pluralism and globalism in law.[6] However, unilateralism will be shown to be particularly forthright and aggressive in its paternalism. Additionally, animal welfare protection in trade policy can never facilitate animal flourishing or eschew a moral circle of concern. Commodifying and trading animals' bodies fails to provide them with serious moral consideration. Commodifying animals perpetuates a moral circle of concern that excludes animals.

This chapter concludes by arguing that issues of trade and animal welfare are ineffectively and unethically tackled in the law, and the literature on this issue has not proposed adequate alternatives or evolutions. This has impacted global animal law normativity which frequently relies on similarity theory, adopts harmful circles of moral concern, overuses liberal theory and ignores situatedness and intersectionality. Thus, as chapter II concludes, global animal law must reorient itself. I propose second wave animal ethics to improve law and scholarship on trade and animal welfare.

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[4] David Favre, 'An International Treaty for Animal Welfare' (2012) 18 Animal Law Review 237, 249.

[5] Sykes (n 1) 70. Also see Stuart Harrop, 'The Dynamics of Wild Animal Welfare Law' (1997) 9 Journal of Environmental Law 287, 291; and Julinda Beqiraj, 'The Delicate Equilibrium of EU Trade Measures: The Seals Case' (2013) 14(1) German Law Journal 279, 319.

[6] For further, see chapter V section 3.2.

2. Different Sites of Trade Law and their Contribution to Global Animal Law

Global law is connective, future-oriented and increasingly post-Westphalian. It is not a spatial or categorical enclosure that law fits within. Nonetheless, state-centric international and domestic trade law have contributed to global animal law norms. Thus, this section analyses the neglect of animal welfare in WTO treaties, negotiations and institutional mechanisms. Then, it explores how the EU is the only legislator to begin including animal welfare in bilateral trade agreements. Further, this section analyses the evolving interpretation of WTO law by the DSB and how this has impacted the EU's unilateral trade policy on animal welfare. The overall picture is a mixture of trade law neglecting animal welfare or addressing the issue with ineffective and unethical unilateralism.

This section uses the four second wave animal ethics issues to analyse the impacts of these developments on global animal law and animals' lives. First, this section will show trade law lags behind animal law with regard to similarity theory. Trade law treats animals as property (distinguishing marine animals as 'natural resources') and is blind to the relationality between humans and animals.[7] Trade law commodifies animals, frustrating efforts to reward flourishing and indistinguish human and animal categories. An exciting new stream of animal law literature conceptualises animals as labourers in law but, for reasons of space, that literature is left aside in this thesis.[8] Second, animals are outside the moral circle of concern employed by trade law. Trade law captures marginal humans in its moral circle of concern through, for example, considerations of women and trade and special and differential treatment for developing countries, though resulting policies tend to have limited impact.[9] By contrast, animals are excluded from the moral circle employed. To evolve to a second wave foregoing of moral circles, trade law could move toward a precautionary approach, incorporating trade impact issues and removing narratives of animals as resources. Third, trade law remains rooted in and intricately tied to neoliberalism, despite critique by scholars like Andrew Lang.[10] This chapter applies neoliberal critiques to the

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[7] Charlotte E Blattner, *Protecting Animals Within and Across Borders: Extraterritorial Jurisdiction and the Challenges of Globalization* (Oxford University Press 2019) 86.

[8] Charlotte Blattner, 'Beyond the Goods/Resources Dichotomy: Animal Labor and Trade Law' (2019) 22(2) Journal of International Wildlife Law & Policy 63.

[9] Amrita Bahri, 'Measuring the Gender-Responsiveness of Free Trade Agreements: Using a Self-Evaluation Maturity Framework' (2019) 14 Global Trade and Customs Journal 517; Stephanie Switzer, 'A Contract Theory Approach to Special and Differential Treatment and the WTO' (2017) 16(3) Journal of International Trade Law & Policy 126.

[10] See chapter III.

WTO and chapter V proposes moving away from liberal approaches to trade and animal welfare. Finally, the WTO DSB defers to members' policy priorities, which could align with second wave situatedness. However, the EU's Inuit exception in the Seals Regime was arguably an effort at contextualisation which the DSB condemned. This facilitates and perpetuates coloniality in trade policy on animal welfare, echoing the wider colonial force of the WTO in general.

Overall, this chapter will reveal that trade law is more rooted in anthropocentric normativity than animal law and, thus, chapter V will conclude that solutions to the trade and animal welfare problem will need to span both areas in the short term.

2.1. Multilateralism: The WTO's Institutional Neglect of Animal Welfare

2.1.1. WTO Negotiations

There are no provisions in the WTO treaty or the covered agreements on the issue of animal welfare.[11] Nor are there authoritative interpretations (which are not commonly given) by the WTO's Ministerial Conference or General Council on the issue.[12] This is not likely to change soon because, at present, there are no negotiations on animal welfare at the WTO. Indeed, the WTO's enlarged membership, together with its unwavering preference for consensus decision making and package deals, has meant that the most recent round of negotiations (the Doha Round) is now considered dead following pained, protracted and unfruitful discussions.[13] Free trade agreements have proliferated as a result. The absence of multilateralism on animal welfare and trade facilitates the proliferation of countless harms due to the exclusion of animals from ethical consideration and their commodification. Discussions on animal welfare, where they have occurred, have focused on the Agreement on Agriculture (AoA). There were negotiations over including animal

[11] Alex B Thiermann and Sarah Babcock, 'Animal Welfare and International Trade' (2005) 24(2) Revue Scientifique et Technique (Office International Des Epizooties) 747, 747.

[12] Marrakesh Agreement Establishing the World Trade Organization (15 April 1994) LT/UR/A/2 <http://docsonline.wto.org> (WTO Agreement) art IX(2); Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) LT/UR/A-2/DS/U/1 <http://docsonline.wto.org> (DSU) art 3(9); Lothar Ehring and Claus-Dieter Ehlermann, 'The Authoritative Interpretation Under Article IX:2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvements' (2005) 8(4) Journal of International Economic Law 803, 813–818.

[13] Alan Matthew, 'Doha Negotiations on Agriculture and Future of the WTO Multilateral Trade System' [2013] IDEAS Working Paper Series from RePEc <https://search.proquest.com/docview/1697478793?accountid=14116> accessed 18 December 2020.

welfare expressly within subsidy provisions in the AoA but this did not materialise.[14] To contextualise this, the general treatment of agriculture at the WTO should be outlined.

Agriculture has always been treated exceptionally under international trade law, foregoing liberalisation requirements in order to protect the interests of the most powerful states.[15] The failure of the Doha Round of negotiations was largely due to negotiations on agricultural trade.[16] In response, the WTO abandoned its 'single undertaking' approach to negotiations. The resulting dispersion of negotiations has meant agricultural negotiations suffered 'effective abandonment'.[17] Thus, because poor countries disproportionately rely on agriculture for 'export earnings' and overall economic development, Global North countries will receive disproportionate benefits from the WTO system.[18] Large subsidies allow comparatively rich, western farmers to edge poorer farmers in the Global South out of global markets. The WTO ought to reflect on its failure to achieve its liberalisation objectives for members that rely heavily on agricultural exports.[19] Alternatively, many commentators oppose further agricultural trade liberalisation because agriculture is distinctive in its provision of public goods and is thus 'incompatible with free trade'.[20]

Second wave animal ethics requires giving this circumstance reflexive consideration to simultaneously protect animals and rectify the injustices the WTO causes for the Global South. This need not require liberalising trade in animals and their bodies. One potentially effective solution is a 'mandatory export tax equal to the value of any subsidies received' so as to enable domestic support to continue to ensure 'food security, rural development and … animal welfare and environmental standards' but also to stop poorer countries' exports being undermined by artificially cheap exports from richer states.[21]

Trade in agricultural products, including animals and their bodies, is primarily regulated by the AoA as well as the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement). The AoA is comprised of three pillars each representing different trade liberalisation goals: market access (enhancement), export subsidies (reductions) and domestic support (reductions). With

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[14] Committee on Agriculture, 'Special Session – Summary Report on the Fifth Meeting of the Special Session – Held on 5 – 7 February 2001 – Note by the Secretariat' (22 March 2001) G/AG/NG/R/5.

[15] James Scott, 'The Future of Agricultural Trade Governance in the World Trade Organization' (2017) 93(5) International Affairs 1167, 1172 citing Jennifer Clapp, 'Food security and contested agricultural trade norms' (2015) 11(2) Journal of International Law and International Relations 104.

[16] ibid 1167.

[17] ibid 1184.

[18] ibid.

[19] ibid.

[20] Wanki Moon, 'Is Agriculture Compatible with Free Trade' (2011) 71 Ecological Economics 13, 14.

[21] Scott (n 15) 1182 citing Clive George, *The truth about trade* (Zed 2010) 142.

regard to subsidies, the AoA permits those falling within the so-called 'green box'. It is unclear whether subsidy payments for animal welfare protection could be regarded as 'green box' subsidies because of the agreement's silence on this issue (though some WTO members do provide such payments regardless).[22] Animal welfare might be encompassed within the category for 'payments under environmental programmes'[23] or the non-exhaustive category for general services.[24] The exclusion of fisheries from this agreement denotes an anthropocentric division that prioritises human use and neglects animals' capacities and desires.[25]

The SPS Agreement provides freedom to WTO members to restrict trade by enacting measures that are aimed at protecting human, animal or plant life or health from risks arising from, for example, pests or diseases.[26] WTO members may pursue a self-defined level of protection including zero-risk.[27] Insofar as animal health and welfare overlap, this agreement's application directly impacts animal welfare. There are restrictions on the right to enact SPS measures which include obligations to: ensure the necessity of the measure; base the measure on a risk assessment; and avoid discrimination or disguised restrictions on international trade.[28] The SPS Agreement includes the OIE as a reference organisation. However, the lack of reference to animal welfare in the SPS Agreement has led to the conclusion that the institutional link to the OIE excludes its animal welfare work.[29] This is a frustrating restriction borne of the WTO's neglect of the animal question and without a strict legal basis, though this supposed exclusion is often flouted in practice.[30]

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[22] Agreement on Agriculture (15 April 1994) LT/UR/A-1A/2 <http://docsonline.wto.org> (AoA) annex 2; Michael Cardwell and Christopher Rodgers, 'Reforming the WTO Legal Order for Agricultural Trade: Issues of European Rural Policy in the Doha Round' (2006) 55(4) International & Comparative Law Quarterly 805, 810, 819 and 830.

[23] Alan Swinbank, 'Like Products, Animal Welfare and the World Trade Organization' (2006) 40(4) Journal of World Trade 687, 704–705.

[24] AoA (n 22) annex 2.2.

[25] ibid annex 1.

[26] Agreement on the Application of Sanitary and Phytosanitary Measures (15 April 1994) LT/ UR/A-1A/12 <http://docsonline.wto.org> (SPS Agreement) art 2:1 and annex A, para 1.

[27] ibid annex A, para 5; Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (4th edn, Cambridge University Press 2017) 955 et seq.

[28] SPS Agreement (n 26) arts 2.2, 2.3 and 5.1.

[29] 'Understanding the WTO Agreement on Sanitary and Phytosanitary Measures' (*World Trade Organization*) <https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm> accessed 18 December 2020; Sarah Kahn and Mariela Varas, 'OIE Animal Welfare Standards and the Multilateral Trade Policy Framework' (*OIE Discussion Paper*, 2012) 6 <https://www.oie.int/en/animal-welfare/future-developments/> accessed 18 December 2020; Steven White, 'Into the Void: International Law and the Protection of Animal Welfare' (2013) 4(4) Global Policy 391, 394 citing; David Fraser et al, 'Capacity Building to Implement Good Animal Welfare Practices: Report of the FAO Expert Meeting' (*Food and Agriculture Organization*, 2009) 18 <http://www.fao.org/3/i0483e/i0483e00.pdf> accessed 18 December 2020.

[30] See chapter V section 4.2.3.

In a proposal to the WTO's Committee on Agriculture in 2000, the EU expressed concern that the 'WTO does not provide a framework within which to address animal welfare issues'.[31] The EU argued there is a 'genuine need to discuss animal welfare in the WTO context', particularly in relation to the AoA.[32] The EU also noted a fear of undermining animal welfare standards and low animal welfare havens.[33] *EC – Seal Products* helps WTO members avoid their welfare measures being undermined, but it remains true that the WTO does not provide a framework to address animal welfare issues. The EU notes that provisions like GATT article XX provide a context to resolve some welfare issues but that 'animal welfare should be globally addressed in a consistent manner within the WTO'.[34] This follows repeated assertions that the EU accepts and respects domestic regulatory autonomy on this issue.[35] Though, it is notable that, in *US – Shrimp*, the panel recommended multilateral collaboration before unilateral measures are taken for issues such as wildlife protection.[36] Second wave animal ethics would require that any global treatment of animal welfare be coupled with situated and locally implementable strategies and connections.

The EU's proposal was not well received.[37] Global South countries were the central opponents, arguing that WTO members should be left to regulate animal welfare themselves, that this would distract from human welfare priorities, and that the WTO is not an appropriate forum.[38] Given that these same members accept a role for the WTO in sustainable development and environmental protection, it is likely that this view stems from the erroneous view of animal welfare as a solely domestic issue. The members feared that the EU's proposals were disguised protectionism and that the EU was being hypocritical by permitting some animal harms and denouncing others.[39] This is no reason to demonise those Global South countries for their position on animal welfare regulation. Indeed, in its proposal, the EU notes that it is most concerned with intensive production methods which are most common in industrialised countries.[40] The EU later

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[31] WTO Committee on Agriculture Special Session, European Communities Proposal: Animal Welfare and Trade in Agriculture (2000) G/AG/NG/W/19 1.

[32] ibid 2.

[33] ibid 1.

[34] ibid 3.

[35] ibid 2–3.

[36] Panel Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (1998) WT/DS58/R (US - Shrimp) paras 7.54-7.61.

[37] Swinbank (n 23) 690.

[38] Committee on Agriculture, 'Special Session – Summary Report on Third Meeting of the Special Session held on 28 – 29 September 2000' (10 November 2000) G/AG/NG/R/3.

[39] ibid. For discussion, see Gaverick Matheny and Cheryl Leahy, 'Farm-Animal Welfare, Legislation, and Trade' (2007) 70(1) Contemporary Problems 325, 353.

[40] European Communities Proposal (n 31) 2.

claimed its proposals were 'misrepresented' and that it was focusing on 'factory farming' of the kind that most Global South countries do not partake in.[41] One wonders, in this case, why the EU did not seek a plurilateral agreement amongst a subset of WTO members. Second wave animal ethics requires investigating the lived experience of these traded animals whilst avoiding coloniality, paternalism and context-blindness. Achieving this requires a tough balancing act and proposals are made in this regard in chapter V. The call for WTO members to choose their own animal welfare regulation has, it seems, now been heeded following the *EC – Seal Products* case, as elaborated below.[42]

The WTO membership's refusal to engage multilaterally on the issue of animal welfare, and the deference to members' priorities and unilateral policies, should not be mistaken for value-neutrality. There is value in the ostensibly neutral, as identified by feminist and intersectional ethics. The WTO's treatment of the trade in animals and their bodies reveals this. Trade in animal products has been and continues to be liberalised through negotiations under the AoA. It remains true that trade in agricultural products remains subject to relatively high levels of protectionism.[43] Nonetheless, some progress has been made in liberalising agricultural trade in recent years and negotiations continue.[44] Progress includes tariff cuts[45] and the recent Nairobi Decision which includes the elimination of agricultural export subsidies.[46] Thus, the normative position taken is that, in lieu of agreement otherwise, animals are not deserving of attention as sentient beings and their suffering as a result of increased trade in their bodies and products stemming therefrom is acceptable as status quo. The WTO membership accepts the propertisation and commodification of animals, it has no knowledge of or desire to protect animal flourishing, and it fails to recognise that animal protection is an issue with too many global permutations to be relegated to the domestic sphere. Thus, while the WTO membership has refused to negotiate an official stance or set of standards on animal welfare, it has acted on shared values which are harmful to animal

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[41] Committee on Agriculture, 'Second Special Session of the Committee on Agriculture – 29 – 30 June 2000 – Statement by the European Community' (11 July 2000) G/AG/NG/W/24.

[42] See below at section 2.3.

[43] Michael Trebilcock and Kristen Pue, 'The Puzzle of Agricultural Exceptionalism in International Trade Policy' (2015) 18(2) Journal of International Economic Law 233; Moon (n 20) 15.

[44] On authority for ongoing negotiations, see AoA (n 22). On the ongoing negotiations, see World Trade Organization, 'Agriculture Negotiations' <https://www.wto.org/english/tratop_e/agric_e/negoti_e.htm> accessed 18 December 2020.

[45] World Trade Organization, Revised draft modalities for agriculture (1 August 2007) TN/AG/W/4, TN/AG/W/4/Corr.1 <http://docsonline.wto.org>.

[46] World Trade Organization, Ministerial Decision on Export Competition (19 December 2015) WT/L/980, WT/MIN(15)/45 <http://docsonline.wto.org>.

welfare. Prominent scholars fail to recognise this when they describe the WTO's goals as 'circumscribed and functional' rather than creating 'communities of shared values and norms'.[47]

Despite the lack of enthusiasm amongst WTO members regarding animal welfare in 2000, the world has changed significantly in the past twenty years with regard to animal liberation issues. Chapter V will argue that the risks and opportunities available now should encourage new attempts at multilateralism on animal welfare in order to tackle the trade and animal welfare interface. In this regard, it is notable and unfortunate that the EU decided to abandon its multilateral approach to animal welfare following this false start. The EU could have pursued plurilateral agreements with industrialised farming nations and further technical assistance for countries where animal industry is developing toward more intensive methods.[48] Instead, the EU opted for an ambitious agenda to negotiate FTAs and include animal welfare provisions therein. FTAs cannot provide the benefits of the alternatives just articulated, as argued below.

The question remains: what kind of proposals for more collaborative multilateral efforts would be best placed to enact change? Literature at the time of the EU's proposal opined that a change to the 'framework of rules' was required to deal with the animal welfare issue rather than a 'piecemeal approach' such as the proposal for institutional work put forward by the EU.[49] Framework reform seems somewhat inconceivable at a time when the WTO is in crisis at multiple sites (Doha abandoned, the Appellate Body inoperative).[50] Although, perhaps the current crisis actually means change is afoot. Options for change will be explored in the next chapter. The next section will investigate the institutional mechanisms that exist within the WTO framework to deal with the interaction between trade and environmental issues. This will prove inspirational for the chapter V recommendations for animal issues.

2.1.2. WTO Institutional Mechanisms

While there is no official mandate for WTO institutional mechanisms to work on animal welfare, there are many incidental references to and discussions of animal welfare.[51] Interinstitutional cooperation between the WTO and relevant bodies that hold animal welfare expertise would

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[47] Rob Howse, Joanna Langille and Katie Sykes, 'Pluralism in Practice: Moral Legislation and the Law of the WTO After Seal Products' (2015) 48(1) George Washington International Law Review 81, 89.

[48] On the creeping industrialisation of animal interactions, see Thomas G Kelch, 'CITES, Globalization, and the Future of Animal Law' in Randall S Abate (ed), *What can Animal Law learn from Environmental Law?* (Environmental Law Institute 2015) 284–285.

[49] AL Hobbs et al, 'Ethics, Domestic Food Policy and Trade Law: Assessing the EU Animal Welfare Proposal to the WTO' (2002) 27(5–6) Food Policy 437, 453.

[50] See below at section 3.1.

[51] See chapter V section 4.2.

provide an avenue for better consideration of animal interests in trade policy. After all, international trade law does not exist in 'clinical isolation from public international law'.[52] Indeed, trade law and governance already coexist and co-work with environmental law and policy, as will be demonstrated here.

In the event that WTO law conflicts with non-WTO international law, Joost Pauwelyn provides an in-depth analysis of how conflict is defined, how it presents itself and how it is resolved.[53] There is a 'presumption against conflict' in public international law and, in practice, WTO law has peacefully co-existed with other regimes.[54] Further, Pauwelyn argues that the operation of article 41 of the Vienna Convention means that nothing in WTO law can stop its members from contracting out of certain rights and obligations. They could agree to another treaty so long as it does not frustrate the overarching objective of the WTO or the rights of its members.[55] So, for example, a subset of WTO members could decide to conclude a treaty contracting out of certain WTO trade liberalisation obligations in order to protect animal welfare.[56] As proposed in chapter V, this may include animal law treaties that recognise animal sentience and include associated obligations that would restrict or halt trade in animals and their bodies.[57] In practice, difficulties may arise in WTO dispute settlement because the Appellate Body has ruled that covered agreement interpretation can only account for subsequent agreements between *all* WTO members.[58]

In any event, because treaty norms tend to co-exist rather than conflict, the question is one of priority rather than conflict. The WTO treaty provides very little guidance here.[59] Instead, one must rely on the rules of *lex posterior* (the later rule prevails) and *lex specialis* (the more specific rule

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[52] Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline* (1996) WT/DS4/AB/R (US - Gasoline) 17. See also DSU (n 12) art 3(2); Joost Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law? Questions of Jurisdiction and Merits' (2003) 37(6) Journal of World Trade 997, 1001. For an example of conflicting views which Pauwelyn convincingly debunks, see Gabrielle Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and Other Treaties' (2001) 35(6) Journal of World Trade 1081, 1105.

[53] Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003).

[54] ibid 240.

[55] ibid 318.

[56] Pauwelyn's views on non-WTO international law and the DSB has detractors but this thesis does not delve deeply into these points of contention. See, for example, Joel P Trachtman, 'Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law by Joost Pauwelyn' (2004) 98(4) American Journal of International Law 855.

[57] Chapter V section 4.1.

[58] Appellate Body Report, *Peru - Additional Duty on Imports of Certain Agricultural Products* (2015) WT/DS457/AB/R (Peru - Agricultural Products) para 5.106.

[59] Pauwelyn (n 53) 327 and 343.

prevails).[60] A prominent relationship of norm co-existence exists between WTO law and multilateral environmental agreements.[61] Despite the fact that a number of multilateral environmental agreements include specific trade obligations (including trade restrictions that appear non-compliant with WTO rules), they have peacefully coexisted with WTO law. The WTO's role in this regard has been identifying overlap rather than setting 'positive policies' for environmental law.[62] The WTO has adopted this role in the case of sustainable development which is referenced in the WTO treaty's preamble. This treaty reference facilitated the creation of the WTO Committee on Trade and Environment (CTE) and has grounded the CTE's work in facilitating communication 'between trade officials and environmental officials operating at the international level'.[63] Instigating such institutional work on animal welfare might prove challenging in the absence of a relevant treaty provision. However, it could be fruitful insofar as an ethical balancing of trade liberalisation and animal welfare protection is concerned. It would also be appropriate given the connectivity of law in a globalised age.

The benefits of institutional input to the animal welfare issue can be deduced from the positive work stemming from the CTE. This work has helped to appease critics of the WTO's approach to environmental issues stemming from the GATT panel *US – Tuna* disputes and which resulted in the Battle in Seattle. The Doha Round includes mandated work on sustainable development, assigned to the CTE.[64] These negotiations on the environment have three focuses: the relationship between WTO rules and specific trade obligations in MEAs; procedures for regular information exchange and observer status between MEA secretariats and relevant WTO committees; and the reduction or elimination of trade barriers to environmental goods and services.[65] The CTE has been a crucial forum for debating and tackling these issues.[66] It has provided means of 'cooperation and consensus' to ensure coexistence of WTO law and multilateral environmental agreements.[67] This is significant when one notes that, for example, CITES restricts

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[60] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 30; Pauwelyn (n 53) 388.

[61] Pauwelyn (n 53) 2.

[62] Emily Barrett Lydgate, 'Sustainable Development in the WTO: From Mutual Supportiveness to Balancing' (2012) 11(4) World Trade Review 621, 623.

[63] Steve Charnovitz, 'Trade and Environment' in Arvid Lukauskas, Robert M Stern and Gianni Zanini (eds), *Handbook of Trade Policy for Development* (Oxford University Press 2013) 894–895.

[64] World Trade Organization, Doha Ministerial Declaration (20 November 2001) WT/MIN(01)/DEC/1 <http://docsonline.wto.org> para 51.

[65] ibid para 31. For commentary, see Gracia Marín Durán, 'The Role of the EU in Shaping the Trade and Environment Regulatory Nexus: Multilateral and Regional Approaches' in Bart Van Vooren, Steven Blockmans and Jan Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (Oxford University Press 2013) 228–233.

[66] Marín Durán (n 65) 230.

[67] Pauwelyn (n 53) 350 citing WTO doc WT/CTE/1, para 171 (1996).

trade in about 35,000 species and the relationship between CITES and the WTO has embodied harmony, 'cooperation and cohesion'.[68] Perhaps the most ambitious project is to negotiate an Environmental Goods Agreement in order to liberalise trade in environmental goods and services. These negotiations include 18 WTO members and have been stalled since December 2016.[69] This experience indicates that a similar agreement for high-welfare (facilitating) products would require intense negotiating efforts.

One difficulty to note is that the WTO maintains a 'closed-door' approach to this policymaking as well as dispute settlement; it shields itself from inbound normative influence.[70] This makes it difficult for animal welfare experts to seek to input their knowledge to these processes. For example, the OIE is a permanent observer to the SPS committee but NGOs are excluded.[71] Minor improvements to this situation have included: confirmation that NGOs may submit amicus curiae briefs during disputes though, in practice, the Appellate Body frequently chooses to reject them or not to consider them;[72] and the adoption of guidelines by the General Council concerning the WTO's relations with NGOs which provides clarity but rules out direct involvement in WTO work or meetings.[73] Of course, the situation of the DSB is changeable given current work on alternative dispute settlement mechanisms and, thus, this situation may change (discussed below).

If non-WTO norms (treaty or otherwise) are to develop regarding the trade and animal welfare interface, it would be beneficial if interinstitutional interaction were to be pursued with the WTO. The work of the CTE has shown that this can be a route to peaceful coexistence. This would allow for the multilateral response to the trade and animal welfare interface recommended in chapter V. There are no welfare-specific bodies currently in existence that the WTO could interact with (noting that there are limits to the welfare focus of the OIE). Therefore, chapter V explores why such bodies are required, what they might look like, and how they will help to deal

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[68] CITES Secretariat and WTO Publications, 'CITES and the WTO: Enhancing Cooperation for Sustainable Development' (2015) 1 <https://www.wto.org/english/res_e/publications_e/citesandwto15_e.htm> accessed 18 December 2020.

[69] Joachim Monkelbaan, 'Using Trade for Achieving the SDGs: The Example of the Environmental Goods Agreement' (2017) 51(4) Journal of World Trade 575, 589 and 597–598.

[70] Chris Wold, 'Taking Stock: Trade's Environmental Scorecard after Twenty Years of "Trade and Environment"' (2010) 45(2) Wake Forest Law Review 319, 340–344.

[71] Andrew Lang and Joanne Scott, 'The Hidden World of WTO Governance' (2009) 20(3) European Journal of International Law 575, 591.

[72] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 215 of the DSU by Malaysia* (2001) WT/DS58/AB/R (US - Shrimp (Article 21.5 - Malaysia) para 108; Yoriko Otomo, *Unconditional Life: The Postwar International Law Settlement* (Oxford University Press 2016) 41–43; Wold (n 70) 343–344.

[73] World Trade Organization, 'Guidelines for Arrangements on Relations with Non-Governmental Organizations' (1996) WT/L/162; Wold (n 70) 345.

with the impact of trade on animal welfare by, amongst other things, collaborating with the WTO at an institutional level.

2.2. Free Trade Agreements: Further Liberalisation with Few Opportunities to Minimise Associated Impact on Animal Welfare

GATT article XXIV permits trade liberalisation agreements between WTO members, recognising the 'desirability of increasing freedom of trade'. Customs unions and free trade agreements (FTAs) aim to pursue deeper 'economic integration' amongst pairs or subgroups of WTO members by acting as a 'stepping stone for later multilateral trade'.[74] That is the theory. In practice, customs unions and FTAs are proving an attractive alternative to the WTO's stalled multilateral negotiations; they have evolved from regional agreements to wider 'cross-regional' agreements and from market access agreements to modern deep and comprehensive FTAs.[75] These cover everything from market access, to trade and sustainable development, to dispute settlement. At present a 'spaghetti bowl' of 484 agreements exist, providing deeper trade liberalisation than the WTO.[76] Free trade agreements have proliferated, at least in part due to the failure of the WTO's Doha Round of negotiations. The abandonment of animal welfare negotiations by the WTO membership has meant that the EU has turned to bilateral and larger 'mega-regional' free trade agreements in order to achieve its animal welfare objectives. The EU is the only FTA negotiator to propose animal welfare provisions for inclusion. This section argues FTAs hold less potential for animal protection than multilateral and more connective means of governance.

FTAs pose three central challenges for animal welfare. First, the GATT's definition of an FTA requires trade liberalisation on 'substantially all the trade' between the parties to the agreement, with exceptions relating to special and differential treatment for developing countries.[77]

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[74] Van den Bossche and Zdouc (n 27) 671 et seq.

[75] World Trade Organization, 'World Trade Report 2011: The WTO and Preferential Trade Agreements: From Co-Existence to Coherence" (2011) 6 <https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf> accessed 18 December 2020.

[76] See WTO figures on regional trade agreements at: http://rtais.wto.org/UI/publicsummarytable.aspx. The 'spaghetti bowl' was first referred to in Jagdish Bhagwati, 'US Trade Policy: The Infatuation with FTAs' [1995] Department of Economics Discussion Papers No 726 4.

[77] General Agreement on Tariffs and Trade (15 April 1994) LT/UR/A-1A/1/GATT/1 <http://docsonline.wto.org> (GATT) art XXIV:8(b); Appellate Body Report, *Turkey - Restrictions on Imports of Textile and Clothing Products* (1999) WT/DS34/AB/R (Turkey - Textiles) para 48; Decision on Differential and More Favourable

Thus, while trade law treats animals as property and if animal products are traded between the partners, it is difficult to eliminate trade in low welfare products. WTO members do breach these requirements.[78] However, such brazenness is unlikely in animal welfare contexts where the WTO is more often used as a scapegoat to justify a lack of regulation.[79]

A second problem is that FTAs often create new dispute settlement mechanisms. These typically do not apply to sustainable development or animal welfare commitments within FTAs.[80] However, they do provide additional means of challenge to animal welfare protecting trade restrictions if trade in the relevant products is liberalised under the FTA. Thus, FTAs provide deterrents to utilising unilateral trade measures to protect animal welfare.

A third problem for animal welfare is that article GATT XXIV:5(b) forbids FTAs from making trade barriers 'higher or more restrictive' than they were before the agreement entered into force. This stops members using FTAs as disguised protectionism. However, this also forbids willing FTA parties from restricting trade in goods to protect animal welfare. Currently, it remains unclear how this requirement might apply to technical regulations within the scope of the Agreement on Technical Barriers to Trade (TBT Agreement). Accordingly, it has been suggested that mutual standard setting might not be possible but that mutual recognition of standards would be acceptable.[81] Although FTAs are not always fully WTO-compliant, this legal restriction is impactful in a context where regulators often use excuses not to protect animal welfare. Thus, FTA provisions on animal welfare can only, at best, minimise the impact of further trade liberalisation on animal welfare. They cannot counter 'scale effects' of further liberalisation because they should not exclude animal products or low welfare animal products specifically.[82]

Additionally, FTA parties are unlikely to alter an FTA's careful balancing of rights and obligations by, for example, unilaterally restricting trade in animal products subject to trade liberalisation under the FTA. This would be in bad faith or even a potential treaty violation.[83] Treaty violation may be avoided by including an exception akin to GATT article XX for public

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Treatment, Reciprocity and Fuller Participation of Developing Countries (28 November 1979) L/4903 <http://docsonline.wto.org> (Enabling Clause) s 2(c).

[78] For example, the EU-Turkey Customs Union excludes agricultural products. See Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union [1995] OJ/L 35/6 art 2.

[79] Chapter III section 3.4.

[80] However, a strongly worded provision could now be enforceable following *Opinion 2/15 of the European Court of Justice (Full Court) of 16 May 2017 pursuant to Article 218(11)* ECLI:EU:C:2017:376 para 161.

[81] Joel P Trachtman, 'Toward Open Recognition? Standardization and Regional Integration Under Article XXIV of GATT' (2003) 6(2) Journal of International Economic Law 459.

[82] Wold (n 70) 320.

[83] For example, 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 [2002] OJ L 352/3 arts 2(4)(d) and 135(1).

morality concerning animal welfare. 262 FTAs contain such provisions for environmental protection.[84] However, it seems trade negotiators like the EU are not interested in pursuing this avenue of unilateral protection for animal welfare. Instead, the EU developed a cooperative model in response to this situation. For sustainable development, the EU modelled a cooperative approach on the North American Free Trade Agreement's (NAFTA) chapter-based approach but excluding that agreement's dispute settlement provisions.[85] NAFTA is considered a high-point in FTA sustainability innovation, even compared to its successor: the USMCA.[86] Incorporation of animal welfare lags far behind. This is despite the fact that most FTAs will entail full or partial liberalisation of trade in animals and animal products.

All FTA provisions on animal welfare to date are based on a cooperative model without enforcement or dispute resolution opportunities.[87] The first FTA to include animal welfare was the 2002 EU-Chile FTA.[88] This FTA relegates animal welfare to the SPS chapter, thus excluding non-health related welfare concerns. It also includes animal welfare objectives under the aim to 'facilitate trade in animals and animal products', thus encouraging further harmful scale effects of trade on animal welfare. This agreement's ambitions stretch no further than 'reaching a common understanding' on animal welfare standards.[89] The shift to deep and comprehensive FTAs did not improve the treatment of animal welfare. For example, the 2010 EU-South Korea FTA still includes animal welfare in the SPS chapter and only requires cooperation through the exchange of information and expertise.[90] The only improvement is a requirement to 'cooperate in the development of animal welfare standards in international fora'.[91]

Some sporadic improvements have been made since then. These depend on a strong EU proposal and acquiescence from the relevant trading partner. The EU only proposed one very

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[84] José-Antonio Monteiro, 'Typology of Environment-Related Provisions in Regional Trade Agreements' [2016] WTO Staff Working Paper No ERSD-2016-13 4 <http://hdl.handle.net/10419/145110> accessed 18 December 2020.

[85] European Commission, 'Report on the impact of animal welfare international activities on the competitiveness of European livestock producers in a globalized world' (2018) COM(2018) 42 final 8.

[86] Noemie Laurens and others, 'NAFTA 2.0: The Greenest Trade Agreement Ever?' (2019) 18(4) World Trade Review 659, 668–672; Wold (n 70) 320.

[87] Jan Walter, 'EU Bilateral Trade Agenda: What's in It for Animals' (*Eurogroup for Animals*, 2015) 2 <http://www.animalwelfareintergroup.eu/wp-content/uploads/2016/05/EU-bilateral-trade-agenda.pdf> accessed 18 December 2020.

[88] EU – Chile FTA (n 83).

[89] ibid annex IV, arts 1(1), 1(2) and 12(2)(e).

[90] Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L127/6 arts 5(1)(2) and 5(9).

[91] ibid art 5(9).

weak provision on animal welfare in negotiations with the Philippines and Indonesia.[92] However, it shifted animal welfare to a 'cooperation' chapter and added obligations of technical assistance and capacity building in the EU-Vietnam FTA.[93] It was thought that the EU-Canada Free Trade Agreement (CETA) would go further. However, the EU reportedly traded away its animal welfare proposed text 'in exchange for Canadian concessions on geographical indications'.[94] The only eventual improvement here is an adoption of OIE definitions.[95] The EU-Mexico Global Agreement includes significant improvements; animal welfare (together with antimicrobial resistance) is given its own chapter.[96] This includes a recognition of animal sentience, reference to OIE standards, and an endeavour to improve implementation of the OIE standards.[97] A further significant development is the first (reported) inclusion of trade liberalisation conditional on animal welfare standards in negotiations toward an EU-MERCOSUR FTA.[98] This accords with a policy proposal I developed for better animal welfare protection in FTAs.[99] Conditional liberalisation, which may incorporate technical regulations, is required to prevent FTAs from leading to low animal welfare havens and a race to the bottom.

In conclusion, restricting trade in animal products (beyond current levels) and dealing with scale effects of trade in FTAs is not possible within FTAs. Legal and political barriers make it unfeasible for an FTA to raise trade barriers to protect animal welfare. The most FTAs could do is condition additional liberalisation on animal welfare. The enactment of FTAs is also likely to impose political, and potentially legal, barriers to unilateral trade restrictions in relevant animal products. Thus, the proliferation of FTAs is making animal welfare protection in trade difficult. The inclusion of cooperative animal welfare provisions in FTAs can, in this context, only be regarded as a token gesture. They might improve the treatment of certain animals that are traded

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[92] European Commission, 'EU-Indonesia FTA (EU Textual Proposal): Chapter [XX]: Sanitary and Phytosanitary Measures' (2016) art X.1(e) <https://trade.ec.europa.eu/doclib/docs/2017/february/tradoc_155287.pdf> accessed 18 December 2020; European Commission, 'EU-Philippines FTA (EU Textual Proposal) - Chapter [XX]: Sanitary and Phytosanitary Measures' (2017) art X.1(e) <https://trade.ec.europa.eu/doclib/docs/2017/march/tradoc_155432.pdf> accessed 18 December 2020.

[93] Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam [2020] OJ L 186/63.

[94] Walter (n 87) 5.

[95] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L 11/23 art 5(1)(c).

[96] European Commission, 'EU-Mexico Global Agreement in Principle - Chapter X: Cooperation in Animal Welfare and Anti-Microbial Resistance' (2018) <https://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156799.pdf> accessed 18 December 2020.

[97] ibid art XX.1 and XX.2.

[98] Mattha Busby, 'EU Imposes Hen Welfare Standards on Egg Imports for First Time' (*The Guardian*, 2019) <https://www.theguardian.com/environment/2019/oct/02/eu-imposes-hen-welfare-standards-on-egg-imports-for-first-time> accessed 18 December 2020.

[99] 'Model Animal Welfare Provisions for EU Trade Agreements' (*Eurogroup for Animals*, 2017) 8.

in the long term. For example, cooperative provisions have been demonstrated to have had an impact on domestic legal regimes abroad, such as in Chile. However, this does not guard against the risks of low animal welfare havens and consequent risks of regulatory chill. Of course, if such cooperative activity led to an equivalence of standards between the EU and its partner countries then this would solve these problems. But instances of such improvements have been isolated cases and the overall impact of FTAs is far more likely to be negative.

2.3. Unilateralism: WTO Disputes Facilitating Coloniality and Ineffectiveness in Trade Measures

2.3.1. WTO Dispute Settlement Provides WTO Members with Domestic Regulatory Autonomy to Protect Animal Welfare

Animal welfare has been subject to negative integration through evolving DSB interpretations. DSB rulings are considered a 'law-like tool', lacking precedential status but generally forming consistent lines of reasoning and commanding generally good adherence.[100] The literature focuses on the DSB over other WTO functions[101] but the DSB is in crisis, jeopardising legal progress made there.[102] The DSB has not explored the impact of the AoA and SPS Agreement on animal welfare. Thus, animals' fate has rested upon DSB interpretations of the technocratic GATT and TBT Agreement. The literature overwhelmingly focuses on the GATT even though both agreements apply to trade restrictions that condition taxation levels or internal regulations on animal welfare protections.[103] The DSB Appellate Body's relatively settled approach identifies three stages at which animal welfare trade restrictions might be deemed acceptable under WTO law. The first holds untapped potential, the second is an easy hurdle, the third is the typical site of contention.

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[100] Henrik Andersen, 'Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions' (2015) 18(2) Journal of International Economic Law 383; Robert Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary" (2016) 27(1) European Journal of International Law 9.

[101] For example, Celeste Black, 'Live Export and the WTO: Considering the Exporter Supply Chain Assurance System' (2013) 11 Macquarie Law Journal 77; Jennifer Klein, 'EU Cosmetics Directive and the Ban on the Animal Testing: Compliance, Challenges and the GATT as a Potential Barrier to Animal Welfare' (2012) 21(1) Transnational Law & Contemporary Problems 251; Laura Morfuni, 'Pain for Profit: An Analysis of the Live Export Trade' (2011) 16(2) Deakin Law Review 497.

[102] See below at section 3.1.

[103] My research remedying this is summarised here: 'Method-of-Production Labelling: The Way Forward to Sustainable Trade' (*Eurogroup for Animals*, 2019) <https://www.eurogroupforanimals.org/sites/eurogroup/files/2020-02/E4A-Policy-Paper-Labeling_and_WTO_04-2019-screen_0.pdf> accessed 18 December 2020.

2.3.1.1. Finding Discrimination

The first stage tests compliance with substantive non-discrimination obligations that require equal treatment for like products which are directly competitive and substitutable.[104] The treaties do not define likeness. Instead, GATT panel and DSB rulings identify likeness criteria. Two criteria (consumers' tastes and habits and processes and production methods (PPMs)) can distinguish low and high welfare animal products. Consumer tastes and habits are a 'key' criterion to establishing whether two products are like one another.[105] Disputes have not tested this option for animal welfare under the GATT but previous reports indicate potential success here, leaving scope for preferences for, for example, dolphin-safe tuna.[106] Ethical consumers do not regard high and low welfare products as substitutable.[107]

Non-product related PPMs are a more contentious likeness criterion.[108] They were dismissed in unadopted GATT panel disputes *US – Tuna I* and *US – Tuna II*.[109] Unadopted rulings have limited authority so literature professing 'conventional wisdom' of PPM irrelevance is flawed.[110] Most commentators now dismiss '*per se*' illegality of PPM-based distinctions following *US – Shrimp*.[111] The debate about PPMs continues, particularly regarding product-related and non-

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[104] GATT (n 77) arts I, III:2 and 4; Agreement on Technical Barriers to Trade (15 April 1994) LT/UR/A-1A/10 <http:// docsonline.wto.org> (TBT Agreement) arts 2.1 and 2.2. These rules include a most-favoured nation principle (requiring equal treatment for like products from different exporting states) and a national treatment obligation (requiring equal treatment for imported products that are like domestic products). The TBT obligations are treated by the AB as similarly demanding compared to their GATT counterparts: Howse (n 100) 54, 58 and 60.

[105] Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos Containing Products* (2001) WT/DS135/AB/R (EC - Asbestos) para 117.

[106] Panel Report, *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (2011) WT/DS381/R (US - Tuna II (Mexico)) paras 7.231-7.232; Meredith A Crowley and Robert Howse, 'Tuna-Dolphin II: A Legal and Economic Analysis of the Appellate Body Report' (2014) 13(2) World Trade Review 321, 327.

[107] Matheny and Leahy (n 39) 350.

[108] Van den Bossche and Zdouc (n 27) 311 et seq.

[109] GATT Panel Report, *United States - Restrictions on Imports of Tuna* (unadopted, 1992) GATT BISD 39S (US - Tuna I) para 5.15; GATT Panel Report, *United States - Restrictions on Imports of Tuna* (unadopted, 1994) DS 29/R (US - Tuna II) paras 5.18.

[110] For example, Steve Charnovitz, 'The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality' (2002) 27(1) Yale Journal of International Law 59, 76–77; Peter L Fitzgerald, '"Morality" May Not Be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law' (2011) 14 Journal of International Wildlife Law & Policy 85, 100–101.

[111] Christine R Conrad, *Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals* (Cambridge University Press 2011) 24.

product-related PPMs under the TBT.[112] Nonetheless, the DSB has not definitively ruled on the issue.[113]

Overarchingly, likeness must be decided case-by-case, determining whether there is a 'competitive relationship between and among products'.[114] Thus, the criteria are not a 'closed list' and new ones may arise to incorporate animal welfare.[115] If argumentation succeeds here, no further testing is required. If argumentation fails, compliance at stages two and three is required to justify differential treatment of like products.

2.3.1.2. Collective Values

Assuming breach of the substantive WTO rules, second stage compliance is easily achieved because the DSB is 'deferential' to WTO members' regulatory values.[116] GATT article XX contains a finite list of exceptions to GATT's substantive rules with three of relevance to animal welfare. Article XX(b) permits trade restrictions which permit human, animal or plant life or health. While welfare considerations have been found encompassed within animal health in *US - Tuna II (Mexico)*,[117] no WTO members have argued this in a dispute.

Article XX(g) permits trade restrictions related to conservation of exhaustible natural resources. Evolving article XX(g) rulings hold threefold significance for animal welfare: they share a dynamic of tension between trade objectives and trade impact issues;[118] conservation and welfare are conflated in DSB rulings, providing incidental discussion of welfare;[119] and conservation

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[112] For example, Laurens Ankersmit, Jessica Lawrence and Gareth Davies, 'Diverging EU and WTO Perspectives on Extraterritorial Process Regulation' (2012) 21 Minnesota Journal of International Law Online 14, 14; Laurens J Ankersmit and Jessica C Lawrence, 'The Future of Environmental Labelling: US - Tuna II and the Scope of the TBT' (2012) 39(1) Legal Issues of Economic Integration 127, fns 31-32.

[113] For example, Appellate Body Report, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products* (2014) WT/DS400/AB/R, WT/DS/401/AB/R (EC - Seal Products) para 5.14; Van den Bossche and Zdouc (n 27) 885 et seq.

[114] Appellate Body Report, *EC - Asbestos* (n 105) para 99; Appellate Body Report, *United States - Measures Affecting the Production and Sale of Clove Cigarettes* (2012) WT/DS406/AB/R (US - Clove Cigarettes) para 120.

[115] Appellate Body Report, *EC - Asbestos* (n 105) paras 102 and 113.

[116] Howse (n 100); Aaron Cosbey and Petros C Mavroidis, 'Heavy Fuel: Trade and Environment in the GATT/WTO Case Law' (2014) 23(3) Review of European, Comparative & International Environmental Law 288.

[117] Panel Report, *US - Tuna II (Mexico)* (n 106) paras 7.437 and 7.499; Appellate Body Report, *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (2012) WT/DS381/AB/R (US - Tuna II (Mexico)) paras 246-247 and 330.

[118] Katie Sykes, 'WTO Law, the Environment and Animal Welfare' in Werner Scholtz (ed), *Animal Welfare and International Environmental Law: From Conservation to Compassion* (Edward Elgar 2019) 271.

[119] One particularly confusing passage is Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to article 21.5 of the DSU by the United States and Second Recourse to Article 21.5 of the DSU by Mexico* (2017) WT/DS381/ para 7.131; Sykes (n 118) 292–293 and 302.

disputes are 'incidentally relevant' insofar as welfare overlaps with conservation objectives.[120] Public uproar followed the unadopted GATT panel decisions in *US – Tuna* in the 1990s for disregarding environmental protection.[121] Consequently, widespread belief was that regulatory measures for conservation or animal welfare were incapable of GATT compliance.[122] *US – Shrimp* marked a turning point. This case accounted for the change in circumstances that has occurred since the GATT was first enacted in 1947 through 'evolutionary interpretation' to include animals under article XX(g) as 'exhaustible natural resources'.[123] The Appellate Body prioritised 'external legitimacy' here by employing non-WTO international law as an aid to interpretation.[124] The DSB is permitted to do so by the Dispute Settlement Understanding.[125] The DSB's approach has generally been to utilise non-WTO international law as 'normative background' to disputes and as a 'fall-back' reference point where 'the WTO treaty remains silent'.[126] Following *US - Shrimp*, the *US – Tuna* reports became regarded as 'outliers'[127] and a deferential approach to domestic regulatory objectives was entrenched for article XX.[128]

The DSB's approach to animal welfare was settled when *EC – Seal Products* expressly ruled it to fall within article XX(a) public morality.[129] This case has provided the most significant judgement on animal welfare to ever emerge from an international tribunal. The panel stated, in obiter dicta, that animal welfare is a 'matter of ethical responsibility for human beings' generally which has been 'globally recognized', as illustrated by 'international doctrines and measures of a similar nature' to the Seals Regime at issue.[130] The case determines animal welfare regulatory objectives will not be dismissed out of hand by the WTO. This determination may extend to the TBT Agreement because article 2.2 permits trade restrictions pursuing legitimate objectives (based

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120 Harrop and Bowles (n 1) 84.

121 Brandon L Bowen, 'The World Trade Organization and Its Interpretation of the Article XX Exceptions to the General Agreement on Tariffs and Trade, in Light of Recent Developments' (2000) 29(1) Georgia Journal of International and Comparative Law 181, 188.

122 Harrop and Bowles (n 1) 88; Howse (n 100) 48–49.

123 Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (1998) WT/DS58/AB/R (US - Shrimp) paras 129-134.

124 Howse (n 100) 31 and 38.

125 DSU (n 12) art 3(2). Also VCLT (n 60) art 31(3)(c) recognised in Appellate Body Report, *Japan - Taxes on Alcoholic Beverages* (1996) WT/DS8/AB/R, WT/ DS10/AB/R, WT/DS11/AB/R (Japan - Alcoholic Beverages II) 10.

126 Katie Sykes, 'Sealing Animal Welfare into the GATT Exceptions: The International Dimension of Animal Welfare in WTO Disputes' (2014) 13 World Trade Review 471, 489; Pauwelyn (n 53) 207 (ordering reflects quotage).

127 Cosbey and Mavroidis (n 116).

128 Sykes (n 1) 72.

129 Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (2014) WT/DS400/R, WT/DS401/R (EC - Seal Products) para 7.404; Appellate Body Report, *EC - Seal Products* (n 113) paras 5.167 and 5.201.

130 Panel Report, *EC - Seal Products* (n 129) paras 7.409 and 7.420.

on an illustrative open list)[131] and article 2.1 similarly permits legitimate regulatory distinctions (chosen by members' themselves, with even-handedness in application required).[132] GATT article XX and TBT Agreement articles 2.1 and 2.2 operate similarly at this stage.

Concerningly, the Appellate Body's unobtrusiveness entrenches '[c]aring more about some animals than others' and 'selective attention, cognitive dissonance, or even wilful ignorance' by permitting critique of some animal suffering but not others (wild seals abroad but not factory farmed animals in the EU).[133] The Appellate Body regards this as a legitimate preference, not hypocrisy.[134] It 'mirrors and reproduces' societal biases.[135] This is because the DSB's competence does not extend to critiquing WTO members' policies.[136] The only literature to critique this regarding animal welfare is humanist, advocating less ethical consideration for animals.[137] While one cannot expect the WTO would require all animal welfare issues to be regulated equally and simultaneously, there must be a standard applied to avoid hypocrisy and coloniality.[138]

Many scholars counter claims of coloniality by stating that compassion and animal protection are spread through religion and cultures globally. This fails to acknowledge that global values may be pursued through colonial means.[139] Blattner claims we must accept these 'inconsistencies' or face totalitarianism.[140] Second wave animal ethics, which favours deep listening and contextuality, reveals a third option of rejecting inconsistencies by drawing widely from indigenous peoples' rights and other legal discourses. Blattner is concerned that tackling inconsistency will 'reverse achievements of animal law'.[141] I am not convinced xenophobic or racist animal law advances should be considered achievements. This perpetuates oppressive, exclusionary forces which ultimately work against animals' wellbeing.

2.3.1.3. Measure's Design

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131 Appellate Body Report, *US - Tuna II (Mexico)* (n 117) para 313.

132 Appellate Body Report, *US - Clove Cigarettes* (n 114) paras 175 and 182.

133 Howse (n 100) 63.

134 ibid.

135 Blattner (n 7) 287.

136 Rob Howse and Joanna Langille, 'Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values' (2011) 37(2) Yale Journal of International Law 367, 428.

137 For example, Nikolas Sellheim, *The Seal Hunt: Cultures, Economies and Legal Regimes* (Brill Nijhoff 2018) 267.

138 See below at section 3.

139 Sykes (n 126) 479–480.

140 Blattner (n 7) 289.

141 ibid 290.

Second stage deference pushes most disputes into the third stage which entails 'heightened scrutiny of the design of the measure' under GATT article XX's chapeau and the TBT Agreement article 2.1 even-handedness standard.[142] The chapeau prohibits 'arbitrary or unjustifiable discrimination' or a 'disguised restriction on international trade'. Applying the chapeau entails marking a 'line of equilibrium' to avoid abuse of article XX exceptions.[143] This adds a requirement of good faith,[144] assessed by reference to features like arbitrariness,[145] efforts to negotiate,[146] and flexibility of the measure.[147] So long as WTO members bear this in mind, there is no *per se* barrier to enacting trade restricting animal welfare measures under WTO law.

Some commentators contend the DSB's flawed arguments have simply shifted from article XX's provisions to the chapeau.[148] Indeed, the goalpost for regulatory design was seen to shift in every iteration of the *US – Tuna II (Mexico)* dispute, focusing on different elements of the measure.[149] Compliance at this stage is helped by, for example, avoiding 'unexplained gaps' in application and, for article XX(a), expressly grounding the measure in public moral concern.[150] Interestingly, non-compliance of the EU Seals Regime with article XX's chapeau caused the DSB to require the EU to remove an exception for marine resource management hunts and add further conditions and clarifications to the indigenous hunt exception.[151] This resulted in better protection for animals but a disregard for intersectional justice and indigenous peoples' wellbeing.

2.3.1.4. Conclusions on Role and Impact of the DSB

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[142] Howse (n 100) 46 et seq; Andrew Lang, 'The Judicial Sensibility of the WTO Appellate Body' (2016) 27(4) European Journal of International Law 1095, 1098.

[143] Appellate Body Report, *Article 21.5 - Malaysia* (n 72) para 159; Appellate Body Report, *Brazil - Measures affecting imports of retreated tyres* (2007) WT/ DS332/AB/R (Brazil - Retreated Tyres) para 224.

[144] Appellate Body Report, *US - Shrimp (Article 21.5 - Malaysia)* (n 72) para 158.

[145] ibid para 150.

[146] ibid paras 122-123.

[147] ibid paras 149-150.

[148] For example, Sanford Gaines, 'The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures' (2001) 22(4) University of Pennsylvania Journal of International Economic Law 739, 743.

[149] Cary Coglianese and André Sapir, 'Risk and Regulatory Calibration: WTO Compliance Review of the US Dolphin–Safe Tuna Labeling Regime' (2017) 16(2) World Trade Review 327, 336.

[150] Lorand Bartels, 'The WTO Legality of the Application of the EU's Emission Trading System to Aviation' (2012) 23(2) European Journal of International Law 429, 452; Sykes (n 126) 496.

[151] 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 [2015] OJ L 262/1 art 1.

The DSB provides regulatory space for WTO members to restrict trade and protect animal welfare. However, animal law experts should not treat this as good news. First, the DSB's approach is substantively flawed from a second wave perspective. The DSB was incapable of recognising intersectionality in *EC – Seal Products*. Its approach permits inconsistency, hypocrisy and coloniality: various measures (like the EU ban on cat and dog fur) remain unchallenged. The relegation of animal welfare to article XX(a) also pins progress on variable public moral concern. The WTO also perpetuates the view of animals as property,[152] setting dangerous precedents.

Second, this approach favours unilateralism, permitting the WTO to remain hands-off regarding trade impact issues. Although the DSB recommends multilateralism in *US – Shrimp*, the regulatory scope created through evolution in the case law has favoured unilateralism in practice. Second wave animal ethics reveals unilateralism as ineffective and unethical for animal welfare protection in trade. This approach diverts attention from the most serious welfare issues, legitimises coloniality in welfare protection and may delay progress on animal welfare in the Global South due to a desire to create distance from colonial influences. This ignores the potential of more connective legal modalities in a globalised age.

Finally, the Appellate Body is staffed with generalised judges without animal welfare expertise[153] and is, in any event, in a precarious state. The DSB has improved treatment of trade impact issues by incorporating non-WTO international law and it has provided genuinely progressive obiter remarks on animal welfare. However, this progress is fragile. The current crisis of the Appellate Body (discussed below) highlights the fragility of judicial "law-making", throwing its future operation and the precedential force of its previous rulings into question.

These arguments support entrenched animal welfare standards at the international level to encourage and safeguard progress in forums like the DSB. The literature ought to grab the opportunity of this critical moment by theorising about what extra-WTO work is required on the trade and animal welfare interface.

2.3.2. Unilateral Trade Policy in the Context of Regulatory Autonomy for Animal Welfare

The WTO offers no official forum for debating common animal welfare standards, working procedures or understandings.[154] But, the WTO protects its members' regulatory freedom regarding public morality about animal welfare. Meanwhile, FTAs foreclose the option of

[152] See, generally, chapter III.

[153] Howse (n 100) 26.

[154] Though animal welfare is at issue in many places nonetheless. See chapter V section 4.2.3.

safeguarding against scale effects of trade on animal welfare. Thus, we have a perfect storm of regulatory scarcity and domestic regulatory autonomy that have facilitated the use of opportunistic unilateral measures that display coloniality. This section will set out how the EU's response to this regulatory freedom has resulted in trade policy that uses ineffective and colonial means to protect animal welfare.

The ineffectiveness of the EU's unilateral trade policy on animal welfare stems from the fact that the EU's animal welfare policy agendas neglect trade. Recall that the TFEU obligation to regard animal sentience in policy-setting excludes the common commercial policy.[155] This results in ineffective communication between trade and animal welfare experts in EU governance settings. For example, the EU's Animal Welfare Platform, whose work replaces the EU's strategy-based approach, has mostly neglected the issue of trade, only introducing discussion on dog health in trade in 2018.[156] No reason has been given for this. The only trade-related international activity on animal welfare that the EU foresaw in its most recent strategy was to continue including 'animal welfare in bilateral trade agreements or cooperation forums'.[157] The EU has abandoned its multilateral aspirations on trade and animal welfare. It is also evident from the inconsistent nature of the EU's animal welfare trade restrictions that there is no consistent policy objective underlying this.

Further, an implementation study conducted on the EU's animal welfare strategy neglects the issue of trade.[158] A separate report which does address trade issues focuses on European producer viability rather than impacts on animal welfare.[159] The report notes that FTA provisions on animal welfare have led to the establishment of working groups and, for example, this has resulted in Chile developing a 'full body of national legislation on animal welfare'.[160] The report describes the EU as having a 'lighthouse effect' on animal welfare.[161] It is concerning that these reflections entirely neglect the impacts of trade liberalisation on animal welfare set out in chapter

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[155] Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2008] OJ C115/1, (TEU, and TFEU) art 13.

[156] 'Platform Meetings' (*European Commission*) <https://ec.europa.eu/food/animals/welfare/eu-platform-animal-welfare/meetings_en> accessed 18 December 2020.

[157] European Commission, 'Communication on the European Union Strategy for the Protection and Welfare of Animals 2012-2015' (2015) COM/2012/6 final/2 10.

[158] European Court of Auditors, 'Special Report: Animal Welfare in the EU: Closing the Gap between Ambitious Goals and Practical Implementation' (2018) 47 <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=47557> accessed 18 December 2020.

[159] European Commission, 'Report on the impact of animal welfare international activities on the competitiveness of European livestock producers in a globalized world' (2018) COM(2018) 42 final.

[160] ibid 5.

[161] ibid 9.

III. While the EU may be encouraging more welfare legislation abroad, it is also increasing animal harm through the scale effects of trade and low welfare havens. It is hypocritical for the EU to laud itself as an animal welfare lighthouse while continuing to permit harmful practices at home and continuing to pursue trade liberalisation that puts animal welfare at risk.

Regarding coloniality, this critique should be distinguished from scholars writing on trade and animal welfare that falsely describe animal welfare as a western value that is imposed on the Global South.[162] In fact, western nations perpetuate incomparable animal harms, and the Global South has produced many animal protection traditions.[163] The animal protection debate occurs within societies, cultures and countries just as much as it exists between them. The multidirectional paths within this debate mean animal welfare is not solely a western value. However, animal welfare *has* been weaponised to aid coloniality. For example, the EU's Seals Regime entails coloniality because it harms Inuit communities and was drafted without meaningful debate with those communities.[164] Also, when drafting animal laws, the Global South adopts western models to achieve harmonisation (and, thus, access to western markets), giving little consideration to the suitability of those models for local circumstances.[165]

The lack of policy direction on animal welfare and trade within the EU has led to deficiencies and coloniality in the rather sporadic policies that the EU has unilaterally enacted on both trade liberalisation and trade restriction. On trade liberalisation, the EU has not sought to include animal welfare in its programme of unilateral trade liberalisation efforts. The EU's GSP+ scheme offers enhanced trade liberalisation to countries that comply with a number of conditions, including the ratification and implementation of 27 environmental and labour treaties.[166] The first barrier to using this approach is the lack of animal law treaties. As an alternative, reference could be made to the OIE standards. The second barrier is the EU's cooperative approach to dealing with animal welfare at the international level. Evidently, such a cooperative approach fails to

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[162] Ling Chen, 'Sealing Animal Welfare into Free Trade: Comment on EC-Seal Products' (2015) 15 Asper Review of International Business and Trade Law 171; Yangzi Sima and Siobhan O'Sullivan, 'Chinese Animal Protection Laws and the Globalisation of Welfare Norms' (2016) 12(1) International Journal of Law in Context 1, 8. Also see points made by Stuart Harrop, 'From Cartel to Conservation and on to Compassion: Animal Welfare and the International Whaling Commission' (2003) 6 Journal of International Wildlife Law & Policy 79, 95; Matheny and Leahy (n 39) 353; and Peter V Michaud, 'Caught in a Trap: The European Union Leghold Trap Debate' (1997) 6(1) Minnesota Journal of Global Trade 355, 363–364.

[163] Sykes (n 126) 479–480.

[164] Elizabeth Whitsitt, 'A Comment on the Public Morals Exception in International Trade and the EC-Seal Products Case: Moral Imperialism and Other Concerns' (2014) 3(4) Cambridge Journal of International and Comparative Law 1376, 1380.

[165] Sima and O'Sullivan (n 162) 1 and 5.

[166] Regulation (EU) 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 [2012] OJ L 303 art 9 and annex VIII.

recognise the severity of the risks for animal welfare created by international trade. The operation of the EU's unilateral trade liberalisation policy through the GSP displays coloniality because the EU dictates the conditions for environmental protection (etc) that will result in economic reward for numerous countries of the Global South.[167] Thus, the conclusion here is not necessarily that unilateral trade liberalisation with animal welfare incentives would be attractive from the perspective of second wave animal ethics. Rather, it is merely notable here that animal welfare is entirely neglected in this area of trade policy.

On trade restriction, the EU has failed to impose welfare-based trade restrictions where this would have heavily impacted European farmers.[168] Factory farmed animals, which are the most vulnerable to the effects of trade due to the scale of suffering endemic in the industry, are almost entirely neglected by trade measures.[169] An alternative case is the New Zealand ban on export of live sheep in 2003. Exports prior to the ban amounted to 2.2 million kg in 2003.[170] Thus, New Zealand was willing to halt a lucrative export stream for welfare concerns. This resulted in a drop in production of sheep meat and numbers of sheep kept in New Zealand.[171]

The EU primarily uses trade measures to protect animal welfare in response to public moral concern regarding animal welfare in contexts of eastern and indigenous practices.[172] Here, the EU's inconsistency displays xenophobia and coloniality, ignoring western practices that harm animals. The only literature that tends to point this out is anthropocentric in tone, failing to recognise animals as ethical subjects.[173] The EU targets primarily non-European practices with trade restrictions in the 2009 Seals Regulation and the 2007 Cat and Dog Fur Regulation.[174] The EU's animal welfare trade restrictions that target western practices were significantly minimised or delayed in the legislative process.[175] Elsewhere, the EU comfortably enacts trade restrictions that may impact welfare but are motivated by other policy objectives like conservation, human and

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[167] Stephanie Switzer, 'Environmental Protection and the Generalized System of Preferences: A Legal and Appropriate Linkage?' (2008) 57(1) International & Comparative Law Quarterly 113.

[168] Chapter III, section 3.4.

[169] The only exception aims to protect animal health, offering only incidental welfare protection. See Slaughter Regulation 1099/2009 [2009] OJ L303/1 art 12.

[170] Data available at: https://comtrade.un.org/data/.

[171] Data available at: http://www.fao.org/faostat/en/#data/QL/metadata and http://www.fao.org/faostat/en/#data/QA/metadata.

[172] Ibid.

[173] Chen (n 162) 179.

[174] Seals Regulation 1007/2009 [2009] OJ L 286/36; Cat and Dog Fur Regulation 1523/2007 [2007] OJ L 343/50.

[175] See chapter III section 3.4.1.

animal health, and illegal, unreported and unregulated fishing.[176] This disparity in treatment of animal welfare issues is not aligned with the significance of each risk and, instead, is likely motivated by xenophobic public pressure.

It is difficult to use trade data to support this argument because of the significant gaps and welfare-blindness of trade data explored in chapter III. For example, there is no specific HS code to identify imports of seal meat. However, imports of sealskins to the EU were very low in 2002, before the import ban was implemented (only 117,000kg). It is impossible to determine import levels for cat and dog fur because no relevant HS code exists. Lacking the relevant data, one must rely on common knowledge of European markets: they have always had more meat, dairy and leather than sealskin or cat and dog fur products. Thus, focusing trade and animal welfare policy on the latter practices appears misguided. This appears and operates in a morally hypocritical and colonial fashion, denouncing primarily non-European practices whilst ignoring factory farming practices, amongst others.

Moving from questions of moral hypocrisy and coloniality to questions of effectiveness, it is clear that the EU does not, on the whole, use trade policy effectively to guard against the impacts of trade on animal welfare set out in chapter III. This is inevitably true because trade liberalisation increasingly concerns 'positive integration' or standardisation, redesign and harmonisation in contrast to 'classical trade liberalization and negative integration' primarily entailing deregulation.[177] This shift entails growing multilateralism in trade governance so that unilateral animal welfare regulation is incapable of addressing most trade impacts. Multilateralism or standardisation is required to deal with offshoring harm because unilateral regulation typically only targets particular export markets.

More specifically, it would be impossible to use trade policy to effectively protect animals against the trade impacts set out in chapter III whilst neglecting products stemming from factory farming, as the EU does. However, where data is available, it is interesting to note that the EU's unilateral trade restrictions seem to have had their intended effect and have improved the quality of goods being exported to the EU. For example, the implementation of the Cosmetics Regulation

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[176] Habitats Directive 92/43/EEC [1992] OJ L 206/7 arts 12(2), 13(1)(b), and 14(2); CITES Regulation 338/97/EC [1997] OJ L 61/1; Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2010] OJ L 20/7 art 6(1); IUU Fishing Regulation (2008) OJ L 286 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999 [2008] OJ L 286, art 4(2); on import ban for beef treated with hormones, see Appellate Body Report, *European Communities - Measures Concerning Meat and Meat Products* (1998) WT/DS26/AB/R, WT/DS48/AB/R (EC - Hormones); Regulation (EC) No 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin [2004] OJ L 139/55 arts 3 and 6; Slaughter Regulation 1099/2009 [2009] OJ L303/1 art 12.

[177] Thomas Cottier, 'International Economic Law in Transition from Trade Liberalization to Trade Regulation' (2014) 17(3) Journal of International Economic Law 671, 673.

did not result in a fall in imports. The main exporters (China, the US and Switzerland) were clearly well placed to deal with this regulatory change. In the case of the EU egg labelling requirement, import levels did not fall. However, this does not mean the product standards improved, only that they were labelled. Of course, every market is different. However, there is at least some evidence that unilateral trade restrictions can be an effective means of improving the animal welfare standards for particular products from a particular exporter. Chapter V will explore why this is insufficient and why multilateralism is required to ensure the effectiveness of trade and animal welfare policy.

Although regulatory scarcity and domestic regulatory autonomy have facilitated moral inconsistency (/hypocrisy) and coloniality, these developments in unilateralism have been widely praised by the literature. The next section will review this literature. While it is possible that more thoughtful policy on trade and animal welfare might lead to better unilateral trade measures from the perspective of second wave animal ethics, inherent restrictions of unilateralism remain which point to the value of more connective, globalised means of governance.[178] It would take a restrained and exceedingly just legislator to be able to navigate improving animal welfare through trade measures, avoid pandering to morally hypocritical views regarding foreign animal industries, and overcome farming lobbies to address the pressing trade issues related to factory farmed animals. The evidence to date suggests that the EU, the most prominent legislator on trade and animal welfare, is not up to the task. For these reasons, chapter V will introduce recommendations based in multilateralism.

3. The Future of Trade Law and New Proposals for its Contribution to Global Animal Law

Global animal law literature has responded to the legal developments outlined above with troublesome proposals. The literature celebrates *EC – Seal Products* and accepts unilateralism as the dominant approach to animal welfare in trade policy, despite this presenting serious difficulties which will be explored here. This chapter has shown that unilateralism has become the dominant approach because there are no multilateral negotiations or institutional work packages on animal welfare at the WTO and FTAs entail legal and political barriers to restricting trade in animal products. *EC – Seal Products* and other disputes provide domestic regulatory autonomy to

[178] See below at section 3.2.2.

unilaterally restrict trade to protect animal welfare. However, such unilateral measures, though more common than multilateral and bilateral measures, ultimately remain rare and sporadic. No new measures have been passed following *EC – Seal Products*. Those measures that were already in place are uneven and often display coloniality, responding to inconsistent and hypocritical public concern rather than harm. Thus, despite *EC – Seal Products*, international trade law remains a significant concern for animal welfare, particularly from a second wave perspective.

However, leading literature on trade and animal welfare is cautiously optimistic about trade's impact on animal welfare following *EC – Seal Products*. This chapter will fill crucial analytical gaps in the literature by applying second wave animal ethics in order to expose significant, persistent problems of the international trade law response to animal welfare issues. This conclusion acquires further weight because of the normative impact this is having on emerging global animal law. This section will first use second wave animal ethics to critique the new narrative of the WTO as a facilitator of animal welfare protection in the wake of *EC – Seal Products*. Then, this section will critique the work of two leading scholars on trade and animal welfare who propose roads forward. Katie Sykes proposes *EC – Seal Products* will lead to normative development on animal protection in international law and Charlotte Blattner proposes that the best road forward entails unilateralism and extraterritorial measures. I will demonstrate that the shortcomings of these proposals are rooted in first wave animal ethics. This will expose the normatively deficient foundations on which global animal law is being built. These conclusions will lead into the next chapter which proposes alternative second wave-inspired proposals in order to more effectively and ethically protect animals that are traded and also to reorient the normative development of global animal law.

3.1. The Wake of EC – Seal Products

The literature following *EC – Seal Products* contrasts with that preceding it. Also, it is largely positioned at the fringes of the trade linkage debate, rather than at the centre of growing literature on global animal law (with notable exceptions analysed below). First, the literature is increasingly written by trade experts doctrinally analysing the decision. Animal advocates are now less vocal about trade and animal welfare. The problem with this is that trade experts are unable to distinguish animal welfare from environmental protection.[179] Or, they make the distinction and then appear

[179] Catherine Jean Archibald, 'Forbidden by the WTO? Discrimination Against a Product When Its Creation Causes Harm to the Environment or Animal Welfare' (2008) 48(1) Natural Resources Journal 15, 15; Chen (n 162); Christoph T Feddersen, 'Recent EC Environmental Legislation and Its Compatibility with WTO Rules: Free Trade or Animal

to forget and conflate the two later on.[180] Second, the tone shifts to optimism inspired by the DSB's increasingly deferential approach. Blattner goes as far as to say that international trade law is a 'sheep in wolf's clothing'.[181] This optimism is exaggerated. The literature argues, accurately, that the DSB now accommodates WTO members who choose to protect animal welfare through trade measures.[182] However, I find the conclusions extrapolated from this and the narrative direction of the literature problematic.

The literature concludes that, on the basis of *EC – Seal Products*, the WTO is 'at least not an obstacle' to new animal welfare legislating such as international wildlife law that incorporates compassion and animal welfare.[183] I do not agree that *EC – Seal Products* removes this obstacle. The co-existence of trade law and environmental law has been facilitated and determined by *multilateral* work including the WTO Agreement's reference to sustainable development, the creation of the Trade & Environment Committee, and ongoing negotiations to incorporate environmental concerns into the WTO's work. The DSB ruling on animal welfare only states what WTO members may do *unilaterally*. Elsewhere, the DSB has encouraged multilateral efforts to be made before resorting to unilateral measures.[184] However, it does not proclaim meaningfully or definitively on how multilateral work would be treated if it includes trade restrictions. This does not mean the WTO would necessarily object to a turn to more compassionate conservation. However, institutional work on this at the WTO could act like a laboratory on regulatory coexistence, increasing the chances of such legislation coexisting with WTO law.

Instead of promoting institutional work, the literature has frequently called for further DSB interpretation regarding animal welfare as a way forward.[185] For example, Lo argues that the DSB ruling on animal welfare could be an alternative to negotiation of new treaty rules.[186] Sykes

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Welfare Trade?' (1998) 7(7) European Environmental Law Review 207, 210–211; Michaud (n 162) 374; André Nollkaemper, 'The Legality of Moral Crusades Disguised in Trade Laws: An Analysis of the EC "Ban" on Furs from Animals Taken by Leghold Traps' (1996) 8(2) Journal of Environmental Law 237, 238.

[180] Andrew Jensen Kerr, 'The Trans-Pacific Partnership and the Construction of a Syncretic Animal Welfare Norm' (2016) 27(1) Duke Environmental Law and Policy 155, 156–157; Laura Nielsen, *The WTO, Animals and PPMs* (Martinus Nijhoff Publishers 2007) 320.

[181] Blattner (n 1).

[182] Howse and Langille (n 136) 368; Thomas G Kelch, *Globalization and Animal Law: Comparative Law, International Law and International Trade* (2nd edn, Kluwer Law International 2017) 265; Andrew Lurié and Maria Kalinina, 'Protecting Animals in International Trade: A Study of the Recent Successes at the WTO and in Free Trade Agreements' (2015) 30(3) American University International Law Review 431, 451; Sykes (n 118) 273; David Thomas, 'The Trade in Seal Products and the WTO' [2015] Journal of Animal Welfare Law 19, 25.

[183] Sykes (n 118) 273.

[184] Appellate Body Report, *US - Shrimp* (n 123) 65–66.

[185] Bollard (n 2) 104.

[186] Chang-fa Lo, 'The Role of Dispute Settlement Mechanism in Facilitating Multilateral Trade Negotiations' (2014) 9(2) Asian Journal of WTO and International Health Law and Policy 407; Andersen (n 100).

recommends incorporating non-WTO international law on animal welfare, such as a general principle on animal welfare, into DSB rulings.[187] Failing to incorporate non-WTO international law risks the DSB's legitimacy and opportunities for 'growth and progression of the [WTO] system'.[188] In this vein, some scholars have proposed different chambers within the DSB to allow for more specialist responses to issues like animal welfare.[189] There are three problems with this DSB-focused approach.

First, the DSB is an inappropriate forum. The 'instrumental rationality' typically relied upon by the WTO DSB means it is unlikely to be able to do 'full justice to animal welfare' because law in this area is both 'instrumental and noninstrumental and expressive'.[190] The WTO DSB also does not have adequate facilities to incorporate expert opinions to remedy its lack of knowledge. Panels may seek information from experts but are not mandated to do so.[191] By contrast, the WTO has a Permanent Group of Experts on subsidies.[192] Procedural restraints of the DSB mean it cannot work toward the imperatives of second wave animal ethics. The DSB cannot question the use of similarity theory or circles of moral concern in WTO members' trade measures. This is because the DSB cannot critique the scope of measures brought before it.[193] The DSB also cannot nudge the WTO away from liberalism and toward care ethics because such fundamental normative questions would require agreement of the WTO members in negotiations, probably at a Ministerial Conference. In any event, WTO members do not contest animals' property status in DSB disputes, so this question is unlikely to come before the DSB and may lie outwith its envisaged competence. The DSB could perhaps integrate intersectionality considerations into its reports. However, in *EC – Seal Products*, the DSB was just as blind as the EU was to the potential to underline the Seals Regime's exception for indigenous products with intersectionality theory.[194] This all speaks to the 'uncertainty about the role of jurists as the keepers of international law'.[195]

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[187] Sykes (n 126) 472–474 and 485.

[188] ibid 489–490.

[189] James Thuo Gathii, 'Saving the Serengeti: Africa's New International Judicial Environmentalism' (2016) 16(2) Chicago Journal of International Law 386, 436.

[190] Howse and Langille (n 136) 372.

[191] DSU (n 12) art 13.

[192] Agreement on Subsidies and Countervailing Measures (15 April 1994) LT/UR/A-1A/9 <http://docsonline.wto.org> (SCM Agreement) art 4.5.

[193] See above at section 2.3.1.

[194] Emily Lydgate, 'Is It Rational and Consistent? The WTO's Surprising Role in Shaping Domestic Public Policy' (2017) 20(3) Journal of International Economic Law 561; Gracia Marín Durán, 'Measures with Multiple Competing Purposes after EC - Seal Products: Avoiding a Conflict between GATT Article XX-Chapeau and Article 2.1 TBT Agreement' (2016) 19(2) Journal of International Economic Law 467.

[195] Otomo (n 72) 136.

Second, the literature has celebrated the permissibility of unilateral measures without critiquing the drawbacks of a unilateral approach.[196] The literature fails to recognise that the normative impact of *EC – Seal Products* is to further entrench the perception of animals as property and that we should prioritise human morality over protection of the animals themselves, for their own sake. The coloniality of unilateral measures has also gone without much criticism from animal law scholars. Further, there is no recognition that *EC – Seal Products* and consequent unilateralism provide no remedy to the scale effects of trade on animal welfare and the persistent rise of FTAs enhancing this. Finally, focusing on unilateralism rather ignores the global features of the trade and animal welfare issues and the increasing globalisation of law. Thus, on a more fundamental scale, and from the perspective of animals, *EC – Seal Products* seems to miss the point on some counts. Whilst recognising the case's political significance, Otomo describes the ruling as a 'straightforward [application] of blackletter law, reaffirming the inviolability of the sovereign body … and the apolitical nature of the legal decision'.[197] It does not provide the shake-up of international law animals would benefit from. For these reasons, *EC – Seal Products* should not induce complacency; extra-WTO developments on animal welfare and trade are required to encourage multilateralism at the WTO aimed at improving the normative treatment of animal welfare.

Third, the DSB is in a precarious state; the Appellate Body has been rendered non-functioning.[198] This highlights the fragility of governance by dispute settlement and this remains unaddressed by the literature. This thesis will not seek to predict what the outcome of ongoing discussion will be regarding ways to save dispute settlement within the WTO system, though it is worth noting a multi-party interim appeal arbitration arrangement has been agreed by some parties.[199] Instead, this thesis will explore the consequences of a fragile dispute settlement system for animal welfare. First, it is worth noting the reasons why the Appellate Body has fallen.

The US has attacked the body and blocked appointments of members so that it can no longer issue reports. This has been described as the 'biggest "governance crisis"' since the WTO's

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[196] Indeed, my own early work on this topic is guilty of this: Iyan Offor and Jan Walter, 'GATT Article XX(a) Permits Otherwise Trade-Restrictive Animal Welfare Measures' (2017) 12(4) Global Trade and Customs Journal 158.

[197] Otomo (n 72) 145.

[198] Steve Charnovitz, 'The Missed Opportunity to Save WTO Dispute Settlement' (*International Economic Law and Policy Blog*, 2019) <https://ielp.worldtradelaw.net/2019/12/the-missed-opportunity-to-save-wto-dispute-settlement.html> accessed 18 December 2020.

[199] Statement on a mechanism for developing, documenting and sharing practices and procedures in the conduct of WTO disputes (30 April 2020) JOB/DSB/1/Add.12 <http:// docsonline.wto.org>. Also, for an insightful take on the potential roads forward, see Joost Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect? What Choice to Make?' (*SSRN (forthcoming in JIEL)*, 2019) 2 <https://ielp.worldtradelaw.net/2019/07/scenarios-for-wto-dispute-settlement-post-2019.html> accessed 18 December 2020.

establishment.[200] The US's critique of the Appellate Body has been derided as 'deliberately ambiguous'.[201] However, one can discern the features the US is critical of and, for the large part, they align quite neatly with those features of the DSB that have made it amenable to the protection of animal welfare. The US critiques the Appellate Body's 'persistent over-reach' by, for example, making 'findings unnecessary to resolve a dispute' (such as that animal welfare is a significant global concern), 'creative interpretations' (such as ruling that exhaustible natural resources include living resources), and 'adding or diminishing of rights and obligations' of members (such as by relying on norms of non-WTO international law).[202]

This development is concerning because a move away from the Appellate Body entails a potential return to 'power relations' playing a significant determining factor in the outcome of disputes.[203] Of course, this may not materialise now Joe Biden has won the US presidential election. Regardless, the potential demise of the DSB demonstrates that progress achieved through dispute settlement is always fragile and the normative development of animal law should not hinge upon this. It is unlikely that the significance of the Appellate Body's existing rulings will disappear given that they will probably continue to be referenced by 'panels and tribunal decisions'.[204] However, it is also true that new normatively significant rulings or interpretations of WTO law, as some commentators desire, will not come to pass.

3.2. The Road Forward

Leading scholars writing on trade and animal welfare have not addressed the shortcomings of unilateralism as an approach to resolving the problems identified in chapter III, nor how international trade norms are dominating much of the conversation around animal welfare and international law. This section applies critiques of unilateralism, first wave animal ethics and neoliberal trade normativity to the novel and exciting work of Katie Sykes and Charlotte Blattner. Sykes and Blattner move the trade and animal welfare literature forward by framing their work around the animal question, shifting away from the linkage debate and toward global animal law.

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[200] Ernst-Ulrich Petersmann, 'How Should WTO Members React to Their WTO Crises?' (2019) 18(3) World Trade Review 503, 503.

[201] ibid 506.

[202] ibid 508–511.

[203] Pauwelyn (n 199) 2–3.

[204] Markus Wagner, 'Guest Post: The Impending Demise of the WTO Appellate Body: From Centrepiece to Historical Relic?' (*International Economic Law and Policy Blog*, 2019) <https://ielp.worldtradelaw.net/2019/06/guest-post-the-impending-demise-of-the-wto-appellate-body-from-centrepiece-to-historical-relic.html> accessed 18 December 2020.

However, second wave animal ethics reveals gaps in their proposals. Consequently, chapter V recommends a reorientation of global animal law scholarship.

3.2.1. Sykes' Proposal for WTO-Facilitated Development of Norms for Animal Protection

The DSB's rulings enhance domestic regulatory autonomy and carry normative significance. Lang argues that DSB rulings have 'constitutive' importance, shaping 'intersubjective understandings about the objectives and values which the trade regime embodies'.[205] Unfortunately, the external impact of DSB rulings on global animal law is unlikely to be positive.

Thomas Kelch describes the role and impact of WTO law on animal welfare as 'unexpected and crucial'.[206] Sabine Brels includes *EC – Seal Products* amongst international law developments contributing to a global recognition of animal issues.[207] Blattner notes the case's contribution to the 'achievement of certain animal welfare objectives'.[208] The case is frequently hailed as a 'victory for animal welfare'.[209] Many scholars argue that the case opens the door for similar trade restrictions, failing to recognise that this has not happened and is perhaps unlikely to happen.[210] While *EC – Seal Products* immediately benefitted seals, I think the ruling will actually prolong animal suffering. This section argues as such whilst analysing Katie Sykes' claim that the case will lead to positive normative development for animal protection in international law.

Sykes observes that the panel and the Appellate Body recognise growing global attention to the ethical challenge of animal suffering.[211] Sykes' position regarding the normative significance of international trade law for animal protection could be conceptualised in two parts: expressive significance and contribution to norm development. I do not disagree with Sykes' premise.

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[205] Andrew Lang, 'Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime' (2006) 9(1) Journal of International Economic Law 81, 111.

[206] Kelch (n 182) 265.

[207] Sabine Brels, 'The Evolution of International Animal Law: From Wildlife Conservation to Animal Welfare' in Randall S Abate (ed), *What can Animal Law learn from Environmental Law?* (Environmental Law Institute 2015) 110–111.

[208] Blattner (n 1) 289 and 299.

[209] Bollard (n 2); Lydgate (n 194); Danielle Magnifico, 'The Effects of Domestic Regulation on International Trade Law as an Avenue for Change Beyond Borders' (2016) 16 Asper Review of International Business and Trade Law 201.

[210] Donald M Broom, 'International Animal Welfare Perspectives, Including Whaling and Inhumane Seal Killing as a WTO Public Morality Issue' in Deborah Cao and Steven White (eds), *Animal law and welfare: international perspectives* (Springer 2016) 58; Lurié and Kalinina (n 182) 450–451; Gregory Shaffer and David Pabian, 'European Communities - Measure Prohibiting the Importation and Marketing of Seal Products' (2015) 109(1) American Journal of International Law 154, 158.

[211] Sykes (n 118) 298.

However, I am led to different conclusions by second wave animal ethics and consideration of the trade impacts elaborated in chapter III.

3.2.1.1. Expressive Significance

On expressive significance, Sykes argues it is 'very significant that the first international adjudicative body to recognise animal welfare as a shared ethical responsibility of humanity and a globally recognised issue was a WTO tribunal'.[212] Blattner echoes this, stating that the WTO has enabled its members to progress the international conversation on animal welfare further than any 'global animal treaty law' has.[213] Sykes moderates her position by arguing that the impact would be 'indirect and partly symbolic', bound by the 'limits of the WTO's mandate'.[214]

As explored in chapter II, animal protection has just a 'tentative and embryonic presence in international law'. [215] Therefore, '[p]roportionally, the role of international trade law in establishing and developing that presence has been outsized'.[216] This speaks to scholarly debate regarding uneven constitutionalisation within international law. [217] The need for constitutionalisation at the international level stems from a shift toward transnational public goods entailing that national constitutions are unable to act without international law to provide citizens with what they need.[218] The WTO 'does not address public goods in a meaningful manner' as it is 'immaterial' to its functioning.[219] Nonetheless, the WTO is often referenced as an international legal regime that demonstrates relatively advanced or sophisticated constitutionalisation compared to other international regimes.[220] This unevenness has been pointed to as a potential contributing factor to the 2008 financial crisis because of a '"de-coupling" of the global markets from the wider social context'.[221] Because the economic system has 'advanced "further" than other functional

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[212] ibid 273; Sykes (n 1) 55.

[213] Blattner (n 1) 289–290 and 296.

[214] Sykes (n 118) 270.

[215] Sykes (n 1) 57.

[216] ibid.

[217] Andersen (n 100).

[218] Ernst-Ulrich Petersmann, 'From Fragmentation to Constitutionalisation of International Economic Law? Comments on Schneiderman's "Constitutionalism"' in Marc Bungenberg et al (eds), *European Yearbook of International Economic Law 2016* (Springer 2016) 52.

[219] Petros C Mavroidis, 'Free Lunches? WTO as Public Good, and the WTO's View of Public Goods' (2012) 23(3) European Journal of International Law 731, 740.

[220] Michael Fakhri, 'Reconstructing the WTO Legitimacy Debates Towards Notions of Development' [2009] Comparative Research in Law & Political Economy, Research Report No. 45/2009 5.

[221] Poul F Kjaer, 'Introduction' in Poul F Kjaer, Gunther Teubner and Alberto Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (2011).

systems', there has been an 'expansion of economic rationality beyond the borders of the economic system'.[222] This is what is happening as trade norms and economic rationality are expanding into and infiltrating global animal law through 'meta-constitutional principles' as established in, for example, *EC – Seal Products*.[223] Meanwhile, there are seldom few international bodies that could otherwise constitutionalise the international regulation of animals' lives.

Sykes identifies the *EC – Seal Products* dispute and FTA provisions as the source of trade law's contribution.[224] She argues that the DSB's recognition of animal welfare has 'expressive significance' and could help to shift 'animal welfare from the periphery to the mainstream of international legal discourse',[225] growing into a 'broader phenomenon'.[226] I concur that the contribution of international trade law to the establishment of animal protection as an international law subject is disproportionately large and has constitutional potential. However, I worry that the mainstreaming Sykes hypothesises will not come to pass. The contribution of international trade law thus far has favoured unilateralism as well as information sharing and cooperation in FTAs. It is hard to predict whether this will, in turn, lead to multilateralism for animal welfare.[227]

Perhaps Global South WTO members will grow aware that unilateral animal welfare regulation of western nations harms their markets, owing to globalisation's connectivity. This may inspire multilateralism on animal welfare. Perhaps the frailty of the DSB's rulings in current contexts will increase support for a separate legal regime focusing on animal welfare. Alternatively, WTO members might accept the DSB's approach and leave the EU to its unilateralism. I believe that *EC – Seal Products* has hindered chances of future multilateralism on animal welfare by legitimising and entrenching unilateralism as the dominant approach. If more WTO members replicated the EU in enacting unilateral trade restrictions to protect animal welfare, more animals' lives might be improved through unilateralism. But I doubt this will happen soon. Sykes notes that trade disputes led to enactment of the Agreement on the International Dolphin Conservation Program and argues it is not unthinkable that this pattern could repeat itself for an animal welfare measure.[228] It is not unthinkable but it is unlikely, especially in the current trade climate where bilateralism continues to increase in significance.

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[222] ibid.

[223] Andersen (n 100).

[224] Sykes (n 1) 57.

[225] Sykes (n 118) 273.

[226] Sykes (n 1) 57.

[227] Daniel Yuichi Kono, 'Are Free Trade Areas Good for Multilateralism? Evidence from the European Free Trade Association' (2002) 46(4) International Studies Quarterly 507.

[228] Sykes (n 118) 296.

Sykes' position on the WTO's contribution to global animal law will be further elaborated here through two arguments. First, it is unclear whether the DSB's approach to animal welfare will lead to normative development and multilateral normative development is desirable and necessary to deal with trade impacts on animal welfare. Second, the norms that would flow from the DSB's present approach to animal protection are unlikely to be positive.

3.2.1.2. Norm Development

Sykes argues that international trade law has 'unexpectedly' become an 'important context for the formation of global norms regarding animals'.[229] She argues that this has played an 'important role in the evolution of global animal law'.[230] More widely, Sykes thinks the WTO is capable of 'contribut[ing] to the development of norms of animal protection'.[231] Of central importance here is the statement by the panel in obiter dicta in *EC – Seal Products* that animal welfare is an issue of global importance and a shared ethical responsibility of humanity.[232] Sykes argues the WTO DSB has 'made important contributions to the global discourse on the value of animals, the moral imperatives to reduce animal suffering and wasted animal life, and the status of these principles in international law and policy'.[233]

Sykes concludes that the DSB's treatment of cases relating to animals 'could contribute something to the conceptual foundation of an emergent international law of animal protection in the full sense'.[234] As an example, Sykes argues the ruling may be a 'significant first step' in the incorporation of animal welfare into wildlife conservation law.[235] She also concludes that '[s]tronger links between trade deals and animal protection could enhance the effectiveness of existing international animal-protective norms and foster the growth of new norms'.[236]

I agree that the WTO has become an important site for the development of norms for global animal law. However, two problems flow from this argumentation. First, some authors

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[229] Sykes (n 1) 57.

[230] ibid.

[231] ibid 56.

[232] Panel Report, *EC - Seal Products* (n 129) para 7.420. Also, for debate on the status of obiter dicta in DSB disputes, see Henry Gao, 'Dictum on Dicta: Obiter Dicta in WTO Disputes' (2018) 17(3) World Trade Review 509.

[233] Sykes (n 1) 73.

[234] Sykes (n 118) 304.

[235] ibid 273.

[236] Sykes (n 1) 58.

conflate norm development with standard setting.[237] Second, WTO-facilitated normative development is assumed to be positive but, I argue, it is not. Conflation of norm development with standard setting is evident in some of Charlotte Blattner's work. Blattner states that *EC – Seal Products* 'laid the groundwork for a higher level of animal welfare than is currently accorded by international treaty law'.[238] Blattner's claim that the case potentially legitimises the 'global protection of animal interests' (implying international, multilateral standard setting) is misleading.[239] As Blattner herself recognises, this case concerned domestic regulatory autonomy and public morality (which varies between states) and the WTO continues to prioritise 'business interests' over social issues.[240] Thus, at most, the normative pronouncements in this case may contribute to global discussion or normative development on animal protection. However, these normative pronouncements cannot legitimise the global protection of animal interests because the case concerned domestic measures.

Second, regarding normative development, *EC – Seal Products* favours unilateralism in ways that are problematic from a second wave perspective. Unilateralism facilitates moral hypocrisy, xenophobia and coloniality in trade policy. Additionally, unilateralism is insufficient to deal with impacts of trade analysed in chapter III like low animal welfare havens and chilling effects. Indeed, Dillon argues that trade liberalisation including scale effects of trade are the most significant danger for trade impact issues.[241] Further, the DSB, and the wider WTO environment, perpetuate treatment of animals that is deeply anthropocentric, legitimises balancing animals' lives with trade liberalisation goals and ensures animals continue to be regarded as commodities. It is eminently unclear how normative development on this basis is desirable.

Additionally, from a second wave animal ethics perspective, it is not positive that normative development within global animal law would be tied to WTO dispute settlement pronouncements where commodification and propertisation of animals is accepted uncritically. Listening deeply to animals and taking their interests seriously, as mandated by second wave animal ethics, is impossible from a normative position rooted in a conceptualisation of animals as things. Further, the enhanced effectiveness that Sykes alludes to (provided by FTA provisions on animal protection) is somewhat suspect. Certainly, there is evidence of FTA provisions leading to better

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[237] There are prominent exceptions, including Steven White, 'Shifting Norms in Wild Animal Protection and Effective Regulatory Design' in Scholtz (n 118) 192–193.

[238] Blattner (n 1) 298.

[239] ibid 299.

[240] Charlotte Blattner, 'Global Animal Law: Hope beyond Illusion: The Potential and Potential Limits of International Law in Regulating Animal Matters' (2015) 3 Mid-Atlantic Journal on Law & Public Policy 10, 27; Blattner (n 1) 303.

[241] Sara Dillon, 'A Farewell to Linkage: International Trade Law and Global Sustainability Indicators' (2002) 55(1) Rutgers Law Review 87, 106.

domestic treatment of animal welfare. However, there is no evidence that FTAs have yet improved WTO members' engagements with the OIE's work. Further, even if such benefits occurred, FTA's impacts still skew negatively due to scale effects. Thus, these results are not enough to determine that hostility towards the WTO is a 'strategic mistake' for animal activists, as Sykes suggests.[242]

In conclusion, Sykes sees strategic advantages to advising 'animal welfare advocates to recognize and capitalize on the potential of international trade law'.[243] However, I am concerned this misses the bigger picture by facilitating the perpetuation of reactionary unilateral measures in lieu of a multilateral response (within the WTO framework or elsewhere) and by accepting animal propertisation in lieu of critiquing this. Interestingly, Sykes seems to dismiss scale effects of trade as something that is not inevitable because it can be 'offset by other moves to improve animal protection'.[244] I argue that domestic regulatory autonomy provided by the WTO is insufficient by itself to facilitate such offsetting. The scale effects and political pressure imposed by FTA proliferation makes it very difficult, if not impossible, to offset the impacts on animal welfare set out in chapter III.

The short-term impact of the WTO's approach (permitting often problematically targeted unilateral measures and facilitating the conclusion of FTAs that enhance scale effects of trade on animal welfare) is seriously harmful to animals' lives and to global animal law. This is because unilateral protective measures to safeguard consumers from low welfare products sometimes quantitatively improve animal welfare but sometimes they do not, as shown above. Further, domestic regulatory autonomy will do little to help animals when political will is lacking and new markets can emerge to consume products that are restricted elsewhere. The long-term impact of the WTO's approach, assuming it does lead to the development of further norms, is also not positive. This is because the norms entrenched favour ineffective and unjust unilateralism and an entrenchment of animals' property status.

Sykes is self-aware that her positivity about the WTO might be regarded as 'unconventional or even eccentric'.[245] I would have to agree, for two reasons. First, I am not confident the mainstreaming of animal welfare into international law Sykes hypothesises will occur and *EC – Seal Products* may have actually embedded an approach that will make mainstreaming less likely.

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[242] Sykes (n 1) 58.

[243] ibid 73. An example of such work: 'Trade & Animal Welfare' (*Eurogroup for Animals*) <https://www.eurogroupforanimals.org/sites/eurogroup/files/2020-02/E4A-Trade-A3-screen-1_0.pdf> accessed 18 December 2020.

[244] Sykes (n 1) 70.

[245] ibid 72.

Second, the normative influence of international trade law's approach to animal protection is likely to be a first foot in the wrong direction for global animal law.

3.2.2. Blattner's Proposal for Enhanced Unilateralism and Extraterritoriality

Blatter takes a different path to Sykes. Blattner supports developing animal law through unilateral, extraterritorial measures that would create a 'dense, global jurisdictional net of overlapping and concurring laws'.[246] She regards treaty-making as unfeasible and a distraction from the most pressing legal issues.[247] Blatter does, however, argue that extraterritorial measures can activate new collaborative governance [248] and that '[g]lobal interspecies justice' requires more than extraterritorial unilateralism.[249] I critique unilateralism and, in responding to Blattner's proposal, I deepen this position to justify the multilevel, multilateral proposals detailed in chapter V. Further, Blattner adopts a view of multilateralism as 'uniform and consistent' whilst I argue, in accordance with global law metatheory, it is capable of and strongest when encompassing diversity and facilitating situated normativity.[250]

Blattner's work is a detailed, rigorous and valuable analysis of the shape and legality of various forms of extraterritoriality. Her focus on primarily legal questions contrasts with this thesis which provides nuanced, detailed insights into law and ethics, jurisprudence, critical theory and trade policy. While Blattner provides a doctrinal view of legal outcomes of unilateralism, this thesis critiques the socio-legal and theoretical decision to pursue unilateralism, favouring more ethical and effective multilateralism.

Reaching this conclusion required filling crucial gaps in the literature. I have shown global animal law scholars poorly comprehend global law, empirical impacts of trade on animals' lives were unknown, and relevant animal law literature disproportionately focuses on unilateralism and trade. Blattner argues animal law scholars are 'waiting for an [international] agreement' on animal welfare.[251] I think animal law scholars have failed to conceptualise ethical, effective and feasible global law instruments. They have misappropriated the global label and overfocused on universally applied international law. Thus, Blattner's dismissal of multilateralism does not account for the

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[246] Blattner (n 7) 56–57.

[247] ibid 56.

[248] ibid 199–232.

[249] ibid 314.

[250] ibid 403.

[251] ibid 56.

global, connective multilateralism detailed in chapter V. I diverge from Blattner's proposals for two reasons.

First, chapter V will argue multilateralism is essential for effectively and ethically resolving trade and animal welfare issues. It cannot be abandoned due to apparent infeasibility. Blattner argues that unilateralism often leads to multilateralism but provides no examples of this succeeding where power disparities exist between states.[252] Second, various forms of multilateralism are more feasible than universal treaty-making. Blattner, and animal law scholars widely, are fatigued with treaty ambitions. Yet, changing tactic does not necessitate unilateralism, as Blattner suggests. Globalisation and global law introduce connective, future-oriented, post-Westphalian avenues unexplored by animal law scholarship. Global legal landscapes are also changing in ways favourable to multilateralism. These arguments are explored in chapter V. Further endorsing unilateralism would endorse existing animal law mechanisms which facilitate moral hypocrisy and coloniality. Alternatively, second wave animal ethics, global law and new political climates may usher in a new age of multilateralism in animal law.

Intersecting oppressions, situated animal ethics and coloniality are central to unilateralism's deficiencies. While multilateralism could provide discussion forums for global animal law issues, unilateralism has imposed ethical and governance systems on the Global South. Blattner recognises oppressiveness of animal welfare measures imposed selectively on minority groups.[253] However, Blattner responds by arguing that unilateralism can be ethical if incorporating 'listening to other perspectives' and 'good faith consultation and collaboration', inspired by Maneesha Deckha.[254] Blattner falls short of her promise to 'foreground these principles' in two ways.[255] First, Blatter fails to operationalise intersectionality as an imperative. Instead, she treats it as a design feature of regulation. Second, Blattner assumes intersectional design features can be easily incorporated but this is not the case.

On the first point, Blatter advocates 'more careful management' of extraterritorial measures to guard against intersectional oppression.[256] Blattner states that while extraterritorial legislation can 'exacerbat[e] existing sociocultural tensions' and contribute to 'imperialism and neocolonialism', this is no reason to 'recoil' because doing so would be 'succumbing … to the law

[252] ibid 57.

[253] ibid 367 et seq.

[254] ibid 372–373 citing Maneesha Deckha, 'Animal Justice, Cultural Justice: A Posthumanist Response to Cultural Rights in Animals' (2007) 2 Journal of Animal Law & Ethics 189, 220–223.

[255] Blattner (n 7) 373.

[256] ibid 372.

of the market'.[257] Thus, Blattner conceptualises intersectional justice as a design consideration rather than criteria to decide whether unilateral legislation should be pursued in the first place and whether it would be ethical and effective.

Contrastingly, I recommend avoiding coloniality and pursuing intersectionality as tasks that are logically prior to questions of legality and which are capable of influencing policymaking. Second wave animal ethics requires this to avoid tokenism. Blattner's claim that she 'foregrounds' consideration of neocolonialism conflicts with her treatment of it as a design feature. Blattner is also incorrect to repeatedly state that the options are between extraterritorial legislation and the law of the market.[258] This neglects other forms of multilateralism and global law insights.

In connection, white animal law scholars must amplify Global South and other minority voices better equipped to identify these problems. Blattner and others demonstrate that awareness of intersecting oppression is growing amongst animal law scholars.[259] Intersectional insights demand that white scholars accept they are incapable of deciding how to deal with coloniality in global law. Global South scholars have embodied insight into colonialism's legacy and reigning coloniality that white scholars can only appreciate in the abstract. Therefore, this thesis promotes situatedness, listening and collaborative cross-cultural conversation. Aph Ko writes of black vegan activists whose time and energy are dominated by educating white people, leaving their important work neglected.[260] White animal academics and activists must educate themselves and amplify marginal voices to diversify the movement. Thus, I admire Blattner's proposal to incorporate listening into animal advocacy.[261] However, it is dangerous and tokenistic to argue for listening whilst advocating for unilateralism.

On the second point, Blattner fails to recognise the difficulty of incorporating intersectionality into legal practice, amplifying the first problem. Failing to explore how to integrate intersectional considerations into law-making processes reveals the proposal as tokenistic. For example, Blattner discusses the *EC-Seal Products* case at length throughout her book but does not address arguments that the input of Inuit people to the legislative process for the EU's Seals Regime were unfairly dismissed.[262] Further, the exception for indigenous products would never have protected Inuit communities because the measure was poised to cause a market crash. Paying

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[257] ibid xiv–xv, 2, 51.

[258] ibid 408.

[259] Maneesha Deckha's work, cited throughout this thesis, is particularly significant.

[260] Aph Ko, 'Bringing Our Digital Mops Home: A Call to Black Folks to Stop Cleaning up White Folks' Intellectual Messes Online', *Aphro-ism: Essays on Pop Culture, Feminism, and Black Veganism from Two Sisters* (Lantern Books 2017).

[261] Blattner (n 7) 408–409.

[262] Sellheim (n 137) 255.

regard to indigenous perspectives would have revealed this and potentially led to solutions. These considerations are of direct relevance to Blattner's point and to global animal law but remain unexplored. I think Blattner's hope that 'multiculturalism' will spawn from overlapping extraterritorialism is unrealistic.[263] Multiculturalism is much more likely to spawn from multi-level, multi-speed global law-style multilateralism, proposed in chapter V. The field of environmental law has lessons for animal law regarding the benefits, necessity and challenges of recognising intersecting oppressions by including indigenous peoples, the Global South and other minorities in decision-making processes. This will facilitate discussions regarding fairness, justice, participation and benefit sharing. Animal law scholarship neglects these lessons. Thus, this section introduces environmental law's approach to indigenous peoples and the next chapter explores the Global South and third world approaches to international law (TWAIL).[264]

Indigenous peoples' participation is but one factor in tackling intersecting oppression. Involving indigenous peoples is particularly challenging as it entails acknowledging legal plurality. This points to the benefits of global law scholarship's future-orientation and decentring of the state. The benefits of including minority groups like indigenous peoples are not explored sufficiently in animal law scholarship. Conversely, scholarship on environmental governance has recognised the value of including indigenous peoples in climate change law-making processes due to their contribution of 'valuable context-specific knowledge and resources',[265] their involvement in rulemaking leading to enhanced opportunities for implementation and compliance,[266] and ethical considerations of 'cultural integrity'.[267] The enactment of this in practice is limited but environmental law remains ahead by having embarked upon this intellectual debate whereas animal law largely has not.

Despite its progress, environmental law still struggles with 'procedural, conceptual and structural challenges' to including indigenous people.[268] Gaining access alone has proven a fundamental challenge. Despite trying to gain access since the 1920s, it took indigenous peoples until the 21st century to achieve participation in forums like the UN.[269] Importantly, ensuring the

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[263] Blattner (n 7) 408–409.

[264] See chapter V section 3.2.

[265] Marcela Brugnach, Marc Craps and Art Dewulf, 'Including Indigenous Peoples in Climate Change Mitigation: Addressing Issues of Scale, Knowledge and Power' (2017) 140(1) Climate Change 19, 20.

[266] ibid.

[267] ibid.

[268] ibid.

[269] Marjo Lindroth, 'Indigenous-State Relations in the UN: Establishing the Indigenous Forum' (2006) 42(3) Polar Record 239, 241.

possibility of inclusion does not ensure adequate participation in practice.[270] This is due to the 'extreme power imbalance' resulting from a 'centuries-long history of colonization, violence and discrimination against indigenous communities' and the internalisation of system marginalisation in these law-making systems.[271] Participation processes at the UNFCCC and the CBD demonstrate this.

In practice, the 'possibilities for having real impact' at the International Indigenous Peoples' Forum on Climate Change at the UNFCCC process is 'nearly inexistent'.[272] Problems that have arisen there include 'confusion, problems of accreditation and deliberate exclusion' with access badges that forbade access to many important rooms.[273] Therefore, indigenous groups have long called for a UNFCCC working group to deal with these problems.[274] Such a working group was only established in 2019.[275] These problems and the solutions proposed by indigenous peoples require careful consideration if participation is to be taken seriously in global animal law studies.

The CBD is considered the most accessible environmental law forum for indigenous peoples and yet serious problems persist.[276] Article 8(j) of the CBD mandates that the contracting parties respect, preserve and maintain indigenous and local knowledge, innovations and practices, whilst also sharing the benefits of utilising these with them. A working group was created to implement these requirements.[277] However, 'traditional community structures' and 'communal land tenure' lack (legal) recognition due to serious discriminatory challenges and insufficient mandated participation.[278] Further, indigenous peoples are often geographically isolated from public processes and excluded from public spaces and education.[279] Thus, engagement in CBD processes is practically challenging. Additionally, indigenous ways of knowing differ from western prioritisation of science and technical fact-finding. Western political systems tend to neglect such

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[270] James D Ford et al, 'Including Indigenous Knowledge and Experience in IPCC Assessment Reports' (2016) 6(4) Nature Climate Change 349.

[271] Brugnach, Craps and Dewulf (n 265) 21.

[272] ibid 23.

[273] Farah Mihlar, 'Voices That Must Be Heard: Minorities and Indigenous People Combating Climate Change' (*Minority Rights Group International*, 2008) 3 <https://www.refworld.org/docid/492d18da2.html> accessed 18 December 2020.

[274] ibid 8.

[275] UNFCCC, Report of the Conference of the Parties on its twenty-third session (8 February 2018) FCCC/CP/2017/11/Add.1 decision 2/CP.23 para 6.

[276] Louisa Parks and Mika Schröder, 'What We Talk about When We Talk about "local" Participation in International Biodiversity Law: The Changing Scope of Indigenous Peoples and Local Communities' Participation under the Convention on Biological Diversity' (2018) 11(3) Open Journal of Sociopolitical Studies 743, 749.

[277] CBD Secretariat, COP 4 Decision IV/9 (1998).

[278] Brugnach, Craps and Dewulf (n 265) 24.

[279] ibid.

different ways of knowing, thus excluding indigenous knowledge.[280] The CBD is considered a best-case example and yet these serious problems persist. Thus, animal law scholarship requires giving consideration to the feasibility of broad participation and benefit sharing if it takes a stance against anti-intersectional oppression.

The challenges inherent in participation are not given here as reasons to avoid it. Rather, they are given to demonstrate the serious consideration and work required to rely on participation in legal proposals on global animal law and, particularly, the trade and animal welfare issue. These challenges present themselves in the international legal spaces discussed and in domestic legal systems that operate over the lands of indigenous peoples. What Blattner proposes would require involving indigenous peoples in the domestic legal processes of foreign jurisdictions. This intensifies the existing barriers to participation in international and local domestic legal spaces. Problems of language, recognition of cultural practice and knowledge, transport and physical access to relevant spaces are even more significant in the domestic law-making processes discussed by Blattner. There is a wealth of knowledge in environmental law scholarship on participation and critique in global law scholarship on Westphalian legal systems that animal law scholars would benefit from turning their attention to.

These challenges remain unacknowledged in the field of animal law. Thus, Blattner's proposal to consider intersectionality cannot add justness or legitimacy to her proposal because its workability remains unclear. Until a clear path is identified toward engagement with marginal people in animal law processes, we should aim in the first instance for cooperation, collaboration and multilateralism cognisant of realities of global law. Unilateralism remains too much of an imposition and too paternalistic. Animal law scholars should investigate indigenous concepts and knowledge into decision making processes that have displayed coloniality or western-centricity.[281] Animal law's failure to sufficiently address coloniality weakens arguments for unilateralism and lends support to arguments for multilateralism.

4. Conclusion

[280] ibid 24–25.

[281] Jonathan Clapperton, 'Indigenous Ecological Knowledge and the Politics of Postcolonial Writing' in Jonathan Clapperton and Liza Piper (eds), *Environmental Knowledge, Environmental Politics: Case Studies from Canada and Western Europe* (Rachel Carson Center 2016); Nicholas J Reo, 'The Importance of Belief Systems in Traditional Ecological Knowledge Initiatives' (2011) 2(4) International Indigenous Policy Journal 1; Leanne R Simpson, 'Anticolonial Strategies for the Recovery and Maintenance of Indigenous Knowledge' (2004) 28(3/4) American Indian Quarterly 373.

Trade law continues to facilitate, perpetuate and substantiate the commodification of animals' lives and bodies, indifference to their intense suffering, and the law's systemic oppression against this brutally Othered community. This conclusion is at odds with the literature's celebration of *EC – Seal Products*. This chapter has demonstrated that the scholarly response to these legal developments entrenches norms within global animal law that would put animals' lives at risk through the perpetuation of systemic oppression and the entrenchment of coloniality through unilateral responses to animal harms in trade policy. This conclusion has been reached through the application of second wave animal ethics to the legal developments set out in this chapter. Thus, the efficacy of ethical transparency and critical analysis is proven here.

These are strange times in the realm of trade law and governance, with the failure of the WTO's Doha Round and the cryostasis of the Appellate Body creating serious uncertainty regarding the future. Animal law scholars may not welcome the conclusion reached here, that the progress on animal welfare at the DSB is both frail (given the nature of dispute settlement and the current climate) and facilitates harm and systemic oppression. However, it is important for scholars to engage with this argument given that the literature has, thus far, presented a solely positive outlook on the potential of unilateralism as well as unilateralism's potential to contribute to norm development. Unilateralism, as has been shown, is incapable of dealing with the risks of low animal welfare havens and regulatory chill set out in chapter III. Additionally, the proliferation of FTAs and consequent scale effects of trade combine with the dominance of unilateralism to create a perfect storm of regulatory scarcity and autonomy. Within this context, the WTO's DSB has been unable to do anything but conceptualise xenophobia and coloniality within its members' trade policies as legitimate preferences or collective values. This is clearly unacceptable from a second wave perspective. This is all borne of the neoliberal norms that underpin international trade law.

With regard to the second wave, at least some of the shortcomings of the scholarly response to *EC – Seal Products* and the wider trade law environment are due to the entrenchment of first wave animal ethics. Both Sykes and Blattner opt for incrementalism by working within the confines of existing WTO law. This is valuable and complex work but it does not contribute to a utopian vision of law that is capable of safeguarding animals' interests in a way that eschews similarity theory and a circle of moral concern. The welfarist approach in law, which is being used to propose amendments to trade law, is incapable of eschewing either. Of course, one could counterargue that it is unrealistic to imagine legal realities in which animals are not commodified and legitimate objects of trade. But, as animal law scholars, surely we ought to be able to conceptualise those legal futures if we are to be capable of identifying and working towards our legal objectives. The considerations of intersectionality and situatedness entailed in second wave

animal ethics are absolutely essential to the realisation of animal liberation. It is for this reason that I launch such a sustained critique against the celebration of *EC – Seal Products* which has wreaked havoc on indigenous peoples' lives and livelihoods. I believe that animal law scholarship must be cognisant of wider political contexts, especially when professing to work within realms of global law.

Indeed, the impact that both trade law and the scholarship on international trade and animal welfare have had on global animal law is perhaps the most pressing concern for animal law scholars stemming from this chapter. Each of the shortcomings addressed throughout this chapter and summarised here are not just shortcomings of trade law, they are shortcomings of animal law. Thus, law that ought to exist *for* animals is anything but. Trade law is a natural topic of animal law scholarship and its presence in global animal law spaces is not necessarily harmful in itself. But, when animal law scholarship embraces trade norms and accepts the commodification of animals without providing any framework for alternative legal futures, serious harm is done to that body of law and, potentially, animals' lives as a consequence.

Given that the solutions proposed in the literature are deemed insufficient here, chapter V will move on to propose alternatives that are grounded in second wave animal ethics. Resolving this situation will require that this moment of crisis at the WTO is used as a moment of reflexion and reform. Additionally, the proposed task for animal lawyers is to reconceptualise the early normative development of global animal law in order to deal with the risks identified by second wave animal ethics and in order to incorporate norms and ethics based on the second wave.

Chapter V

Intersectional Global Animal law to Tackle the Trade and Animal Welfare Problem: A Utopian Vision and Guidelines for Incremental Reform

1. Introduction

1.1. Second Wave Animal Ethics as Operationally Superior to First Wave Animal Ethics

I have argued throughout this thesis that second wave animal ethics are key to improving animals' lives and global animal law, through trade policy and otherwise. This chapter draws this critical, ethical and intersectional analysis to a close whilst also opening a future research agenda which will be set out in the conclusion to this thesis. Scholars argue that the kind of open-ended, care-based, situated theory relied upon in this thesis forecloses any possibility of reaching definitive, unambiguous conclusions.[1] Supposedly, such analysis entails perpetual indecision and stasis in advocacy and policy-making. This chapter counters these arguments by using second wave animal ethics to reach firm recommendations for global animal law and scholarship that will address the problems identified in this thesis. These problems are: deficiencies of global animal law (chapter II); problems trade causes for animal welfare (chapter III); and ineffectiveness of policy and scholarly responses to the trade and animal welfare nexus (chapter IV).

[1] Gary Steiner, *Animals and the Limits of Postmodernism* (Columbia University Press 2013) 4. This critique aligns with wider critique of poststructuralism as nihilistic.

Chapter I advocated for second wave animal ethics as an ethically superior alternative to first wave animal ethics. This chapter demonstrates the second wave is also operationally superior because it provides more ethical and effective solutions to the problems identified in this thesis. The trade and animal welfare problem is one example amongst many that demonstrates the value of applying a second wave lens. The recommendations of first wave animal ethics that are used as a comparator are those elaborated in the relevant literature and, to an extent, relevant developments in law and policy. Chapter IV demonstrated that existing law (and literature) is: ineffective at protecting animals' lives; complacent (sometimes encouraging) of moral inconsistency and hypocrisy in animal law; dangerous toward moral subjects not traditionally considered in animal ethics (such as racial and religious minorities); and unduly reliant upon liberalism and associated concepts of individuality and propertisation which have been used to perpetuate animal harm.

These limitations reveal to experts and laypeople alike that first wave animal ethics are conceptually problematic and operationally deficient. Under any conception of law (and ethics notwithstanding), ineffectiveness, hypocrisy and endangerment of vulnerable minority groups are undesirable. Thus, this chapter's recommendations should persuade even those who do not align with second wave animal ethics. Further, this chapter is helpful for those animal advocates who struggle with deciding between abolitionist and incremental action. This is because this chapter elaborates a transparent utopian vision and details guidance for pre-utopian policymaking where reformist incrementalism is required. In speaking of utopia, inspiration is drawn from Antonio Cassese who's writing on utopianism in international law studies aims to 'avoid the extremes of both blind acquiescence to present conditions and the illusion of being able to revolutionize the fundamentals'.[2] I admit to being beholden to the illusion that fundamentals can and will be revolutionised. But, I am also pragmatic enough to present incremental reforms should this not be possible. Thus, I align relatively closely with Cassese's call for oxymoronic 'realistic utopia', intending 'to suggest in utopian terms new avenues for improving the major deficiencies of the current society of states' by engaging in 'imaginative thinking'.[3]

1.2. Mapping Problem Resolution for the Trade and Animal Welfare Nexus

[2] Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) xviii.

[3] ibid xxi.

This chapter has three sections. First, a defence of multilateralism. Second, recommendations to improve the global animal law scholarly endeavour through radicalising and democratising its processes and results. Third, recommendations to improve the law and policy response to the trade and animal welfare problem. This entails a network of global animal law instruments and multilateralism within trade governance through WTO committee work and supporting negotiations. These recommendations for scholarship and policy are set out sequentially but should be considered together because of the jurisgenerative potential of global lawyers.[4] The conclusion of this thesis will identify avenues for elaboration in a future research agenda. All three sections will be briefly introduced here.

Both sets of recommendations are inspired by second wave animal ethics. Their ability to address the problems identified in chapters II, III and IV are their metrics for success. Thus, the recommendations will address the deficiencies of global animal law as a scholarly sub-discipline: its ethnocentricity, disproportionate focus on (and deference to) trade law norms, and masking of its ethical underpinning. The recommendations will address trade's neoliberal underpinnings and the problems it causes for animal welfare: substandard imports, low animal welfare havens, a regulatory chilling effect, and a lack of labelling. Finally, the recommendations will address inadequacies of international trade law, policy and scholarship: a problematic focus on unilateralism, legitimising effect on hypocrisy, and neoliberal minimisation of animal welfare as 'non-trade issue'.

The recommendations also tackle the four central critiques that second wave animal ethics raises against the first wave treatment of trade and animal welfare. First, (global) animal law relies upon similarity theory and a human-animal dichotomy. International law and trade law only deal with animal welfare for charismatic megafauna. They also promote human subjectivity and animal commodification, eschewing posthumanism's indistinction of the human.

Second, (global) animal law relies upon a circle of moral concern; an inside/outside dualism that neglects some animals and all non-sentient nature. There is no precautionary principle like in environmental law. Trade policy replicates the moral circle by treating environmental issues as entirely separate from moral concern for animal welfare. Indeed, trade law arguably utilises a tighter moral circle than other legal regimes by excluding those such as farm animals when prioritising economic interests and human welfare in decision-making.

Third, (global) animal law relies on liberal individualism, like most legal systems. Welfarist legislation mostly fails to recognise animal individuality, treating them instead as protected *things*.

[4] See above at chapters II section 3.2.1.

Scholarship on animal rights law is gaining traction.[5] Yet, care theory may be a more effective ethical underpinning than rights theory to the legal entrenchment of animal rights. Trade law is definitively neoliberal. Thus, it is particularly difficult but also particularly beneficial to move away from liberal subjectivity here.

Finally, (global) animal law academics have neglected intersectionality and situatedness in cross-cultural legal debates. Global animal law must prioritise such considerations to achieve legitimacy and effectiveness. Growing unilateralism on trade and animal welfare necessitates urgent work to situate animal law and increase participation.

Proposing recommendations capable of tackling all these issues is a lofty ambition. The recommendations must also be more effective than comparable first wave alternatives. This is further complicated by diversity and complexity within the first and second waves. Owing to this complexity, this chapter will not weigh the relative triumph of the second wave recommendations against first wave alternative on each metric identified. Rather, this chapter will conduct a holistic analysis, noting intricate ties between the success metrics. It is concluded that, on the whole, second wave recommendations perform better compared to first wave alternatives when measured against the success metrics.

To simplify these objectives, this chapter focuses on the developments identified in chapter IV: a turn to unilateralism, optimism regarding the norm-building power of the DSB on animal welfare, and a disregard for second wave ethical considerations. These trends represent the first wave response to the problems identified in chapter III and are intricately tied up with the inadequacies of global animal law discussed in chapter II. Thus, focusing the trends identified in chapter IV naturally encompasses the problems discussed in chapters II and III.

First wave theorists may counterargue that there remains scope within their theories to inspire improvements to the reigning anthropocentric narrative on trade and animal welfare. For example, there is scope for a more militant adherence to animal rights ethics to lead to vast improvements in trade policy from animals' perspectives. Some of the authors of this literature hold animal rights positions whilst all arguably have at least some concern for animal welfare. Yet, the incremental reform proposed in the literature entrenches harmful norms in the law. Thus, I encourage further development of these first wave responses to the trade and animal welfare problem. As yet, I do not think any recommendations from this literature are more conceptually or operationally effective than those I envisage in this chapter. Additionally, the first wave-inspired literature has failed to identify much of what is harmful about recent developments on the trade and animal welfare question. While this may be improved, I believe that first wave animal ethics is

[5] See above at chapter II section 2.3.2.

incapable of taking intersectionality seriously. Animal oppression is a symptom of a system that exerts force and oppression on minority groups. Utilising this oppressive system, as first wave animal ethics do, will not be as effective as second wave animal ethics at improving animals' lives.

Unilateralism in response to global animal law issues is inherently oppressive via coloniality. Therefore, the first part of this chapter builds on the critique of unilateralism in chapter IV with a defence of multilateralism in the current political climate. Multilateral animal welfare protection has been critiqued as infeasible.[6] I argue this is incorrect in the current political climate. I also note that multilateralism has been equated with global treaty-making. This is incorrect and owes to global animal law's misappropriation of the global label. The recommendations outlined here align with global law's interconnectivity (networks of instruments), post-Westphalian governance (decentring the state and treaty law) and future-orientation (focus on scholarship). These arguments support the two sets of recommendations developed in this chapter. Taken together, these three parts provide the answer to the research question of this thesis: to what extent can introducing an intersectional ethical framework to global animal law help to reconceptualise legal research on international trade and animal law.

2. In Defence of Multilateralism and Global Governance in the Current Political Climate

Chapter IV set out the limits to a unilateral approach to trade and animal welfare. This section will first address the feasibility of a multilateral approach as the preferred approach of second wave animal ethics. The recommendations set out in this chapter are based in multilateralism for two reasons. First, multilateralism is not as unfeasible as some global animal law scholarship argues. Second, multilateralism is not equivocal with a global treaty. There are various forms of multilateralism and if a global treaty is truly unfeasible there are many potential alternatives to explore before resorting to unilateral measures or bilateral trade agreements. This section will then set out Gunther Teubner's reflections on global governance and democracy, adding further weight to the second wave imperatives of situatedness, intersectionality, and deep and wide participation contained in the recommendations.

[6] Chapter IV section 3.2.2.

2.1. Multilateralism, Feasibility and Second Wave Animal Ethics

Multilateralism is an 'institutional form which coordinates relations among three or more states on the basis of "generalized" principles of conduct'.[7] Those principles 'specify appropriate conduct for a class of actions, without regard to the particularistic interests of the parties or the strategic exigencies that may exist in any specific occurrence'.[8] Globalisation and the interconnectivity and post-Westphalian nature of global law evolve our understandings of multilateralism, drawing attention to multi-level governance, diversity in standard setting, and normative transfer between legal regimes and actors.

However, many global animal law scholars equate multilateralism with a global treaty and, thus, argue multilateralism on animal welfare is unfeasible.[9] While animal law scholars have typically supported multilateralism to (problematically) impose western standards on the Global South,[10] there is growing concern about the political effort required to reach agreement.[11] Others believe global treaty making necessarily entails settling for a lowest common denominator.[12] Most animal law scholars have turned away from multilateralism, believing a treaty is unlikely based on failed efforts thus far. Thus, failures of existing proposals for multilateral mechanisms remain unexplored.

Charlotte Blattner's treatment of multilateralism is more detailed than most but is still only two pages long. It also treats multilateralism as unrealistic whilst neglecting to consider forms of multilateralism beyond large-scale treaty-making. Blattner's goal is to justify her unilateral approach by pointing to the difficulty of treaty-making. Blattner's exploration of unilateralism is warranted, given it is the current trend. However, I think it would be incorrect to argue this is a positive move for animal protection. Blattner argues that probability analysis by Guzman determines that an animal welfare treaty is unlikely to be agreed.[13] Guzman believes economic incentive is the primary

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[7] John Ruggie, 'Multilateralism: The Anatomy of an Institution' (1992) 46(3) International Organization 561, 571.

[8] ibid.

[9] Charlotte E Blattner, *Protecting Animals Within and Across Borders: Extraterritorial Jurisdiction and the Challenges of Globalization* (Oxford University Press 2019) xiii; Harald Grethe, 'High Animal Welfare Standards in the EU and International Trade - How to Prevent Potential "Low Animal Welfare Havens"?' (2007) 32(3) Food Policy 315, 321; AL Hobbs et al, 'Ethics, Domestic Food Policy and Trade Law: Assessing the EU Animal Welfare Proposal to the WTO' (2002) 27(5–6) Food Policy 437, 448.

[10] Clive JC Phillips, *The Animal Trade: Evolution, Ethics and Implications* (CABI Publishing 2015) 163.

[11] Grethe (n 9) 321; Hobbs et al (n 9) 448.

[12] Blattner (n 9) xiii.

[13] ibid 55.

treaty-making motive and agreement becomes impossible when 'consumers and producers are unevenly distributed among states'.[14] Blattner argues that because animal consumption and production are unevenly distributed between states, agreeing a treaty is difficult or impossible.[15] I regard Blattner's analysis as too cursory to be convincing.

Blattner neglects that treaties are frequently concluded in contexts of uneven consumption and production. Also, non-economic treaty-making objectives have led to successful agreements that provide global public goods and express normative significance. If Guzman's problems were insurmountable, multilateral environmental agreements would not exist.[16] Further, the entire corpus of international trade law, entailing broad-ranging multilateral rules, exists between members with diverse consumption and production trends.

Blattner also believes treaty-making on animal welfare would always entail states lowering their domestic standards, matching a lowest common denominator.[17] But the kinds of standards Blattner's discussion entails, comparable to the OIE animal welfare standards, represent a minimum threshold. Animal welfare treaties would not cap protection levels and there should be no incentive to lower standards. Further, the appropriate role of an international treaty on animal welfare is unlikely to be standard setting. Such standards would need to be more context specific. A treaty could, however, create governance bodies to assist members in developing standards leading to the situated welfare protection second wave animal ethics requires. Blattner argues there is little to gain from agreements between states that already have similar standards.[18] This neglects the normative significance such legislative moves would have and the potential to entrench more ethical norms into global animal law.

Thus, global animal law scholarship does not decisively rule out multilateralism as an effective or feasible route forward. Research on trade and animal welfare has focused almost exclusively on unilateralism and WTO compatibility. Chapter IV identified the decreasing utility of this work, arguing that focus should shift to addressing systemic harms, denouncing moral inconsistency (facilitated by the DSB) and recognising the precarity of normative evolution at the DSB given its cryogenic state and its ideological and procedural restraints.

Free trade agreements are less conceptually problematic than unilateral measures but have limited utility for animal welfare protection because they are incapable of dealing with scale effects

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[14] ibid.

[15] ibid 55–56.

[16] For example, the success of the Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTS 3.

[17] Blattner (n 9) 56.

[18] ibid.

of trade, thus failing to account for animal flourishing.[19] Free trade agreements offer some of the benefits of multilateralism but, taken alone, they are insufficient to counteract the dangers they create for animal welfare, let alone making broader progress toward animal flourishing and eroding the human-animal dichotomy and the moral circle of concern.

Having introduced the potential effectiveness of multilateralism, this section will now defend the feasibility of multilateralism. This includes an argument, based in global law metatheory, that multilateralism does not equate to a global treaty and other forms of multilateralism are neglected by global animal law scholarship. Multilateralism has been hit from many angles in recent years. The most concentrated attack stems from the Trump administration.[20] However, one cannot yet discern a downward or upward trend. All that can be concluded is that multilateralism 'seems to have lost at least some of its appeal to some states'.[21] The continuation of multilateralism is vital to avoid returning to 'might is right'. Thus, trade policy practitioners continue to 'place high value on trade multilateralism' despite moves toward plurilateralism.[22] This 'contradicts assumptions that core constituencies have lost interest in trade multilateralism'.[23] 'Might is right' unilateralism endangers law's Others, including animals, and must be avoided at all costs.

Arguably, the decline of multilateralism is partly because it has achieved much of what it set out to do.[24] Pauwelyn, Wessel and Wouters have observed a quantitative stagnation in international law-making 'quantity *and* quality', specifically treatymaking.[25] The reason, they argue, is saturation of existing treaties.[26] Thus, breakthroughs continue where no treaty framework exists.[27] Global animal law may benefit from such breakthroughs for the following reasons.

First, these findings concern treaty-making and there has been an associated rise in soft law. Thus, international law and global governance continue in new forms which also have more potential for situatedness and intersectionality through deep listening and engagement with non-western lawmakers. Second, animal law will have a different trajectory because it is yet to be

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[19] See chapter IV section 2.2.

[20] Jutta Brunnée, 'Multilateralism in Crisis' (2018) 112 American Society of International Law Proceedings of the Annual Meeting 335, 336–337; Harlan Grant Cohen, 'Multilateralism's Life Cycle' (2018) 112(1) American Journal of International Law 47, 47.

[21] Cohen (n 20) 48.

[22] Silke Trommer, 'The WTO in an Era of Preferential Trade Agreements: Thick and Thin Institutions in Global Trade Governance' (2017) 16(3) World Trade Review 501, 520.

[23] ibid.

[24] Cohen (n 20) 49–50.

[25] Joost Pauwelyn, Ramses A Wessel and Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' (2014) 25(3) European Journal of International Law 733, 734 et seq.

[26] ibid 738–739.

[27] ibid.

entrenched within treaty law in a meaningful way. Animal law is likely to be one of the neglected areas of international law-making where breakthroughs may continue for this reason. Thus, research forecasting further slowdown in treatymaking does not mean an animal law treaty will not materialise.[28] Third, the impact of recent events on the political climate may reignite momentum around multilateralism. Right-wing populism - including revolt against globalisation and international law objectives like trade liberalisation and climate change mitigation - has been having a cultural moment.[29] However, post-Brexit and after four years of the Trump administration, the global community recognises the authoritarian threat of right-wing populist policymaking for democracy and the harm it poses to marginal communities.[30]

The US has paralysed the WTO's Appellate Body but the WTO membership has collaborated to implement an alternative appeal system.[31] The US's abandonment of the WHO has been met with wide and vocal condemnation.[32] There is also recognition that populists like Donald Trump actually exhibit globalist tendencies in, for example, advocating for 'free market fundamentalism'.[33] They advocate for 'alter-globalisation' which seeks to minimise public goods like environmental protection and which seek to 'serve large corporates'.[34] This flies in the face of second wave animal ethics, promoting increased commodification, facilitating Othering, and masking coloniality and xenophobic tendencies for politics that are ostensibly "for the people". Further, Trump suffered defeat in the US 2020 election, which leaves space for further moves away from populist leadership in the US. Second wave animal ethics requires pushing against alter-globalisation. Also, one hopes the right-wing populist turn will be short-lived because multilateralism's advantages have been brought to light by numerous global events.

One such event is the solidification of ties between climate change and animal welfare. This has been highlighted by UN policy, animal advocacy, and popular culture in recent years. Another such event is the COVID-19 pandemic: the most truly global experience in living

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[28] For example, Cohen (n 20) 51.

[29] Janne E Nijman and Wouter G Werner, 'Populism and International Law: What Backlash and Which Rubicon?' in Janne E Nijman and Wouter G Werner (eds), *Netherlands Yearbook of International Law 2018: Populism and International Law* (Springer 2019) 6–7.

[30] Bojan Bugaric and Alenka Kuhelj, 'Varieties of Populism in Europe: Is the Rule of Law in Danger?' (2018) 10 Hague Journal on the Rule of Law 21; Kaul Volker and Ananya Vajpeyi (eds), *Minorities and Populism - Critical Perspectives from South Asia and Europe* (Springer 2020).

[31] Chapter IV section 3.1.

[32] Michael Peel et al, 'US Allies Line up to Condemn Donald Trump's WHO Funding Suspension' (*Financial Times*, 2020) <https://www.ft.com/content/08e530df-bd84-4280-89ca-0041bb0a8feb> accessed 18 December 2020.

[33] Lukasz Gruszcynski and Jessica Lawrence, 'Trump, International Trade and Populism' in Janne E Nijman and Wouter G Werner (eds), *Netherlands Yearbook of International Law 2018: Populism and International Law* (Springer 2019); Nijman and Werner (n 29) 10.

[34] Nijman and Werner (n 29) 10.

memory. The pandemic puts multilateralism in a curious situation. There is growing recognition of multilateralism's significance and necessity in response to globally scaled problems. Simultaneously, multilateralism features weakly in responses to the pandemic with the Trump administration abandoning the WHO and with regional and UN bodies failing to lead a coordinated response.[35] Wide speculation states that emergence from the COVID-19 pandemic will be akin to the 'UN rising from the ashes of World War II', providing potential to 'transform global governance to reflect a new reality'.[36] Additionally, there are mixed views on what the impact of COVID-19 will be on nationalism and multilateralism: it poses certain risks and opportunities for each to strengthen its position.[37]

What is clear from this and other dialogues is that multilateralism is not dead and, while there are challenges to new regulation for contentious issues like animal welfare, these are not insurmountable if one focuses upon multi-speed, multi-level multilateralism based in global law interconnectivity. The consequences of the pandemic will be more law on animals' lives and it will take a stand on animal welfare, most likely by ignoring it.[38] It is essential for global animal law scholars to contribute to this conversation or else animal flourishing and care will be foregone. Global politics have changed significantly since 2000 when the EU submitted a doomed proposal for multilateralism to the WTO's Committee on Agriculture in 2000. My view is that these events may increase the feasibility and will definitely increase the necessity of multilateralism in general and as a solution to trade and animal welfare problems in particular.

Moving onto the question of false equivalence, the difficulty of agreeing a universally adopted treaty does not preclude the feasibility of other forms of multilateralism. Chapter II has

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[35] 'COVID-19, the Knockout Punch for Multilateralism?' (*Euractiv*, 2020) <https://www.euractiv.com/section/global-europe/news/covid-19-the-knockout-punch-for-multilateralism/> accessed 18 December 2020; Ray Acheson, 'COVID-19: Multilateralism Matters' (*Women's International League for Peace & Freedom*, 2020) <https://www.wilpf.org/covid-19-multilateralism-matters/> accessed 18 December 2020; Roberto Montella, 'The COVID-19 Pandemic: Multilateralism and Parliaments' (*openDemocracy*, 2020) <https://www.opendemocracy.net/en/can-europe-make-it/covid-19-pandemic-multilateralism-and-parliaments/> accessed 18 December 2020; Olof Skoog, 'Proof Positive: COVID-19 Shows the Necessity of Multilateral Responses - and Global Solidarity' (*UN Chronicle*, 2020) <https://www.un.org/en/un-chronicle/proof-positive-covid-19-shows-necessity-multilateral-responses—and-global-solidarity> accessed 18 December 2020.

[36] Faye Leone, 'UN75 People's Forum Adopts Recommendations for Strengthening Multilateralism' (*IISD*, 2020) <http://sdg.iisd.org/news/un75-peoples-forum-adopts-recommendations-for-strengthening-multilateralism/?utm_medium=email&utm_campaign=SDG Update - 22 May 2020&utm_content=SDG Update - 22 May 2020+CID_b4d2c061af89d20248bd5c65c7821f08&utm_source=cm&utm_term=R> accessed 18 December 2020.

[37] Eric Taylor Woods et al, 'COVID-19, Nationalism, and the Politics of Crisis: A Scholarly Exchange' (2020) early view Nations and Nationalism <https://onlinelibrary.wiley.com/doi/full/10.1111/nana.12644> accessed 18 December 2020.

[38] This has prompted precedent-setting agreement amongst animal protection NGOs: 'The Animals' Manifesto: Preventing COVID-X' (*World Animal Net*, 2020) <https://pub.lucidpress.com/1c6e4a02-2bae-4656-a238-333d956dc2a0/#_0> accessed 18 December 2020.

critiqued the overfocus of global animal law scholars on treaty law, particularly because they profess to be doing global scholarship whilst advocating western perspectives without adequate engagement with the Global South.[39] The recommendations in this chapter are multilateral but do not necessarily represent such a universally standardised response. This, it will be shown, is the most effective and ethical second wave-inspired response to the problem of trade and animal welfare.

In any event, multilateralism is relational. In the case of animal welfare where no treaty exists, agreement between even 10 or 15 states would be considered multilateral.[40] I disagree with Blattner who regards smaller agreements between likeminded states as pointless. In many cases, the provision of global public goods does not require 'universal participation'.[41] For example, it would be useful to pursue agreements between factory farming countries, other agreements between countries devolving into factory farming, and other agreements between countries where small-scale farming is the dominant approach. International law scholarship has long recognised the effectiveness of more 'bespoke policy'.[42]

Further, the dichotomous assumption - that hard, treaty law is binding whilst soft law is non-binding and weak - is widely recognised as false. There is similar potential for 'constraining' force within 'informal modes of cooperation' as in 'traditional treaties'.[43] This is particularly well recognised in environmental law.[44] Codes of practice and standards are often 'more inclusive, transparent, and predictable' and 'normatively thicker' than treaties, whilst also increasing 'flexibility and adaptiveness'.[45] Soft law has great value and often shifts 'future unilateral, bilateral, and regional negotiations in particular directions'.[46] Thus, it is an outdated view of international law to argue that the lack of treaty law equates to the lack of law, and that the difficulty of treaty-making supports a move to unilateralism. Animal law scholars frequently overlook these facts. This is concerning given that soft law presents feasible opportunities for effective global animal

[39] Chapter II section 3.

[40] Cohen (n 20) 50.

[41] ibid 66.

[42] ibid.

[43] Pauwelyn, Wessel and Wouters (n 25) 746–748.

[44] For extensive treatment of this subejct, see Alexander Anile, 'Law or Not?: Considering the Value of International Soft Law in Addressing Environmental Problems' (2019) 4 Perth International law Journal 21; and Jürgen Friedrich, *International Environmental 'Soft Law': The Functions and Limits of Nonbinding Instruments in International Environmental Governance and Law* (Springer 2013).

[45] Pauwelyn, Wessel and Wouters (n 25) 749–750.

[46] Cohen (n 20) 65.

law to safeguard animal flourishing, providing better avenues for situatedness and intersectional considerations like deep listening and wide participation.

For these reasons, there are increasing calls to rethink our 'blanket preference for global-scale multilateral deals to provide global public goods'.[47] There is growing interest in 'local level' justice, aligning with second wave animal ethics situatedness.[48] This chapter proposes a global multilateralism that interconnects hard and soft law, universal, regional and local standards. This differs from Blattner's proposed 'dense, global jurisdictional net of overlapping and concurring laws'.[49] Blattner's proposal solely refers to overlapping domestic extraterritorial measures, though she hopes these will lead to more multilateral measures in the future. Conversely, the global multilateralism proposed here results from negotiation and collaboration, not unilateral imposition. The key difference is that Blattner's 'global jurisdictional net' may look more like ships passing in the night if it primarily consists of concurrent unilateralism. I believe that the multi-speed multilateralism I propose has greater netted interconnective potential due to its rootedness in discussion, listening and participation. It is rooted in connection rather than individualism. Given the prohibitive difficulty of agreeing a universal animal welfare treaty, soft law and non-universal multilateralism are essential components of global solutions to trade and animal welfare problems.

2.2. Global Governance, Democracy and Second Wave Animal Ethics

In transnational and global legal spaces, there are growing concerns regarding a democratic deficit.[50] Gunther Teubner contests that at the 'centre of democratic communication lies not the naïve hope for the one best solution, but the confrontation with alternative world views' and, consequently, 'organized dissent' or 'deliberative theories of democracy'.[51] This should be no less true for global or transnational regimes than for domestic legal regimes. This speaks to second wave animal ethics imperatives of intersectional considerations and situatedness.

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[47] ibid.

[48] ibid.

[49] See chapter IV section 3.2.2.

[50] Gunther Teubner, 'Quod Omnes Tangit: Transnational Constitutions Without Democracy?' (2018) 45(1) Journal of Law and Society 5.

[51] ibid s13.

The unique problem of global legal governance is fragmentation into 'issue-specific regimes' which frustrate efforts at 'institutionalized dissent' necessary for deliberative democracy.[52] Resolving this requires global legal regimes, like the trade regime, to practice 'self-contestation' which means they are 'responsive to external irritations' and they 'institutionalize sites of internal dissent'.[53] This entails deep integration of dissent, such as the animal welfare dissent to trade liberalisation. This also entails integrity and contemplation in external collaborations; welcoming dissents from other regimes such as global animal law. Resolving this also requires 'respectification'[54] which entails a contextualisation of response to the need for self-contestation in appropriate forms for the particular 'epistemic' community or regime in question.

With regard to transnational or global regimes like the trade law regime, Teubner points out that the 'extremely narrow tunnel vision' of such regimes frustrates or can even 'paralyse self-contestation'.[55] In the WTO, this materialises as 'fixation on one hegemonic project', neoliberalist free trade, resulting in 'problematic substantive overdetermination' of the WTO's constitutional elements.[56] Self-contestation for the WTO would require questioning its 'fundamental "neo-liberal" strategies of strengthening and defending free markets'.[57] We may be seeing the beginnings of this in current WTO institutional debates.[58] Some particular considerations for our purposes are the institutional and normative strength of international trade law and its external and forceful impact on the early development of global animal law.

I would argue that respectification in the case of the WTO requires that global animal law be given the most serious and deep opportunities for dissent, given its neglect thus far.[59] Animals and animal advocates would be considered 'affected outsiders' on Teubner's conception, adopting a 'decisive role' in 'regime contestation' and forcing a process of 'internal self-contestation'.[60] The Battle in Seattle and the public backlash to TTIP are two strong examples of this. A second wave-inspired contestation is now required and its imperatives will be proposed throughout this chapter. This holds the potential to bring about the self-contestation and questioning of neoliberalism that

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[52] ibid s14.

[53] ibid.

[54] ibid.

[55] ibid s15 and s22-25.

[56] ibid s23.

[57] ibid s20.

[58] Section 4.2.1.2.

[59] Teubner has in mind more functional differentiation but I believe his idea also works in this way. See Teubner (n 50) s25-28.

[60] ibid s17.

democratic accountability demands. This chapter's recommendations elaborate the means through which this ought to be pursued, both internal to the WTO and external to it.

3. Recommendations for Redirecting First Steps toward a Global Animal Law Research Environment and Agenda

Improving global animal law scholarship is essential to improving multilateralism on trade and animal welfare, particularly due to the jurisgenerative capacity of global lawyers. Chapter II demonstrated that emerging global animal law scholarship is flawed from the perspective of second wave animal ethics. Chapter IV elaborated that these flaws are exemplified in the literature's response to trade and animal welfare problems. This literature on trade and animal welfare is entrenching neoliberal norms into global animal law. Global animal law scholarship should be able to provide radical thinking on trade and animal welfare.

Chapter III noted that trade and animal welfare literature is deficient, in part, because it situates itself at the fringes of the linkage debate, adopting neoliberal trade norms. This has already begun to change with the work of Sykes, Blattner and others. However, further transferal to animal ethics norms in place of trade norms would, in places, improve this literature. This part argues that second wave animal ethics can alter global animal law scholarship's early trajectory, enhancing its potential for producing just and effective solutions to trade and animal welfare problems. This would contribute to realising effective and ethical global animal law scholarship more widely.

Chapter IV identified and filled gaps in the literature on trade and animal welfare. This exemplifies the merits of intersectional, critical second wave animal ethics analyses that favour indistinct concepts of humanity, eschew moral circles of concern, promote care over liberal individualism, and that encompass contextual considerations. The success and legitimacy of global animal law requires self-reflexivity regarding its use of ethics because global conversation regarding animal welfare cannot take place without transparent dialogue regarding ethical priorities.

Improving global animal law scholarship requires recognising that current scholarly proposals for developing transnational and international animal law are stagnating and failing to produce results. This thesis has critiqued current law and scholarship for its ethnocentric framing. Unilateral impositions of western models of animal welfare protection in transnational contexts will not be effective. The legacy of colonialism and reigning coloniality require giving serious consideration to situated animal ethics, law and policy.

This section proposes changes to global animal law scholarship to facilitate moving in this direction and reacting to Teubner's imperatives for democracy in global governance. These recommendations have two objectives: incorporating a more radical and transparent ethical underpinning into global animal law scholarship through jurisgenerative scholarship and centring that scholarship on decolonised concepts of participation, collaboration and mutual learning. The first objective concerns what is being written about and why. The second objective concerns who is writing, where and when they are writing.

3.1. The First Recommendation: A More Radical and Transparent Ethical Underpinning (the "what" and "why")

To move away from similarity theory, global animal law scholarship must eschew anthropocentrism. This is not achieved simply by focusing upon animals and alleviating harms caused to them. Other conceptual issues remain. Global animal law scholarship is fragmented into discussions of, for example, transport and trade of farm animals and protection of wild animals. This perpetuates governance based on human usage, creating governance gaps.[61] Global animal law scholarship also accepts animals' property status, with insufficient legal research exploring global law mechanics to dismantle this. I propose changing global animal law scholarship in key ways. Global animal law scholarship, instead, ought to experiment with more porous legal categories, eschewing the human-animal dichotomy, thus facilitating more interconnected care and protection.

Regarding trade, global animal law scholarship should incorporate deep listening to animal perspectives, removing neoliberal norms and an acceptance of trade liberalisation objectives. There must be inclusive debate about the best mechanisms to achieve this. This may include procedures for 'becoming animal' within debates, the inclusion of relevant experts and advocates, or means of reporting on and including animals' specific means of communicating to us.[62] When animals and their bodies are traded, their lives and welfare should be central to the law that governs trade. This view is surprisingly absent in the relevant literature.

Animals are absent referents in global animal law scholarship on trade.[63] Recognising animals' individual flourishing and their interconnection with each other, with humans and with

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[61] See chapter II.

[62] See chapter I sections 4.1.2 and 4.3.2.

[63] To borrow a term from Carol J Adams, *The Sexual Politics of Meat: A Feminist-Vegetarian Critical Theory* (20th Anniv, Continuum 2010).

their environments through deep listening would facilitate the sort of critical thinking that led to the replacement in this thesis of the phrase 'non-trade issues with 'trade impact issues. A rhetorical and normative shift is required to transform global animal law into an academic space that fosters radical ideas and critical thinking oriented around an indistinct, fluid animal category. Concessions can be made later, when exchanging knowledge with trade officials and policy makers. Animal law scholarship should not be made for trade officials. It should be made for the animals it seeks to protect.

To move away from a circle of moral concern, global animal law scholarship should embrace a precautionary principle, like environmental law.[64] Precautionary principles mandate that in situations of great 'magnitude' such as imposing animal suffering, decisionmakers 'give 'greater weight to the prognosis of doom than to that of bliss'.[65] The precautionary principle is a 'guiding principle of international law'.[66] It is utilised in trade law, it has become a cornerstone of environmental law and its recognition amongst animal law scholars is growing.[67] The precautionary principle should operate to protect animals from harm, even where conclusive scientific evidence proving sentience is lacking. Flourishing should also be considered when operationalising the precautionary principle.

This means species divisions should not unduly bind proposals for treaties, amendments to OIE animal welfare standards, and compassionate conservation initiatives. The precautionary principle should facilitate potential expansion of these proposals as animal welfare science develops. The risks of over-inclusion only amount to inconvenience and economic hardship which humans could endure and adapt to. The risks of under-inclusion include the painful loss of life and the ability to flourish.

To move away from liberalism, global animal law scholarship should embrace radical and critical scholarship. Animal law scholars tend to be 'scholactivists' who want to see change in their lifetimes. As a result, they favour incremental, realistic changes that would inch us closer toward legal systems that adequately protect animals. Intersectional, radical and critical animal studies approaches to animal law are lacking. Thus, visions of utopian legal systems that work for animals are lacking. Without this clear, transparent utopian vision, our reformist research lacks direction

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[64] This is proposed by Blattner (n 9) 276.

[65] Hans Jonas, *The Imperative of Responsibility: In Search of an Ethics for the Technological Age* (University of Chicago Press 1984).

[66] Blattner (n 9) 277.

[67] Abdul Haseeb Ansari and Sri Wartini, 'Application of Precautionary Principle in International Trade Law and International Environmental Law: A Comparative Assessment' (2014) 13(1) Journal of International Trade Law & Policy 19.

and a clear ethical underpinning. Thus, global animal law scholarship should explore care over justice, interconnection over liberal individualism, and emotion-based insights which overlap and interact with rationality. Current events have increased the feasibility and attractiveness of research like this. Our world order is changing. In the space of time it has taken to complete this thesis, the UK has left the European Union, Fridays for Future have spawned global weekly protests against climate change inaction, the WTO Appellate Body has entered cryostasis, COVID-19 has immobilised global society (demonstrating just how interconnected the lives, health and welfare of humans and animals are), and recordings of police brutality in the US have enflamed Black Lives Matter advocacy across the globe (encouraging animal advocates to address their silence on issues of racism). The legal order we know, particularly in international and transnational spaces, is having its various weaknesses exposed. The legal status quo is being exposed to majority white, heteronormative, cis-gendered and male members of society as deeply problematic in ways that have been apparent to oppressed minorities for a long time. The time for radical thought is now because these are times in which the issues and modes of governance are changing at speed.

In some cases, these recommendations for *what* global animal law scholarship should focus on are not dissimilar to what first wave animal ethics would suggest.[68] For example, animal rights proponents have proposed reliance upon a precautionary principle and incorporating animal interests into law (though differently to how that is argued here). Where first and second wave animal ethics inspire similar improvements to global animal law scholarship, the reasons *why* the recommendations are made are distinguishable. Each wave advocates respect for and protection of animals' lives. However, global animal law scholarship based on first wave animal ethics has, thus far, isolated animal oppression from other issues. In contrast, critical, feminist-inspired, intersectional and care-based animal ethics would inspire global animal law scholarship that tackles animal oppression as an instance of systemic oppression of Othered groups, including animals. This is essential in order to make progress. Thus, the intersectionality of various oppressions is important for the substance of global animal law scholarship as well as its procedure and methodology, as is explored in the next section.

3.2. The Second Recommendation: Decolonising Participation, Collaboration and Mutual Learning (the "who", "where" and "when")

[68] Of course, they differ in important ways, particularly when comparing second wave animal ethics with welfarist law. See chapter II section 2.3.1.

Second wave animal ethics requires paying careful attention to individual circumstances and cultural differences, demanding more than a one-size-fits-all approach to animal ethics. Global animal law scholarship will fail to incorporate these considerations in substance if it does not act reflexively and incorporate intersectionality into its procedures.

By reflexivity, I refer to a 'self-critical capacity' for global animal law to 'change itself after scrutiny of its own failures, or indeed successes'.[69] Reflexivity entails the advancement of a 'desirable kind of agency which requires listening, reflection, foresight, and anticipation against the structural determinism of path dependency, such that agents can become more capable of rethinking and transforming structures to good effect'.[70] In second wave animal ethics terms, this requires deep, interconnected care and consequent, intersectionally-minded action toward the more-than-human world.

The kind of intersectional global animal law scholarship proposed here holds space for animals to have their voices heard. In discussing law and politics of the Anthropocene, Dryzek and Pickering note that this should not be overly difficult and simply entails responding to 'signals' of non-human systems just as we respond to the signals of 'human systems'; both are 'often puzzling and require interpretation'.[71] Incorporating reflexivity and intersectional participation into animal law contributes to the development of scholarship and policy that is not paternalistic or colonial, thus facilitating the effective and ethical incorporation of animals' desires into law and governance. Paternal first wave approaches are ineffective at this. Thus, this section explores intersectional, decolonised insights into jurisgenerative participation in animal law scholarship so as to inspire further ethical work on democracy and the more than human.

For these reasons, global animal law scholarship cannot consist solely or predominantly of white scholarship; it must be inclusive regarding who is writing, where they are writing, and when. Shockingly, global animal law scholarship has not recognised its lack of diversity and western-centricity. Thus, this section presents literature on participation and Global South perspectives on law to global animal law scholars. Global animal law scholarship should include, promote and amplify voices within racial and religious minorities and other marginalised groups including women, queer people, and disabled people. This requires action at every level. Presently, western, white scholarship dominates global animal law. Thus, many of these recommendations are directed to those scholars who must seek change.

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[69] John S Dryzek and Jonathan Pickering, *The Politics of the Anthropocene* (Oxford University Press 2018) 35.

[70] ibid 104.

[71] ibid 147.

White scholarship ought to reference a diverse array of sources stemming from non-white communities. They ought to seek out partnerships and joint projects with members of other communities and social demographics. There also ought to be more dialogic scholarship that welcomes tension, open-endedness, and hard questions.[72] Animal law journals, other journals producing special issues on animal law, and book publishers working with animal law scholars ought to include mandatory diversity requirements in their publication strategies. They also ought to include considerations of diversity in their editorial and review comments so that books and papers with exclusively or predominantly white sources can be called out for their narrowness.

Animal law conferences should ensure diversity of speakers and participants. The experts are out there, as are their texts, and both should be promoted widely to encourage more diverse scholarship. Serious consideration should also be given to accessibility in academia and whether it excludes experts and forms of knowledge that do not meet its traditional, narrow criteria for excellence. This may require more informal, public-facing means to discuss and disseminate our research, like blogs and podcasts. This is already happening in a number of spaces and should be encouraged.[73]

Crucially, however, critical race theorists point out that focusing on inclusion alone would erroneously proclaim that "'diversity" is the *presence of black bodies*, as opposed to the presence of black ideas born from black perspectives'.[74] Syl Ko's perspective from Aphro-ism is that really promoting diversity requires embracing concepts, frameworks and research methods beyond and outside Eurocentrism.[75] Bodily inclusion must be coupled with the inclusion of radical and diverse ideas. This includes the second wave priorities elaborated in the previous section. For example, I doubt that the unilateral extraterritorialism recommended by Charlotte Blattner would survive critique from minority scholars from decolonial perspectives. These considerations also hold true for diversity in non-human voices and deep listening and care for animals, as elaborated in the previous section.

Questioning who ought to contribute to global animal law scholarship also raises questions about where and when to write. As global animal law develops further as a discipline, it should

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[72] For example, Edward Mussawir and Yoriko Otomo, 'Thinking about Law and the Question of the Animal' in Andreas Philippopoulos-Mihalopoulos and Victoria Brooks (eds), *Research Methods in Environmental Law: A Handbook* (Edward Elgar 2017).

[73] Inspirational examples include A Breeze Harper, 'The Sistah Vegan Project' (*Sistahvegan*, 2020) <http://sistahvegan.com/> accessed 18 December 2020; and 'The Animal Law Podcast' (*Our Hen House*) <https://www.ourhenhouse.org/animallaw/> accessed 18 December 2020.

[74] Syl Ko, 'Black Lives, Black Life' in Aph Ko and Syl Ko (eds), *Aphro-ism: Essays on Pop Culture, Feminism, and Black Veganism from Two Sisters* (Lantern Books 2017) 4.

[75] Ko (n 74).

move away from more traditional international law journals and trade law journals. Focus should shift toward more animal law-centric spaces and more critical and minority-facing journals. These issues should constitute an ongoing conversation, not reactive pronouncements. Many global animal law questions, like those relating to trade and animal welfare, are systemic and urgent. They cannot wait for more jurisprudence. Thus, more theoretical, systemic, speculative and forward-looking scholarship is required.

Third World Approaches to International Law (TWAIL) has inspiring features for global animal law scholarship. TWAIL adds useful context to second wave discussions of intersectionality and coloniality, though it says nothing specifically about animals. TWAIL emerged from lawyers 'institutionally close to processes of decolonization' and has evolved to combine perspectives that both call for 'amending and overcoming international law'.[76] TWAIL literature aims to 'unpack and deconstruct the colonial legacies of international law and engage in efforts to decolonise the lived realities of the peoples of the Global South'.[77] It 'endeavours to give voice to viewpoints systemically underrepresented or silenced'.[78] Insofar as global animal law scholarship relies upon international law systems, it ought to replicate the efforts at deconstruction and diverse inclusion that TWAIL aims at. Most importantly, animal law scholarship must respect the view of international law from the Global South, particularly if global lawyers have jurisgenerative potential.[79]

From a Global South perspective, international law is 'a predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West'.[80] International law enabled colonisation and the spread of European power. After the dismantling of colonialism, international law ensured that 'the legal structures associated with it remain' and that these structures are 'restated and enforced in insidious ways so as to give them the appearance

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[76] Tracy-Lynn Humby, 'Evaluating the Value of TWAIL, Environmental Justice, and Decolonization Discourses as Framing Lenses for International Environmental Law' (2016) 26(2) Transnational Law & Contemporary Problems 317, 320.

[77] Usha Natarajan et al, 'Introduction: TWAIL – On Praxis and the Intellectual' (2016) 37(11) Third World Quarterly 1946, 1946.

[78] ibid.

[79] Of course, not all patterns of influence in animal welfare regulation are North to South. For example, Europe to Inuit Canadians or Europe and America to China and South Korea (on dog meat and dog and cat fur). But many examples do have this dynamic, like the USA to Mexico (on tuna fishing). Regardless, the broader dynamics and messages of inclusion are relevant in all cases of imposed animal welfare regulation.

[80] Makau W Mutua, 'What Is TWAIL?' (2000) 94 American Society of International Law Proceedings of the Annual Meeting 31, 31.

of legality in a modern and ostensibly postcolonial world'.[81] This has two consequences for western global animal law scholars.

First, the Global South approaches international law with significant suspicion. This should significantly impact how western scholars advocate for international governance of animal welfare. Simply moderating western animal welfare governance models is insufficient. Animal law scholars must understand the Global South's hesitation to engage in international discussions on issues like animal welfare. The suspicion of WTO members regarding the EU's proposal to the Committee on Agriculture ought to be investigated and collaborative solutions sought.[82] Animal law scholars should also be cognisant that fragmentation in international law is particularly onerous for poor states that 'lack the capacity to master each of these fragmented sectors'.[83] North to South advocacy may be impossible in such circumstances. Thus, western animal law scholars ought to work directly with animal protection norms and leaders of the Global South. To facilitate this, global animal law scholarship should use second wave animal ethics and the 'vantage point' of TWAIL to reveal the 'traces left by classical imperialism and its variants, on the social, political and economic relations of the world'.[84]

Second, international law makes false claims of justice and equality. TWAIL shares the concern of second wave animal ethics to 'dismantle the garb of rationality, neutrality and universality'.[85] Thus, TWAIL aims to 'decolonize the material realities of the peoples of the global South by, in part, constructing new and alternative legal futures."[86] Regulating animal welfare at the international level requires deep reflexion upon global injustices, imbalances of power and differences in the treatment of animals in order to achieve an ethical result. Indeed, TWAIL literature has identified how Europe has a 'self-assumed civilizational responsibility to lift the peoples of [Latin America, Asia and Africa] to Europe's level' when, in actuality, this was an 'altruistic cloak to plunder the wealth of the people of Africa and Asia' because they did not lack 'civilizational standards when compared to the genocidal plunder that the Europeans embarked on'.[87] This cloaking should strike animal law scholars as eerily familiar. Is it not suspicious that

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[81] Muthucumaraswamy Sornarajah, 'On Fighting for Global Justice: The Role of a Third World International Lawyer' [2016] Third World Quarterly 1972, 1972.

[82] See below at section 4.2.3.

[83] Sornarajah (n 81) 1979.

[84] Luis Eslava and Sundhya Pahuja, 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law' (2012) 45(2) Law and Politics in Africa, Asia and Latin America 195, 198.

[85] Kwadwo Appiagyei-Atua, 'Ethical Dimensions of Third-World Approaches to International Law (TWAIL): A Critical Review' (2015) 8(3–4) African Journal of Legal Studies 209, 210.

[86] Sujith Xavier et al, 'Placing TWAIL Scholarship and Praxis' (2016) 33(3) Windsor Yearbook of Access to Justice 5, v.

[87] Sornarajah (n 81) 1973.

efforts to globalise animal welfare protection stem from the developed west where systems of oppression of animals' lives are the most barbaric and cruel? Factory farming was born in the west and is spreading from there. Yet, western nations and animal welfare organisations continue to target "barbaric" practices of non-western nations and peoples. The lessons of TWAIL should inspire deep suspicion in animal law scholars of unilateral trade measures like the EU Seals Regime.

TWAIL literature is well established and it would be irresponsible for global animal law scholars to neglect it. This literature recognises failings and masked injustices of international law that have not been exposed or discussed in more traditional international law scholarship. The empathy and prioritisation of marginalised Others within second wave animal ethics requires that animal law scholars take scholarship like TWAIL very seriously to tackle unaddressed systemically oppressive means of animal protection in law. TWAIL literature identifies that 'uncomplicated understandings of international law, at best reduce, or at worst completely negate, whatever political or emancipatory potential might exist in calls for the international'.[88] Thus, global animal law scholarship must include marginal scholarship and substantively prioritise marginal interests. To fail at this is to misuse 'global' language to forward western objectives, contributing to 'material distribution and imbalances of power' problematised by TWAIL and second wave animal ethics.[89]

TWAIL, like all things, has its drawbacks. For example, its conferences have taken place largely in the Global North, it is critiqued for barriers of entry and exclusion of indigenous peoples, lower castes and disabled people, and there is controversy surrounding use of 'third world' terminology (there is a 'First World in every Third World, and a Third in the First, and the Second almost nowhere at all').[90] Thus, alternatives like Afrocentrism are worth exploring.[91] Regardless of how successfully TWAIL scholarship achieves its ambition to be inclusive, critical and deconstructive, its ambitions are inspirational for animal law scholarship. Such ambitions and self-reflexivity will be essential if global animal law is to be legitimate, effective and ethical.

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[88] Luis Eslava and Sundhya Pahuja, 'Between Resistance and Reform: TWAIL and the Universality of International Law' (2011) 3(1) Trade, Law and Development 103, 104.

[89] ibid 105.

[90] Usha Natarajan, 'Third World Approaches to International Law (TWAIL) and the Environment' in Philippopoulos-Mihalopoulos and Brooks (n 72) 210; Natarajan et al (n 77) 1947, 1953; Srinivas Burra, 'TWAIL's Others: A Caste Critique of TWAILers and Their Field of Analysis' (2016) 33(3) Windsor Yearbook of Access to Justice 111. Also see John D Haskell, 'TRAIL-Ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law' (2014) 27(2) Canadian Journal of Law & Jurisprudence 383; and Mosope Fagbongbe, 'The Future of Women's Rights from a TWAIL Perspective' (2008) 10 International Community Law Review 401.

[91] For example, Queeneth Mkabela, 'Using the Afrocentric Method in Researching Indigenous African Culture' (2005) 10(1) The Qualitative Report 178.

3.3. Interim Conclusion: The Potential of these Recommendations for Scholarship to Address the Thesis Problems

These recommendations for improving global animal law scholarship would enhance the effectiveness and ethical soundness of this scholarship generally. They also hold potential for solving the problem of trade and animal welfare. The recommendations would encourage self-reflexivity amongst animal law scholars writing on trade and animal welfare regarding their underlying ethics, normative frameworks and approaches to listening to animals. Transparency will help western scholars collaborate effectively and respond to concerns from the Global South.

It was essential that this thesis recommend improvements to research methodology because the current scholarship presents systemic problems. Methods of doing animal law research influence results and, within global law metatheory, global lawyers are jurisgenerative. Thus, it would be insufficient to set out policy recommendations without addressing scholarship.

There must be wider, systemic change. The recommendations set out above should encourage global animal law scholars to question their research methodologies and approaches to trade and animal welfare. Indeed, considerations of reflexivity and intersectionality led to the recommendations for multilateralism in this thesis. The important questions that global animal law scholars must ask (and answer transparently) are: who is this research for, and where and when should it be disseminated or published in order to achieve its normative, scholarly or policy goals.

The next section will take these considerations forward, applying them to policy recommendations for dealing with the trade and animal welfare problem. Thus, this thesis concludes with recommendations that are inspired by and based on second wave animal ethics. These recommendations are also reached through contemplation of this scholarship's place within global animal law scholarship at large. The methodology of this thesis, and the recommendations reached in the next section, should provide a good example of the reflexive, self-critical and intersectional research recommended in this section. Hopefully, given the disproportionate impact of trade on global animal law scholarship, evolving scholarship on this issue will have significant normative and practical impacts, improving animals' lives.

4. Recommendations for a Second Wave-Inspired Law and Policy Response to the Trade & Animal Welfare Issue

This section will propose radical recommendations that comply with second wave animal ethics by prioritising wide and deep participation, indistinguishing the human legal subject, and emphasising care and flourishing. This section will also propose how incremental change can be pursued without sacrificing the utopian vision. These recommendations are produced through ethical and intersectional analysis, aiming for decolonised transnationalism constituting truly *global* law. However, because these recommendations are made by a situated, white and western scholar, they are presented for discussion with the Global South, not as a final word.

4.1. Options Outwith the Trade Law Regime

> *"Reform of the WTO" is a false intellectual enterprise, as it does not address the widespread, variegated, often confused and confusing set of objections to the operation of the world trading system. It is doubtful whether the WTO can—and quite certain that it should not—continue to operate as it has since 1995 in the absence of more complex global institution-building.*[92]

This thesis provides a novel suggestion by proposing animal law to address trade and animal welfare problems. Most relevant literature focuses exclusively on trade law mechanisms, neglecting non-WTO mechanisms. The focus on trade law is positive in a way, given that trade law has been dominated by a 'small group of insiders' whereas 'scholars with a more humanistic orientation have gravitated' to other legal disciplines.[93] But these pioneering animal law scholars ought not to overfocus on legal forums given to us by neoliberalism. Indeed, WTO law is 'more binding, structurally sounder, and more influential' than other competing domains of international law and this must change.[94] This recommendation is inspired by Sara Dillon's proposal for any legal reform of the WTO to be coupled with improvements to non-WTO international governance mechanisms without a 'subordinat[ion]' to WTO law and with 'inextricabl[e]' connection of the two.[95] This also aligns with Teubner's reflections on 'tunnel vision' of regimes like the WTO, requiring 'self-contestation', internal and external dissent.[96]

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[92] Sara Dillon, 'A Farewell to Linkage: International Trade Law and Global Sustainability Indicators' (2002) 55(1) Rutgers Law Review 87, 133.

[93] ibid 146–147.

[94] ibid 90.

[95] ibid 113.

[96] Teubner (n 50).

For these reasons, the trade law recommendations set out below are best achieved in tandem with parallel animal law developments through global law interconnectivity. Moreover, animal law is necessary to realise a truly utopian vision whereby trade in animals and their bodies is abolished. This utopian vision is the natural consequence of a second wave animal ethics analysis of trade and animal welfare and will be elaborated below. Chapter II analysed existing global animal law proposals for animal protection in international law. These are: the expansion of existing frameworks (the OIE and compassionate conservation through MEAs); a global animal welfare treaty; and a UN declaration. The recommendation elaborated here contributes to this scholarly work, providing a second wave response based on global governance to avoid governance gaps for particular species.

4.1.1. The Recommendation: A Network of Instruments

Second wave animal ethics favours a multilateral approach to trade and animal welfare. This is essential to address the problems identified in chapter III and to respect second wave imperatives of care and deep listening for animals (regardless of geographical location) and situated intersectionality. Unilateralism and bilateralism, taken alone, are ineffective and ethically subpar for tackling global issues like trade. Unilateralism is also particularly forthright and aggressive in its paternalism.[97] Multilateralism has a better chance of avoiding 'might is right' policymaking and incorporating the priorities and voices of less powerful states and people, particularly those suffering from colonialism's legacy and current coloniality.

Multilateralism (and global animal law) may take many forms; it is not synonymous with a universal treaty. Accordingly, I recommend multi-speed multilateralism entailing multiple overlapping agreements and declarations between smaller groups of states with mutual recognition of standards. This maximises the potential to improve animal welfare by focusing on pre-existing transnational normative alignments and common problems. This also responds to findings in relation to EU law and MEAs that 'sequential construction' in which small agreements grow results in increased cooperation compared to agreements that start big.[98] This differs to Blattner's proposed 'net of overlapping and concurring laws' by focusing on multilateralism over unilateralism.

I also recommend an underlying universal agreement or declaration. This could add normative significance and force to the network envisaged. However, this is not essential or

[97] See chapter IV section 2.3.

[98] George W Downs, David M Rocke and Peter N Barsoom, 'Managing the Evolution of Multilateralism' (1998) 52(2) International Organization 397.

central, unlike other proposals for international law on animal welfare. This innovation embraces the globality of law, shifting from a one-dimensional focus on treaty law to include more interconnected and post-Westphalian governance models and giving this thesis its originality. In lieu of proposing draft language, this section will use second wave animal ethics to identify gaps in significant drafting work that already exists.[99] This is followed with discussion of the shape and form of the multilateral action recommended, noting examples of where multi-speed multilateralism has been successful.

4.1.2. Utopian Vision

Proposals for international law on animal welfare lack reference to animal flourishing over animal suffering. References to flourishing would create more scope for positive impact on animals' lives beyond pain avoidance. Existing proposals also fail to include a precautionary principle which could be used to define the scope of relevant measures, eschewing closed lists of species and the moral circle of concern they represent. This allows regulatory scope to evolve and would avoid artificial divisions of species based on human usage. Such division neglects animal flourishing in favour of human utility. Existing proposals also fail to encompass care and recognition of human and animal interconnectedness. Incorporating both would erode the human-animal legal dichotomy, drawing attention to flourishing over species membership.

Second wave animal ethics would require provision for a permanent standing body in any multilateral instrument. Additionally, addressing intersecting harms and avoiding ethnocentricity and coloniality requires legal provision for participation of effected groups, minorities and indigenous peoples. This aims to counteract potential coloniality in the operation of law that professes to be global but which is actually western-centric. A standing body ensures any set of rules is capable of reflexive evolution and provides space for deep and wide participation and ongoing debate. This is essential to complying with second wave imperatives of intersectionality as well as to be able to create the possibility of effective collaborations between animal law and trade law.

Finally, multilateral global animal law instruments must directly and explicitly address the trade in animals and their bodies. Existing proposals do not.[100] This is essential to centre animal interests in response to the issue of trade and to address a potential conflict of laws. Negotiators must be transparent in their intentions as to whether any multilateral animal welfare governance is

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[99] See chapter II section 3.4.

[100] For example, Miah Gibson, 'The Universal Declaration of Animal Welfare' (2011) 16(2) Deakin Law Review 539, 556.

intended to countervail WTO rules based on the *lex posterior* rule of treaty interpretation.[101] Commentary on the recent *Peru – Agricultural Products* case indicates it may be necessary for WTO members to expressly state they will not pursue WTO dispute settlement on a particular issue if they intend to countervail WTO rules through another measure.[102]

The preceding paragraphs outline substantive gaps in existing proposals for international animal law. Discussion now turns to the form of multilateralism that is recommended based on second wave animal ethics. The utopian vision of multilateral animal welfare law is a collection of overlapping and intersecting treaties, agreements and soft law that facilitate progress between groups with similar methods of animal oppression, encouraging a race to the top. This permits multi-speed multilateralism, facilitating progress between willing partners. Such 'differential integration' has proven successful at the EU and at the WTO, with plurilateralism including the Agreement on Government Procurement and a potential Environmental Goods Agreement.[103] This recommendation concurs with the international law trend toward smaller and more flexible networks instead of singularly dominant treaty regimes and institutions.[104] Multi-speed multilateralism also has more potential to comply with second wave animal ethics, avoiding ethnocentric forms of globality and coloniality and tending toward post-Westphalian intersectional globalism.

Multi-speed multilateralism is also beneficial because it responds to the fatigue of animal law scholars who argue for a treaty that appears no more likely now than it did twenty years ago. Multi-speed multilateralism provides an alternative response to the recent trend of leaning into unilateralism. This recommendation encourages animal law scholars and policymakers to embrace global permutations of law, recognising that effective and ethical multilateralism in animal law requires much more than drafting a potential universal treaty. It also requires deep and wide participation in order to avoid coloniality or misappropriation of the 'global' label. Chapter II elaborated the metatheoretical and policy-centric legal research that can inspire ethical and genuinely global animal law. Examples of nuanced, contextual, global and networked forms of law are elaborated here to inspire animal law.

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[101] David Favre, 'An International Treaty for Animal Welfare' in Deborah Cao and Steven White (eds), *Animal law and welfare: international perspectives* (Springer 2016) 250–251.

[102] Gregory Shaffer and Alan L Winters, 'FTA Law in WTO Dispute Settlement: Peru-Additional Duty and the Fragmentation of Trade Law' (2017) 16(2) World Trade Review 303, 321–322.

[103] Robert Basedow, 'The WTO and the Rise of Plurilateralism - What Lessons Can We Learn from the European Union's Experience with Differentiated Integration?' (2018) 21(2) Journal of International Economic Law 411.

[104] For examples, see Ayelet Berman, 'Is There a Stagnation in International Law?' (2015) 109 American Society of International Law Proceedings of the Annual Meeting 71, 72–73.

One example is discussion of the emerging field of international pandemic law. Steve Charnovitz argues that this law requires: governance 'from the local to the global' level; 'both hard and soft law and public law and private law'; 'better international institutions'; 'a monetary, development, and financial dimension'; and involvement of 'foundations, universities, research institutes, pharmaceutical companies, banks, medical associations, etc'.[105] This is what post-Westphalian global, interconnected, future-oriented animal law could look like. Other areas of global governance, like global health law, have been described in multi-faceted, multi-situational and multi-speed terms for quite some time.[106] Innovative partnerships, like the public/private network 'The Global Fund', provide further inspiration.[107] These initiatives demonstrate how a network of animal law instruments might function and intercommunicate. Connecting regulatory bodies with multidisciplinary experts, funding bodies and enhancing knowledge exchange would enhance global animal law's longevity.[108]

One potentially inspiring model is the tripartite collaboration on antimicrobial resistance between the FAO, the OIE and the WHO. This collaboration maximises the effectiveness of existing institutions by improving communication and coordination.[109] The Global Action Plan on AMR utilises the 'one health' concept and aims not only to reduce infection and optimise use of antimicrobial medicines, but also to develop the case for sustainable investment, strengthen knowledge, evidence and awareness and utilise a precautionary approach.[110] Animal law scholars have overfocused on hard law authoritarianism and have neglected facilitative models to inspire improved standards in animal law. Second wave animal ethics would encourage effective, ethical facilitative networks over a single non-situated, colonial, authoritarian and universal regime.

Second wave animal ethics demonstrates that universal treaty law is not required in order to make much of the progress required. However, some goals of a second wave inspired animal law would be better achieved through or supported by a global agreement or declaration. This would provide an undergirding to the network described above. It would not perform the unifying

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[105] Steve Charnovitz, 'The Field of International Pandemic Law' (*International Economic Law and Policy Blog*, 2020) <https://ielp.worldtradelaw.net/> accessed 18 December 2020.

[106] Lawrence O Gostin, *Global Health Law* (Harvard University Press 2014) ch 3.

[107] For details, see: https://www.theglobalfund.org/en/overview/. Also see Matthew Greenall et al, 'Reaching Vulnerable Populations: Lessons from the Global Fund to Fight AIDS, Tuberculosis and Malaria' (2017) 95(2) Bulletin of the World Health Organization 159.

[108] See Teubner (n 50) s10 countering arguments that private governance entails democratic deficits.

[109] FAO, OIE and WHO, 'The FAO-OIE-WHO Collaboration: Sharing responsibilities and coordinating global activities to address health risks at the animal-human-ecosystems interface: A Tripartite Concept Note' (April 2010) 3.

[110] World Health Organization, 'Global Action Plan on Antimicrobial Resistance' (2015) <https://apps.who.int/iris/bitstream/handle/10665/193736/9789241509763_eng.pdf?sequence=1> accessed 18 December 2020 VII.

role envisaged by existing proposals for animal law treaties. Further, this global instrument is only second wave-compliant if agreed following a process of genuine collaboration, attentive listening and wide participation. If no global instrument is possible yet, as appears to be the case, work toward a network can and should progress.

This proposal may be compared with Kelch's attempt to combine universal and specific approaches to animal advocacy.[111] However, while Kelch ostensibly values both approaches, he focuses the majority of his work on developing a means to reach universal principles.[112] He uses feminist care theory to do this, noting its preference for contextualisation but arguing that universalisation is possible. Kelch's insights are of great value. However, I am troubled by the implied western audience of his work and the absence of recommendations for deep and wide participation and negotiation in developing universal principles. The assumption seems to be that non-western, non-white perspectives are accessible to western, white scholars with enough intellectual reflection. This is not the case and diminishes the contributions of marginal scholars whilst claiming universality for a western-centric, western-developed idea.

The objectives of global animal law that could be better achieved through a universal instrument to undergird a network are as follows. First, if it becomes feasible, a universal declaration recognising the ethical and legal significance and duties of care owed to animals would be desirable. Second, the utopian vision requires intense policymaking and institutional work which may be better achieved through a universal instrument. Institutional work practically impacts policy implementation and norm building capacity over time. A universal institutional body would create further opportunities for WTO collaboration. For example, the TBT Agreement requires international standard setting bodies to have membership that is open to 'the relevant bodies of at least all Members'.[113] Third, a universal instrument would provide scope to require the recognition of equivalence of standards. This is important because, within a network of agreements, powerful western states may agree animal welfare standards which would, in practice, dictate standards for the entire global community required to gain market access. Overwhelming or dictated standards can display coloniality, just like unilateral extraterritorialism. Proliferating, diverging standards within a network would also prove overwhelming for states with less capacity. This is unjust because states with the least capacity have not adopted factory farming models. Thus, while they

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[111] Thomas G Kelch, 'Towards Universal Principles for Global Animal Advocacy' (2016) 5(1) Transnational Environmental Law 81; Thomas G Kelch, 'Cultural Solipsism, Cultural Lenses, Universal Principles, and Animal Advocacy' (2014) 31(2) Pace Environmental Law Review 403.

[112] ibid (Kelch 2016) 104.

[113] Agreement on Technical Barriers to Trade (15 April 1994) LT/UR/A-1A/10 <http:// docsonline.wto.org> (TBT Agreement) Annex 1 para 4.

may have fewer formal welfare standards than western states, they cause less industrialised, oppressive harms. The difficulty with proliferating standards is already apparent. GLOBAL GAP animal welfare standards arguably inhibit the Global South from exporting agricultural products due to high costs of compliance with multiple standards.[114] Recognition of equivalence of standards would lessen unfair discrimination against the Global south.[115] This is particularly significant post-COVID-19 if animal health standards multiply and intensify.

Space does not permit further elaboration of the utopian vision. Nonetheless, this discussion has detailed what second wave animal ethics requires of global animal law: a network of instruments and standing bodies engaging in wide and deep participation and adopting the standards of second wave animal ethics.

4.1.3. Reformist Incrementalism

The road to this utopian vision is long and fraught with difficulty. Thus, this section draws red lines to guide incremental reform that complies with second wave animal ethics and that does not inadvertently entrench norms harmful to the utopian vision. This will facilitate real, meaningful work in the short to medium term. This also utilises existing legal regimes and bodies to minimise the impact of fragmentation on poorer states. Francione's consideration of incrementalism denounces measures that acquiesce with animals' propertisation.[116] On this view, trade bans are acceptable but trade reform that permits but limits harm is unacceptable. Francione's incrementalism is deficient in second wave terms because it promotes unilateralism and facilitates racist, colonial measures and moral inconsistency and hypocrisy. The red lines drawn here are as follows.

First, animal law that oppresses Othered groups and individuals is unacceptable. Animal law must address intersectionality or, at least, not actively contribute to systemically oppressive operations of law. This may necessitate foregoing certain animal laws for which there is political and societal appetite. This is essential because animal protection through systemically oppressive means entrenches the oppressive function of law that disadvantages animals and others. Second, single-issue measures are only permissible under certain conditions. These must be enacted together with wider efforts to improve animal treatment. Measures targeting animal oppression uncommon in the enacting state must be coupled with genuine restrictions on comparable

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[114] Yoshiko Naiki, 'Meta-Regulation of Private Standards: The Role of Regional and International Organizations in Comparison with the WTO' (2020) first view World Trade Review 3, 4.

[115] ibid 2.

[116] Gary L Francione, *Rain without Thunder: The Ideology of the Animal Rights Movement* (Temple University Press 1996) 190 et seq.

domestic harms. In connection, capabilities and flourishing ought to justify animal welfare measures rather than human usage. This entails blurring wild/domestic and human/animal dichotomies. Third, similarity theory is an unacceptable justification for animal protection. Animal law must recognise animals' unique capabilities and intrinsic value. Policy may still focus on those animals most like humans in the first instance but only if that similarity is nowhere expressly stated as the reason for offering protection. This facilitates expansion of this protective model to species less similar to humans. Fourth, broad and deep participation and consultation are essential to negotiating and drafting animal welfare measures so as to avoid coloniality and misappropriation of the 'global' label. Finally, these red lines are drawn in a context where animal law exists and is growing. I believe these red lines will evolve current conversations and negotiations rather than frustrate and nullify them. However, second wave animal ethics requires situatedness. Thus, allowance must be made for individual assessments in cases where compliance with all red lines would make certain instruments of animal law impossible and which would severely frustrate animals' abilities to flourish. Allowing such situated assessment responds to the multifaceted nature of these problems and facilitates serious, contemplative legislating rather than context-blind, ineffective pursuit of a one-size-fits-all approach.

It is useful to analyse the compatibility of potential reformist policies with these red lines. First, pre-utopian measures will be required to comply with current liberal legal strictures. These measures ought to encourage relinquishing liberal ideology by entrenching care, interconnectivity, and an indistinguished human subject. The absence of such moves would mean animal law treads water but does not necessarily step backwards. An example of eschewing liberal ideology within liberal legal systems might entail pursuing legal rights for animals but foregoing underlying rights-based ethics in place of care, acknowledging interconnection between rights, and providing rights for communities or groups. Second, animal law need not be literally boundless in scope. Eschewing a moral circle of concern can be achieved by a precautionary principle, retaining the possibility for animals and other lifeforms to be included through an open list or evolutionary interpretation.

Finally, expanding existing legal frameworks is an acceptable alternative to creating new frameworks in the interim. This lessens front-loaded institution building and norm negotiation work. However, serious risks of such approaches mean this is not utopian; expanding existing frameworks cannot substitute the new multilateral mechanisms outlined above. However, existing institutions may transform into members of the networks envisaged or contribute to establishment of new institutions. For example, improvements to the OIE (incorporating further welfare work) and conservation treaties and sustainable development (incorporating wild animal welfare) would be welcome. However, this ought not to dominate global animal law scholars' work. Global animal

law scholars must conceptualise the new multilateralism, encouraging environmental law scholars and health law scholars to incorporate welfare into their work and institutions. Existing institutions present dangers because they are organised around human concerns, ignoring deep listening to animals or critique of the narrow sociocultural human construct. Thus, existing institutions create governance gaps, permit inappropriate divergences in treatment based on human usage and ignore flourishing. For example, CITES incorporates welfare considerations into trade governance but only applies to a very small volume of trade in animals and their bodies.[117] Existing institutions are also troublesome because they encourage complacency amongst policymakers and academics. Focusing animal law developments here risks diverting focus from more radical reform and reducing capacity of those who could usher in such reform. For example, short-term benefits may result from incorporating animal welfare work into the WTO but this acquiesces with trade norms, facilitating animals' propertisation.

These considerations ought to guide incremental animal law reform on the road to the utopian vision outlined above.

4.1.4. Interim Conclusion: The Potential of these Policy Recommendations to Address the Thesis Problems

These recommendations are essential to incorporate second wave animal ethics into global animal law and to deal with the problems of trade. A network of instruments may incorporate flourishing, boundless scope, care, broad and deep participation and dissent to trade law practice and normativity. This also prioritises situatedness, condemning coloniality. Incorporating scope for deep participation is essential when recommending policy as a situated white, western scholar.

Regarding trade, it is beneficial that these global animal law recommendations eschew the narrow sociocultural human construct, providing deep listening to animals. Shifting away from a WTO-centric response to trade and animal welfare is already novel. This has more potential to facilitate animal flourishing, relinquish animals' property status, and expose the conceptualisation of animal welfare as a 'non-trade issue' as problematic. To eventually eliminate trade in animals and their bodies requires an animal law-based approach.

Multilateralism is the only viable option to ethically and effectively address issues of substandard imports, low animal welfare havens, and the chilling effect of trade on animal welfare legislation. Recognising equivalence of standards is a viable alternative to unilateral import bans which operate with coloniality, in violation of second wave animal ethics. Given the

[117] Hobbs et al (n 9) 448.

interconnectedness of these impacts,[118] this would, in turn, lessen the risk of low animal welfare havens and the chilling effect on animal welfare legislation.

4.2. Options Within the Scope of International Trade Law

The recommended network of instruments would complement the following recommendations for international trade law reform which rely upon collaboration with external bodies. These external bodies may be the utopian standing bodies envisaged above or, for the sake of incrementalism, bodies like the OIE.

The recommendation proposed here is to elaborate WTO committee and other institutional work on animal welfare. This conclusion is reached through a process of elimination. Second wave animal ethics have exposed unilateralism as unethical and ineffective and free trade agreements as inadequate. Multilateralism is the favoured approach which, currently, necessitates a role for the WTO. The WTO's dispute settlement function is of limited utility because of the limits explored in chapter IV. This leaves two other WTO pillars: negotiations and institutional work.

I propose improving and democratising trade policy on animal welfare through WTO committees. I will also explore potential WTO negotiations to improve animal welfare protection which may facilitate more global (interconnected and future-oriented) extra-WTO law developments. This accounts for the argument made in chapter III that reconceptualising animal welfare as a trade impact issue eschews false in-out debates about the WTO's boundaries and, instead, identifies what the WTO already impacts without agreeing a policy to control this impact.[119] Trade and animal welfare literature neglects WTO committee work. In fact, many animal law scholars view the WTO as 'synonymous' with the DSB.[120] Nonetheless, there are wide-ranging benefits to focusing on the WTO's institutional infrastructure.

Note that, ideally, a second wave utopian vision would entirely outlaw the trade in animals and their bodies through intersectionally ethical means developed through deep collaboration. This owes to animals' unique flourishing, though some intersectional considerations may make it impossible to outlaw certain trades whilst avoiding coloniality and systemic oppression. Thus, my proposals actually fall short of utopianism. This is because I wanted to envisage second wave

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[118] Chapter III section 3.

[119] Chapter III sections 2.2 and 2.3.

[120] Andrew Lang and Joanne Scott, 'The Hidden World of WTO Governance' (2009) 20(3) European Journal of International Law 575, 614.

animal ethics working with international trade law in a way that is as close to utopianism as possible. Thus, this proposal is limited by the state-centric nature of the WTO and its committees. More innovative global law solutions will hopefully flow from the interaction of these developments with the animal law developments proposed above. It is far-flung (in fact, impossible) for trade law to facilitate the trade in animals and their bodies whilst fully aligning with second wave animal ethics. However, outlawing this trade requires ongoing dialogue that must grow from the ground up. This is only possible through the kind of institutional work and civil society engagement recommended here.

4.2.1. The Recommendation: Committee Work Supported by Negotiations

4.2.1.1. Committee Work

The WTO's institutional infrastructure presents opportunities and risk considerations that are significant for the animal question.[121] WTO committees are described as the 'workhorses of the multilateral trade system' (a metaphor that cannot pass uncritically before animal advocates) and the third pillar of the WTO system (alongside high-level negotiations and dispute settlement).[122] Centrally, WTO committees are a 'vehicle for implementation of WTO Agreements'.[123] Though, in practice, their impact extends more broadly, presenting a 'more dynamic, more cooperative, more reflexive, and more regulatory re-enforcing' picture of the WTO than is typically seen.[124]

Trade officials describe the committees as 'a laboratory for multilateral regulatory cooperation'.[125] They also present opportunities for information exchange which allows members to 'air their differences', 'develop shared ideas', and exercise 'multilateral peer review'.[126] There is evidence of members having learnt lessons through this kind of dialogue.[127] Day-to-day, operational exchanges on animal welfare could unlock the animal question at the WTO, presenting opportunities for norm development.[128]

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[121] ibid 575. This paper provides an in-depth look at two of the 'over 35 committees, working parties, and review bodies' of the WTO.

[122] Devin McDaniels, Ana Cristina Molina and Erik N Wijkström, 'A Closer Look At WTO's Third Pillar: How WTO Committees Influence Regional Trade Agreements' (2018) 21(4) Journal of International Economic Law 815, 815.

[123] ibid 817.

[124] Lang and Scott (n 120) 576.

[125] McDaniels, Molina and Wijkström (n 122) 818.

[126] Lang and Scott (n 120) 578–581.

[127] ibid 581 citing WTO Doc S/FIN/M/14.

[128] On norm development, see ibid 586 and 588.

This view is supported by the example of the Committee on Trade and Environment (CTE). The CTE demonstrates that WTO institutional work can facilitate the coexistence of trade norms with other norms like environmental protection or animal welfare. Thus, evolving international law on animal welfare and trade will benefit from WTO institutional work. The CTE has been 'instrumental in identifying and understanding the relationship between trade measures and environmental measures'.[129] It has facilitated peaceful coexistence of MEAs and WTO law without negotiating formal outcomes.[130] The CTE's work has discovered and demonstrated that improving environmental protection does not necessitate setbacks in trade liberalisation.[131] Crucial to this has been regular information exchange and mutual granting of observer status between MEA secretariats and relevant WTO committees.[132] The CTE's day-to-day work also facilitates this coexistence, such as by examining and analysing the compatibility of eco-labelling with the TBT Agreement.[133] Additionally, the CTE has a separate negotiating track of work to agree further rules.[134] This facilitates evolution toward further governance. The CTE has also inspired the creation of new groups at the WTO to further initiatives to intensify work on trade and the environment between members.[135] Such inter-institutional collaboration, entailing communication, participation and norm and policy development, is crucial to entrenching animal welfare into trade law.

Increasing institutional work on animal welfare should accompany increased transparency of WTO committee work. Presently, committees are even less transparent than the already secretive but somewhat more accountable DSB and negotiation forums.[136] However, recent scholarship on WTO institutional governance argues that committees may enhance the WTO's transparency as a whole. Lang and Scott cite complaints procedures within the SPS Committee and efforts to ensure participation as examples of this.[137] On this basis, transparency concerns do not preclude the viability and effectiveness of committee work on animal welfare.

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[129] Manisha Sinha, 'An Evaluation of the WTO Committee on Trade and Environment' (2013) 47(6) Journal of World Trade 1285, 1313.

[130] ibid 1296.

[131] ibid 1314.

[132] World Trade Organization, Doha Ministerial Declaration (20 November 2001) WT/MIN(01)/DEC/1 <http://docsonline.wto.org> para 31.

[133] Sinha (n 129) 1298–1299.

[134] ibid 1292.

[135] 'New Initiatives Launched to Intensify WTO Work on Trade and the Environment' (*WTO*, 2020) <https://www.wto.org/english/news_e/news20_e/envir_17nov20_e.htm> accessed 18 December 2020.

[136] On transparency in transgovernmental networks, see Lang and Scott (n 120) 606.

[137] ibid 606–610.

Participation is an additional concern. WTO guidelines presently exclude direct NGO participation in WTO work, in turn excluding indigenous and other groups.[138] Thus, NGOs participate in none of the day-to-day committee work of the WTO.[139] The guidelines only include competence (but no obligation) to consult and cooperate with NGOs.[140] In practice, civil society engagement with the WTO only occurs within public forums and ministerial conferences.[141] Public forums are an ostensibly dialogic and engaging space for civil society involvement with WTO work. In reality, the flow of information is 'unidirectional'; public forums are used to convince civil society of trade's benefits and WTO member turnout is poor.[142] This creates a 'disconnect' between the NGO agenda and their presentations, and the objectives of the WTO membership.[143] Thus, civil society interest in these forums for collaboration is dwindling and public forums are increasingly dominated by business groups.[144]

NGO engagement is pursued only to legitimise the WTO's existence. Other potential objectives are neglected. These include improving 'transparency, legitimacy, and accountability', pursuing 'transformative outcomes' and broader dialogues leading to benefits like development, implementation and operationalisation of new norms and conceptual frameworks.[145] Because WTO institutional governance now includes trade impact issues, the WTO's engagement objectives should expand to include mutual information sharing and incorporation of civil society expertise. This is also essential for the democratisation of the WTO, facilitating dissent and eschewing its 'tunnel vision'. The WTO must ensure increased NGO involvement does not exacerbate the divide between the Global North and the Global South. This requires awareness that most NGOs likely to lead on WTO engagement are 'directed by Western educated, middle class people' and, thus, cannot represent Global South perspectives.[146]

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[138] World Trade Organization, 'Guidelines for Arrangements on Relations with Non-Governmental Organizations' (1996) WT/L/162.

[139] Gabrielle Marceau and Mikella Hurley, 'Transparency and Public Participation in the WTO: A Report Card on WTO Transparency Mechanisms' (2012) 4(1) Trade Law & Development 19, 40.

[140] NGO Guidelines (n 138).

[141] On ministerial conferences, see Marceau and Hurley (n 139) 41.

[142] Eric Hannah, James Scott and Rorden Wilkinson, 'Reforming WTO-Civil Society Engagement' (2017) 16(3) World Trade Review 427, 437; Marceau and Hurley (n 139) 41.

[143] Marceau and Hurley (n 139) 41.

[144] Erin Hannah, Amy Janzwood and James Scott, 'What Kind of Civil Society? The Changing Complexion of Public Engagement at the WTO' (2018) 52(1) Journal of World Trade 113, 140.

[145] Hannah, Scott and Wilkinson (n 142) 429.

[146] Erin Norma Hannah, 'The Quest for Accountable Governance: Embedded NGOs and Demand Driven Advocacy in the International Trade Regime' (2014) 48(3) Journal of World Trade 457, 477–478.

Proposals to improve civil society participation in WTO work include a 'consultative committee' to facilitate civil society input into agenda-setting processes at the WTO.[147] Another proposal would see a 'proverbial hundred flowers … bloom' in the conversations around trade to let 'genuine debate flourish' rather than restrict discussion to a defence of the benefits of trade.[148] However, stalled negotiations at the WTO and a lack of official review or reform process for civil society engagement means that opportunities for reform have not yet presented themselves.[149] While this situation persists, improved collaboration with institutions or governmental bodies that work on animal welfare may provide indirect routes to the WTO for NGOs.

A final consideration regarding committee work is to be cautious that WTO bodies do not enhance their external influence through external collaborations. Such influence may err toward trade and economy-centricity in discussions of trade and animal welfare. It would be damaging for those priorities to filter outside the WTO system, further infiltrating animal law. As an example, the SPS Committee monitors compliance with international standards and encourages development of standards.[150] This significant influence may already be shifting the normative and functional development of animal health norms. Having described the rationale and rough shape of this recommendation for enhancing institutional work and collaboration on animal welfare, attention now turns to the role of WTO negotiations.

4.2.1.2. Negotiations

In failing to produce a covered agreement, provision, or institutional statement on animal welfare outside of dispute settlement, the WTO has taken a normative stance. The WTO facilitates and encourages increasing trade of animals and their bodies with no regard for their welfare. This position is not value neutral. This position - denying sentience, ignoring suffering, and ignorant to flourishing - is out of step with most of the world's governments' views on animals. Negotiation is required to change this. The focus on committee work in these recommendations is an effort to focus on ground-up rather than top-down reform. However, creating a committee would require negotiations of a sort. I will address this briefly before then setting out the recommendation for wider negotiations toward incorporating animal welfare into covered agreements.

Simply recommending redrafting WTO rules would be out of touch with reality. This would require the WTO to overcome the difficulties that have stalled its negotiations whilst also

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[147] Hannah, Scott and Wilkinson (n 142) 444.

[148] ibid.

[149] ibid 428.

[150] Lang and Scott (n 120) 595–597.

overcoming the misconceptions of its membership regarding the role and value of cooperation on animal welfare. The goal of committee work would be to utilise existing ground-level competencies, increase understanding of animal welfare concepts and build interest in collaboration. This would lay groundwork for a new campaign for an animal welfare covered agreement or even work toward abolishing trade in animals and their bodies.[151]

However, the Ministerial Conference holds the competence to create new committees 'with such functions as it may deem appropriate'.[152] Fortunately, the Council for Trade in Goods also has competence to 'establish subsidiary bodies as required'.[153] The Council for Trade in Goods could create a working group or other similar body on animal welfare. The Agriculture Committee has also created its own subsidiary bodies, but this is not the preferred option given the limited scope of the AoA which excludes fish.[154] A subgroup of the Council for Trade in Goods focusing on animal welfare could help to build the momentum toward larger-scale Ministerial Conference negotiations on animal welfare. If the members are not agreeable to a subgroup, incremental reform could be pursued by utilising the General Council's competence to set the work programmes for WTO committees.[155] The General Council could approve the addition of animal welfare to the work of existing committees.

Moving onto wider negotiations, in lieu of an animal welfare covered agreement which may presently be out of reach, a more feasible alternative is to amend existing WTO agreements or include animal welfare provisions in other future agreements.[156] These amendments could include: recognising animal flourishing in a future iteration of the WTO Agreement; incorporating animal welfare into the SPS Agreement; expressly recognising animal welfare in the AoA green box; a GATT interpretative note on consumer preferences for animal welfare and PPMs; a reorientation of the WTO negotiations on fisheries subsidies to recognise fish sentience; and

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[151] Proposals have been made to supplement WTO agreements with a ministerial declaration asserting the supremacy of MEAs. A similar statement could be recommended for animal welfare. See Celine Charveriat, 'SDG 2.4: Can Policies Affecting Trade and Markets Help End Hunger and Malnutrition within Planetary Boundaries?' (*ICTSD*) 52 <https://ictsd.iisd.org/sites/default/files/achieving_sdg2-ictsd_compilation_final_ch4.pdf> accessed 18 December 2020.

[152] Marrakesh Agreement Establishing the World Trade Organization (15 April 1994) LT/UR/A/2 <http://docsonline.wto.org> (WTO Agreement) art IV.7.

[153] ibid art IV.6.

[154] 'New Working Group Process Starts as Complementary Forum to Advance Agriculture Talks' (*WTO*) <https://www.wto.org/english/news_e/news19_e/agcom_14feb19_e.htm> accessed 18 December 2020.

[155] WTO Agreement (n 152) art IV.5.

[156] For proposals in this regard, see Thomas G Kelch, *Globalization and Animal Law: Comparative Law, International Law and International Trade* (2nd ed, Kluwer Law International 2017) 307; Peter Stevenson, 'The World Trade Organisation Rules: A Legal Analysis of Their Adverse Impact on Animal Welfare' (2003) 8 Animal Law Review 107, 134.

recognition of wild animal welfare in the Environmental Goods Agreement and other future agreements on trade and environment.

At present, not only are the WTO negotiations either stalled or in very difficult twists, but there was also no ministerial conference in 2019 or, due to COVID-19, in 2020. Trade impact issues received little attention in the Doha Round.[157] It would also be difficult to annex animal welfare to ongoing negotiations on agriculture or fisheries subsidies without a mandate for this being set at a ministerial conference.[158] Negotiations may be put at further risk due to the early retirement of Director General Roberto Azevêdo who acted as the chair of the Trade Negotiations Committee. The process to appoint a successor is currently indefinitely postponed.[159] Regardless, the WTO's legislative function has 'faded in importance' in recent years.[160] Negotiations on particular issues, like SPS issues, is moving to bilateral free trade agreements.[161] This is problematic because it represents a return to 'might is right' and many bilaterally negotiated rules are 'at odds with' existing WTO rules.[162]

Thus, the recommendation is to focus on committee work that may lead to future negotiations or expansions of existing animal welfare work. This would shape the content and direction of future animal welfare negotiations. This route is preferred given the almost complete lack of avenues through which to pursue animal welfare negotiations. There is one exception. It is recommended to pursue committee work as soon as possible to capitalise upon this exception.

The exception providing potential space to develop negotiations on animal welfare is the current reflective moment that the WTO finds itself in. Andrew Lang and others have predicted such a moment and have advised reconceptualisation of the entire 'liberal trade project' in this event.[163] There are ongoing conversations about 'possible reform or modernization of the WTO as a means of responding to [current] challenges'.[164] The avoidance of unilateral measures is one

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[157] Robert Lee, 'World Trade Law and the Welfare of Animals' [2007] Journal of Animal Welfare Law 14, 16.

[158] For information regarding the progress on these negotiations, see World Trade Organization, 'Annual Report 2019' (2019) 36-57 <https://www.wto.org/english/res_e/booksp_e/anrep19_e.pdf> accessed 18 December 2020.

[159] 'General Council Meeting on DG Selection Postponed' (*WTO*, 2020) <https://www.wto.org/english/news_e/news20_e/dgsel_06nov20_e.htm> accessed 18 December 2020.

[160] Markus Wagner, 'The Future of Sanitary and Phytosanitary Governance: SPS-Plus or SPS-Minus?' (2017) 51(3) Journal of World Trade 445, 446.

[161] ibid 445.

[162] ibid.

[163] Andrew Lang, 'Reflecting on "Linkage": Cognitive and Institutional Change in The International Trading System' (2007) 70(4) Modern Law Review 523, 541.

[164] World Trade Organization, 'Annual Report 2019' (2019) <https://www.wto.org/english/res_e/booksp_e/anrep19_e.pdf> accessed 18 December 2020 21.

goal of these discussions, aligning with second wave animal ethics.[165] Presently, the scope of these reform discussions is limited, not yet reaching a negotiation round.[166] Thus, there is time to increase the profile, spread awareness and enhance cooperation on animal welfare in WTO committees. I reiterate, the world has changed significantly since the WTO membership had its last recorded focused discussion on animal welfare in 2000.[167] I suspect the scope for some agreement on animal welfare is higher now than it was then. Further, the increasing turn to plurilateralism at the WTO provides an inroad for animal welfare.[168]

For these reasons, committee work on animal welfare must be pursued with urgency. This should facilitate the inclusion of an animal welfare framework in future reform, facilitating more interconnectivity in global law on animal welfare and trade. The following sections will discuss negotiations only insofar as they would facilitate committee work on animal welfare. I will distinguish utopian and reformist changes to committee work on animal welfare.

4.2.2. Utopian Vision

The utopian vision to address trade and animal welfare problems, in compliance with second wave animal ethics, is to abolish trade in animals and their bodies. Short of that, this section elaborates a vision for when trade continues. This recommendation, of committee work on animal welfare, could build toward respecting animals' flourishing and abolishing trade in animals and their bodies. A central question is whether this requires a new committee or integration of animal welfare into existing committees' work.

The CTE's successes highlight the benefits of a separate issue-specific committee. Thus, a separate animal welfare committee is recommended here. Incorporating animal welfare into the work of existing committees is explored below as a reformist, interim measure. The CTE was established amidst wide-ranging international law developments on environmental protection.[169] The reference to sustainable development in the WTO Agreement also legitimised the CTE's formation.[170] Without similar momentum or treaty provision, establishing an animal welfare committee may prove difficult. This option should be pursued nonetheless due to the potential to vastly improve the treatment of animals in trade policy. The animal welfare committee would have three streams of work. These will be elaborated here.

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[165] ibid 37.

[166] ibid.

[167] See chapter IV section 2.1.1.

[168] Annual Report 2019 (n 164) 48–54.

[169] Sinha (n 129) 1286–1288.

[170] WTO Agreement (n 152) preamble.

The first stream would be reactive, policy-focused day-to-day operations that govern the unilateral measures of WTO member states. This involves centralising work already done in various WTO committees including consideration of domestic subsidies, labelling regimes, tariff differentiation and import licensing.[171] Some scholars promote labelling as essential to improving animal welfare, particularly in trade contexts.[172] A WTO committee could work with external organisations developing labels in order to clearly establish the compatibility of animal welfare or method of production labels with WTO law. Regarding subsidies, an animal welfare committee could clarify why animal welfare is not expressly included in the list of green box subsidies but is permitted as a justification for subsidies in practice by the Committee on Agriculture.[173] Also, following *EC – Seal Products*, the committee could work with the World Customs Organisation to include animal welfare as a feature of tariff schedules capable of justifying differential treatment. This should be reconciled with the tariff bindings on agricultural products agreed at the Uruguay Round which might frustrate efforts to increase tariffs on the basis of animal welfare unless a request for modification due to special circumstances is made.[174] The committee would also contribute to the work of the trade policy review body and the committee on regional trade agreements in assessing animal welfare issues.

The second stream entails ongoing normative discussions about animal welfare's appropriate place in the WTO legal regime and the relationship between trade law rules and norms and those of international and global animal law. This would facilitate normative development regarding multilateralism on animal welfare and trade. The animal welfare committee would house discussion of a potential covered agreement (whether multilateral or plurilateral) on animal welfare and evolution of existing agreements to include animal welfare.[175] Discussion could also lead to interpretive notes or authoritative interpretations on issues like consumer preferences and PPMs in considerations of likeness, fish sentience, and the relationship between animal welfare and conservation. Inspiration for other work could be drawn from the CTE. For example, there are recommendations for the CTE to develop a 'forward-looking regional, plurilateral, and multilateral trade agenda, looking at how best to internalise the current environmental externalities of the food

[171] See below at section 4.2.3.

[172] Grethe (n 9) 324.

[173] See below at section 4.2.3.

[174] General Agreement on Tariffs and Trade (15 April 1994) LT/UR/A-1A/1/GATT/1 <http://docsonline.wto.org> (GATT) art XXVIII.4; Grethe (n 9) 328.

[175] See text to n 156 for details of the kinds of evolution envisaged.

system, through the following tools: subsidies, pricing mechanisms, rules and regulations, and finance'.[176]

The third stream entails adopting a collaborative and participatory function. The animal welfare committee should facilitate ongoing collaboration with the proposed network of multilateral bodies set out in the preceding section as well as bodies like the OIE. If the WTO's approach to civil society engagement evolves, the committee should include wide participation wherever possible. This should entail two-way communication with the committee updating civil society on its work and including civil society expertise in its work.

4.2.3. Reformist Incrementalism

If an animal welfare committee is infeasible in the short term, incorporating animal welfare into existing committees' work would not be detrimental to the goal of improving animals' treatment in trade policy. However, risks of this include diverging treatment of animals depending on human use because, for example, the agriculture committee's work impacts farmed animals but not farmed fish. This fragmented treatment leaves scope for governance gaps. There is also limited opportunity for deep listening to animals' interests when adding welfare to already full workloads of existing committees. Nonetheless, existing committees have something to contribute before an animal welfare committee is feasible.

A search of the WTO documents online database returned 793 hits for the phrase 'animal welfare'. Each result back to 17 May 2017 was reviewed individually to determine what existing work could be built upon. Older results were reviewed selectively because multiple documents related to the same measure or issue. This review gives the overall impression that animal welfare regularly crops up in WTO committee work. The most direct treatment of animal welfare in committees occurred during the negotiations for the AoA and discussion of green box subsidies,[177] and in response to the EU's proposal on animal welfare. The latter reveals pitfalls to avoid if animal welfare gains an increased profile in committee work.

The EU's proposal aimed to seek consensus on the compatibility of a hypothetical multilateral animal welfare agreement with WTO rules.[178] Evidently, no such agreement has been reached and the focus on animal welfare shifted to the DSB and unilateralism. WTO members may rethink their rejection of multilateralism given the resulting consequences of the EU's

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[176] Charveriat (n 151).

[177] Committee on Agriculture, 'Special Session – Summary Report on the Fifth Meeting of the Special Session – Held on 5 – 7 February 2001 – Note by the Secretariat' (22 March 2001) G/AG/NG/R/5.

[178] General Council, 'Preparations for the 1999 Ministerial Conference – EC Approach on Agriculture – Communication from the European Communities' (27 July 1999) WT/GC/W/273.

unilateralism on animal welfare. The EU communicated its goals poorly, serving as warning for future animal welfare proposals to committees.

Many WTO members' responses falsely assumed that human and animal welfare are in opposition.[179] This ignores the intersection of oppression and the complementarity of dismantling intersecting systems of oppressive force. Many WTO members were suspicious of the EU's intentions because of its hypocrisy in permitting some animal harm but not others.[180] This conversation would have benefitted from insights from second wave animal ethics. The EU failed to identify the harmfulness of this moral inconsistency and its potential to facilitate coloniality. However, the EU did remark that it aimed to regulate factory farming which many developing countries don't 'indulge in'.[181] This did not convince the membership as to the EU's intentions. Their suspicions were well founded given the unilateral moves the EU has made against the farming of cat and dog fur and the hunting of seals.[182] Both moves have disproportionately impacted indigenous and non-Eurocentric communities. The EU's proposal lacked self-awareness and effective communication regarding the benefits of multilateralism for animal welfare. Thus, there remains potential for improved communication to inspire WTO members to work together on animal welfare. Indeed, if the EU was motivated to address factory farming, it could have pursued a plurilateral agreement amongst relevant members.

These are useful lessons that will inform incremental additions of animal welfare to committee work. Various other issues have been raised in WTO committees that demonstrate what animal welfare work would be possible. WTO governance frequently interacts with the question of animal welfare. Particularly, WTO members bring animal welfare-related measures to the WTO for discussion or notification. However, there is a lack of wider discussion upon presentation of these issues. An exception is where WTO committees have provided a forum for discussing compliance of animal welfare measures with WTO rules.[183] These discussions could be elaborated.

The committee that most frequently interacts with animal welfare is the SPS committee. This is ironic because the WTO denies that animal welfare is an SPS issue on its website, in an

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[179] Committee on Agriculture, 'Special Session – Summary Report on Third Meeting of the Special Session held on 28 – 29 September 2000' (10 November 2000) G/AG/NG/R/3.

[180] ibid.

[181] Committee on Agriculture, 'Second Special Session of the Committee on Agriculture – 29 – 30 June 2000 – Statement by the European Community' (11 July 2000) G/AG/NG/W/24.

[182] See above at chapter III section 3.4.

[183] Committee on Technical Barriers to Trade, 'Minutes of the meeting of 27 – 28 November 2012 – Note by the Secretariat' (6 February 2013) G/TBT/M/58.

interpretive note and in some committee documents.[184] Yet, 241 of the 793 search results for 'animal welfare' related to sanitary and phytosanitary regulations. Practice in the SPS committee shows that animal welfare is frequently and repeatedly brought to the SPS committee by WTO members. The OIE and the ISO also both provide updates to the SPS committee on animal welfare.[185] The EU notifies the SPS committee of animal welfare technical assistance it provides, explicitly classified as 'SPS-related'.[186] Japan has done similarly.[187] Further, WTO members notify compliance with section 7 of the OIE animal health codes on animal welfare to the SPS committee.[188] Interestingly, some such notifications solely concern animal welfare with some expressly citing chapter 7.1 of the OIE code on animal welfare.[189] Other notifications aren't as explicit.[190] There are many other examples where animal welfare is included within notifications to the committee[191] or considered as relevant to SPS restrictions upon accession of members to the WTO.[192]

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[184] See chapter IV section 2.1.1. Also see Committee on Sanitary and Phytosanitary Measures, 'Relevant Activities – Submission by the World Organization for Animal Health (OIE)' (22 June 2010) G/SPS/GEN/1024; and Committee on Sanitary and Phytosanitary Measures, 'Specific trade concerns – Note by the Secretariat – Revision' (2 March 2012) G/SPS/GEN/204/Rev.12.

[185] Committee on Sanitary and Phytosanitary Measures, '69th Meeting of the SPS Committee – Communication from the World Organisation for Animal Health (OIE)' (22 June 2017) G/SPS/GEN/1553; Committee on Sanitary and Phytosanitary Measures, '72nd meeting of the SPS Committee – Communication from the World Organisation for Animal Health (OIE)' (10 July 2018) G/SPS/GEN/1633; Committee on Sanitary and Phytosanitary Measures, 'Summary of the meeting of 18 – 19 July 2019 – Note by the Secretariat' (12 September 2019) G/SPS/R/95, para 3.14; Committee on Sanitary and Phytosanitary Measures, 'Communication from ISO (Report of Activities)' (22 June 2017) G/SPS/GEN/1555.

[186] Committee on Sanitary and Phytosanitary Measures, 'SPS-related technical assistance provided by the European Union in 2017-2018 – Communication from the European Union – Addendum' (3 March 2020) G/SPS/GEN/1139/Add.5.

[187] Committee on Sanitary and Phytosanitary Measures, 'Technical assistance to developing countries – Communication from Japan – Addendum' (3 July 2019) G/SPS/GEN/1160/Add.7.

[188] Committee on Sanitary and Phytosanitary Measures, 'Notification – Brazil – Animal welfare' (24 November 2008) G/SPS/N/BRA/500; Committee on Sanitary and Phytosanitary Measures, 'Notification – Eswatini – Unprocessed and processed animal products for human consumption' (6 December 2019) G/SPS/N/SWZ/5.

[189] Committee on Sanitary and Phytosanitary Measures, 'Notification – Guatemala – Welfare of dogs and cats' (23 May 2019) G/SPS/N/GTM/72.

[190] Committee on Sanitary and Phytosanitary Measures, 'Notification – Kenya – Animal welfare' (1 August 2018) G/SPS/N/KEN/76.

[191] Committee on Sanitary and Phytosanitary Measures, 'Notification – Viet Nam – Animal and products thereof' (8 August 2014) G/SPS/N/VNM/60; Committee on Sanitary and Phytosanitary Measures, 'Notification – Chile – Foodstuffs for animals' (7 August 2017) G/SPS/N/CHL/551; Committee on Sanitary and Phytosanitary Measures, 'Notification – Kenya – Animal welfare' (1 August 2018) G/SPS/N/KEN/76; Committee on Sanitary and Phytosanitary Measures, 'Notification – Chile – Horses' (26 November 2018) G/SPS/N/CHL/583; Committee on Sanitary and Phytosanitary Measures, 'Notification – Ecuador – Bovine animals, sheep, goats, bison and genetic material (semen and embryos)' (29 May 2019) G/SPS/N/ECU/219.

[192] Working Party on the Accession of the Islamic Republic of Afghanistan, 'Accession of the Islamic Republic of Afghanistan – Checklist of Illustrative Sanitary and Phytosanitary (SPS) Issues for Consideration in Accessions – Addendum' (7 June 2012) WT/ACC/AFG/11/Add.1.

Thus, the SPS committee's actions counter its assertions that animal welfare is not an SPS issue.[193] The committee could have told members these notifications were unnecessary or inappropriate, or clarified the scope of its work. By failing to do so, the committee creates custom that accepts animal welfare as appropriate work for the SPS committee. The division between animal health and welfare is, in practice, increasingly proven as arbitrary and impractical. Thus, it is reasonable to expect the SPS committee might adopt further work on animal welfare and formalise its role in this regard.

Various other committees have also had animal welfare issues brought before them.[194] The TBT committee has accepted notifications of numerous animal welfare measures, including a notification from Germany regarding an animal welfare label.[195] Animal welfare subsidies are frequently notified to the committee on subsidies and countervailing measures.[196] Significantly, Switzerland frequently treats these as falling within the green box and the committee seems to acquiesce.[197] Animal welfare has been discussed during policy review by the Trade Policy Review Body[198] and it has featured in discussions of the committee on regional trade agreements following the inclusion of animal welfare provisions in FTAs.[199] Finally, the committee on import licensing

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[193] See above at n 184.

[194] Committee on Technical Barriers to Trade, 'Notification – Nicaragua – Ecological animal products' (7 October 2003) G/TBT/N/NIC/38; Committee on Technical Barriers to Trade, 'Notification – The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu – Live marine mammalian wildlife or products thereof' (4 March 2013) G/TBT/N/TPKM/132; Committee on Technical Barriers to Trade, 'Notification – European Union – All food from animal clones' (12 March 2014) G/TBT/N/EU/198; Committee on Technical Barriers to Trade, 'Notification – Brazil – Live swine' (16 July 2018) G/TBT/N/BRA/831; Committee on Technical Barriers to Trade, 'Notification – Canada – Live Animals – Addendum' (21 February 2019) G/TBT/N/CAN/505/Add.1.

[195] Committee on Technical Barriers to Trade, 'Notification – Germany – Food products of animal origin' (24 April 2019) G/TBT/N/DEU/16.

[196] Committee on Subsidies and Countervailing Measures, 'Subsidies – New and full notification' (4 May 2018) G/SCM/N/315/AUS; Committee on Subsidies and Countervailing Measures, 'Subsidies – New and full notification' (20 June 2019) G/SCM/N/343/ISL; Committee on Subsidies and Countervailing Measures, 'Subsidies – New and full notification – European Union – Addendum' (18 September 2019) G/SCM/N/343/EU/Add.7; Committee on Subsidies and Countervailing Measures, 'Subsidies – New and full notification – European Union – Addendum' (18 September 2019) G/SCM/N/343/EU/Add.27; Committee on Subsidies and Countervailing Measures, 'Subsidies – New and full notification – Australia – Revision' (14 October 2019) G/SCM/N/343/Aus/Rev.1.

[197] Committee on Agriculture, 'Notification – Switzerland – Domestic Support' (31 October 2018) G/AG/N/CHE/87; Committee on Agriculture, 'Notification – Switzerland – Domestic Support' (2 November 2018) G/AG/N/CHE/88; Committee on Agriculture, 'Notification – Switzerland – Domestic support' (2 October 2019) G/AG/N/CHE/94.

[198] Trade Policy Review Body, '11 and 13 July 2018 – Trade policy review – China – Minutes of the meeting – Addendum' (1 February 2019) WT/TPR/M/375/Add.1; Trade Policy Review Body, 'Trade policy review – European Union – Minutes of the meeting – Addendum' (18 and 20 February 2020) WT/TPR/M/395/Add.1.

[199] Committee on Regional Trade Agreements, 'Deep and comprehensive free trade area concluded as a part of the association agreement between the European Union and Ukraine (Goods and Services) – Questions and Replies' (8 June 2017) WT/REG353/2; Committee on Regional Trade Agreements, 'Accession of Ecuador to the Trade Agreement between the European Union and Colombia and Peru (Goods and Services) – Report by the Secretariat – Revision' (4 April 2019) WT/REG380/1/Rev.1.

has dealt with animal welfare when, for example, Hong Kong discussed its licensing requirement to protect animal welfare, amongst other things.[200]

Asserting that animal welfare is outwith the SPS committee's scope is baseless and out of touch with practice and common-sense. It would also be baseless to assert that animal welfare has no place in the WTO's multilateral work. Evidently, animal welfare has crept in at multiple sites. Further, the WTO's formal silence on animal welfare amounts to a normative stance because the WTO works to liberalise the trade in animals and their bodies. Thus, there are opportunities at multiple sites for existing WTO committees to adopt a more formal role on animal welfare.

The red lines elaborated for global animal law recommendations are also applicable here. These red lines require that policy reform on animal welfare not perpetuate oppressive force against Othered groups and individuals. The red lines also require that single-issue measures only be permitted within a broader framework, that protection be justified on the basis of flourishing and intrinsic value rather than similarity, and that broad and deep participation and consultation be maintained.

With regard to trade policy, there is no effective, reformist alternative to multilateral work. Unilateral measures have been argued to be unethical and ineffective and bilateral free trade agreements can do no more than damage limitation. Thus, I propose animal law scholars, activists and policymakers focus their attention on multilateral spaces (presently, the WTO). However, for those for whom this is impossible or, for whatever reason, deeply undesirable, the damage limitation possible within the context of free trade agreements still holds value.

The most effective means for this is to condition liberalisation on agreed levels of animal welfare, whilst avoiding coloniality through genuine cooperative negotiations. Other policies such as information sharing or technical assistance can only prove beneficial in the long-term, by increasing the likelihood of further multilateral collaboration on animal welfare. Any potential normative benefit of animal welfare provisions in free trade agreements would be overshadowed by the complacency toward animal suffering shown by significantly liberalising trade in animal products.[201]

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[200] Committee on Import Licensing, 'Replies to questionnaire on import licensing procedures – Notification under article 7.3 of the Agreement on Import Licensing Procedures (2018) – Hong Kong, China' (4 October 2018) G/LIC/N/3/HKG/22; see also Committee on Import Licensing, 'Replies to questionnaire on import licensing procedures – Notification under article 7.3 of the Agreement on Import Licensing Procedures (2017) – Macao, China' (27 October 2017) G/LIC/N/3/MAC/20.

[201] See chapter IV section 2.2.

FTAs do present opportunities for 'improved cooperation and coordination'.[202] Yet, taking advantage of this often results in a deviation from existing WTO rules.[203] While it may be attractive to animal advocates to deviate from WTO rules, this is not fruitful in the context of bilateral FTAs for all of the reasons set out in the discussion of multilateralism above. An example of such deviation is the SPS chapter of the TPP Agreement which removes the precautionary principle that is included in the SPS Agreement.[204] Negotiators will, in many cases, be motivated to deviate from WTO rules in order to deregulate rather than to increase regulation. This is the nature of trade liberalisation. It could be recommended here that, for example, FTAs include provision clarifying the primacy of any animal welfare agreements between the parties.[205] But this appears shallow and beside the point in an environment where there is no network of animal welfare instruments yet and where the WTO has no official role with regard to animal welfare. The situation is vastly different for trade and environment where a host of MEAs exist and the WTO takes a formal role. It seems a mistake to imitate tactics used for environmental protection in FTAs when the context of animal welfare governance is so vastly different.

4.2.4. Interim Conclusion: The Potential of these Policy Recommendations to Address the Thesis Problems

Again, note that the best means of eliminating the problems of trade for animal welfare and to align with second wave animal ethics is outlawing trade in animals and their bodies. In present circumstances, that requires a WTO covered agreement or a separate legal instrument that takes precedence over WTO law.

Short of that, a WTO animal welfare committee could eliminate the problem of low welfare imports through recognising equivalent standards. This could legitimise animal welfare protection that occurs in practice without legislation. For example, by states that do not participate in factory farming and, thus, offer better welfare protection in animal farming. Some form of agreement may be required to establish rules of equivalence. If so, committee work would provide the necessary impetus and collaboration to work toward such an agreement. WTO members have the competence to restrict trade to protect animal welfare as a result of *EC – Seal Products*. Combining this freedom with multilateralism to agree acceptable standards at a WTO committee would work to eliminate the problem of low welfare imports.

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[202] Wagner (n 160) 450.

[203] ibid 451.

[204] ibid 455–456.

[205] This has been proposed for MEAs. See Charveriat (n 151) 53.

Mutual recognition of standards would have a knock-on impact on low animal welfare havens and the chilling effect on animal welfare legislation. Although, second wave animal ethics would not support increasing unilateral welfare legislation in lieu of multilateral efforts. The issue of labelling could also be addressed through the work of a WTO committee on animal welfare. Such a committee could clarify the regulatory freedom of WTO members to require the utilisation of animal welfare labels.

Focusing scholarship and policymaking on the WTO's institutional infrastructure rather than dispute settlement or negotiations is more likely to lead to the kind of multilateralism on animal welfare that second wave animal ethics favours. There are two ways in which second wave animal ethics are relevant here: in the type of measure pursued and in its contents.

Committee work is the trade law policy option that is most desirable from a second wave animal ethics perspective. Unilateralism as facilitated through WTO dispute settlement is harmful, unethical and ineffective. Committee work is also more desirable as a means of ground-up, interconnective reform on animal welfare as opposed to top-down reform through negotiations. This is because top-down reform is more likely to entail coloniality.

Second wave animal ethics favours committee work as the most effective and ethical legal process to enact change for animal welfare. However, it cannot be ensured that this committee work would, substantively, align with second wave animal ethics. The best this thesis can do is to recommend that this committee work focus on types of reform and discussion that would be most aligned with second wave animal ethics. This would have the ultimate goal of enacting measures that would effectively and ethically reform the treatment of animals in trade. This is, again, short of the removal of animals from trade all together which should be the ultimate goal of global animal law.

This chapter has detailed the utopian vision of second wave-compliant law on trade and animal welfare. This chapter has also detailed the red lines for effective incremental reform. On this basis, I will conclude with final considerations regarding the interaction of these trade policy recommendations with the global animal law and scholarship recommendations set out above.

5. Conclusion: Second Wave-Inspired Global Animal Law

Global animal law is (will be, ought to be) *so* much more than a universally adopted treaty. If this chapter, and this thesis, have made one thing clear, I hope it is that. Globalisation is evolving and

nuancing our understanding of law. It is no longer monolithic, state-centred or operated solely through force. Law is, and perhaps always has been, diverse, plural, cooperative and everywhere.

It is time for global animal law scholars to lean into this conception of globality. We must leave behind notions of singularity and finality in an international animal law instrument. The law that governs animals' lives is and will be in a process of continual evolution and conversation between actors and institutions. It will have normative significance, it will have practical consequences, and it will refuse to stand still. Additionally, it *must* be transparent in its ethics, clear in its utopian vision, and radical in its make-up. This is the only way to make progress.

And we *must* make progress. We cannot afford to go in scholarly circles. We are focused on emancipating the Other, of exposing the fiction of human superiority. We are focused on facilitating flourishing and saving lives. This is urgent, serious work and it requires growing comfortable with being uncomfortable. I mean this in the sense that Aph Ko regards us as 'conceptual architects'.[206] We must encourage people to 'question their behaviors so they're in a conceptual terrain of confusion, which is one of the most revolutionary areas to be in because we're not bound by oppressive behaviors and norms'.[207] This is what it means to do radical and critical scholarship. Anything less will not be effective.

The problem of trading animals and their bodies across the globe is a crisis from the perspective of second wave animal ethics. How can we enable animals to flourish, provide boundless care for the Other, and observe intersecting oppressions whilst trading in the bodies of diverse, able, and sentient animal lives that we bring to forceful ends? The law is our tool to facilitate this oppression. It does not have to be this way. The law can be a protective force and, in many ways, it is so for human subjects. It is not for animals. Welfare standards in the law are pitiful. They offer glimpses of progress, satiating the public's appetite for fuzzy measures that have little to no impact on their daily lives. But welfare standards do not protect animals in real ways required by second wave animal ethics. Thus, this chapter has operationalised this critical, posthumanist, intersectional ethical toolbox to form a vision of law that is capable of having real, significant impact on animals' lives.

Because we now recognise law as operating and growing out of various spaces, the recommendations for change had to begin with an appraisal of global animal law scholarship. Here, it was crucial to address the reigning neglect of intersectionality in those spaces. Legal protection of animals in the law will not stem from Eurocentric, ethnocentric literature displaying coloniality that speaks *at* its supposedly global audience rather than reaching across the globe for

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[206] Aph Ko, 'Why Confusion Is Necessary for Our Activism to Evolve' in Ko and Ko (n 74).

[207] ibid 32.

collaboration. Diverse dialogue is necessary to facilitate progress. This may be multi-speed, collaborative, and slow. But this is likely to be more effective than the repeated and fruitless efforts of western scholars to impose treaty language on the world without the broad and deep participation and collaboration that would be required to make this palatable. The scholarship needs to evolve past first wave concepts of similarity, liberalism, and compartmentalised activism. These substantive, ethical restrictions are significant and evolution in this regard will depend upon the procedural considerations of participation just outlined.

Evolving global animal law scholarship in this direction will significantly enhance its ability to improve the lives of animals in general and in trade. Trade scholarship has overrun the short life of global animal law scholarship thus far. Trade is an urgent issue and I understand why this has happened. But the conversation has to shift. Global animal law scholars ought to assert their position and the importance of their perspectives over the normative underpinnings of trade law.

And speaking of trade law, we arrive at the core of this chapter: policy recommendations. Unilateralism has been denounced as ineffective and unethical in this thesis. Unilateralism cannot significantly improve the lives of animals who are traded. It is natural that this thesis - which promotes wide and deep collaboration and participation - concludes with an endorsement of multilateralism. There is no other way to achieve effective and ethical progress on animal welfare.

This conclusion opened with a reminder of the globality of law and the fact that a single-minded focus on binding treaty law is outdated. This chapter has elaborated a vision of multilateralism that is multi-site, networked and modern. This entails a network of global animal law instruments coupled with an animal welfare committee at the WTO along with supporting negotiations. This chapter has dealt with considerations of feasibility, the requirements of second wave animal ethics and, importantly, mechanisms to deal with the impacts of trade set out in chapter III. Trade has been used throughout as a model of what improved global animal law might look like. It has also been pointed to as a cause of global animal law's deficiencies. In this way, it is singled out as a site of urgently required reform (or abolition).

I hope that all of this has been made clear and that this analysis will disprove opponents to critical, intersectional analysis who believe that this form of academic thought binds us to indeterminacy and indecision. Not only has second wave animal ethics provided transparency in utopian vision, it has also been used as a toolbox to deeply consider what kinds of incremental reform will push us forward on the road to utopia. I can only hope that the road is short and the destination bright.

Conclusion

1. The Journey So Far

Twenty years ago, feathery corpse rests.
Memories wake fury, revolt.
Now, grasped kinship,
Amongst angry Others.

This thesis has as its overarching, guiding objectives: the improvement of animals' lives, and the rejection of systemically oppressive mechanisms in law and policy that work toward improving animals' lives. To these ends, I posed the following question in the introduction: to what extent can introducing an intersectional ethical framework to global animal law help to reconceptualise legal research on international trade and animal law. The answer I have reached is: the intersectional ethical framework has proven exceedingly capable of not only identifying problematic trends within legal research on international trade and animal law, but also of formulating recommended solutions that would result in a reformulation of law and scholarship that has the potential to be more effective and ethical. I will now revisit and summarise the ways in which this thesis has definitively and convincingly reached this conclusion.

The research required in order to reach this conclusion is best considered in three stages. The first stage is the crafting of an ethics-based framework and methodology rooted in animal perspectives and intersectionality that would be capable of identifying what reformulation is required (chapter I). The second stage is the application of the methodology to the chosen subject matters (global animal law and international trade law) in order to conduct socio-legal research that identifies the reformulation required (chapters II, III and IV). The third and final stage is the reformulation itself, whereby the methodology is used to inspire novel recommendations that are more effective and more ethical than the present state of law and scholarship (chapter V).

In the first stage, second wave animal ethics was delineated for the first time and constructed as a means to identify the reformulation required. The framework has various novelties. First, it is posited as a toolbox rather than a closed system of ethics. This leaves scope for expansion, situatedness and collaborative, diverse theorising. Conversely, most current animal law scholarship adopts utilitarian or rights-based ethics in a closed, universalised manner.

Second, the second wave centres on marginal perspectives including theories of posthumanism, intersectionality theory, feminist animal ethics and Earth jurisprudence. Marginal perspectives present unique, overlooked insights into systemic oppression, intersecting oppressions, politics of power, and imperatives of situatedness and deep listening.

Third, second wave animal ethics have more potential for improving animals' lives because it requires deep listening to animals' perspectives in place of paternalism: animals speak *through* second wave animal ethicists while first wave animal ethicists speak *for* animals.

Fourth, the ethical toolbox crafts space for evolution and incorporation of other theoretical insights not presently included. The openness, precautionary approach and situatedness of second wave animal ethics facilitate inclusion of new perspectives and deep reflexivity.

Finally, second wave animal ethics are presented as an appropriate toolbox and methodology for questions of global law and trade because these insights are conscious of and responsive to their context. This means both that diverging perspectives are incorporated but also that theorists and scholars are self-critical when writing for global audiences. This requires knowledge of the particularities of globalisation which this thesis goes on to show include considerations of coloniality, the interconnectivity of law, jurisgenerative potential of global lawyers and post-Westphalianism. I do not think there are ethical tools better suited to global contexts than those outlined in this first stage.

There are synergies but also tensions between the various theoretical insights that I assign to the second wave of animal ethics. Overarchingly, it seems to me that the tensions that exist are valuable. Tension can provoke reflexiveness and collaboration. Tension is also an unavoidable element of global discussions regarding animal issues and it is better to incorporate this into our ethical toolboxes than to pretend that universalisation and homogenisation are possible, in norms, policies and laws. I see particular tension between, for example, the need to provide deep listening to animals and the question of situatedness and contextuality. Such tensions cannot be resolved from my western standpoint and must be presented for broad and diverse discussion. I believe that relying upon intersectionality theory to put these theoretical insights into conversation with one another is a valuable means of dealing with these real, unavoidable tensions. I see this as a crucial step toward improving global animal law and scholarship. I believe that centring marginal perspectives and second wave animal ethics in global animal law will help to bring work in this area up to speed with some of the most critical and insightful commentaries on, for example, global law, decolonisation and TWAIL. The application of these insights is particularly challenging and, thus, has particularly fruitful potential, where trade law is concerned.

In this regard, I tested the merits of second wave animal ethics in the second stage by using this methodology to identify problems within global animal law, trade norms and policy, and international trade law. These problems make up the reconceptualisation referenced in the overarching research question. This stage of the research led to a multitude of novel contributions and outcomes, demonstrating the efficacy of second wave animal ethics and effectively identifying the problems that must be addressed.

First, global animal law was revealed to display coloniality and ethnocentricity. This was shown to be true of both scholarship and law. The novel conclusion reached was that global animal law amounts, in large part, to western perspectives on international law and animals. It is because of the second wave perspective that this problem, previously neglected in the research, was identified.

Second, global animal law was critiqued for its alignment with first wave animal ethics, resulting in a fragmented approach to wild and domestic animals (centring human usage) and acquiescence with problematic similarity theory. These tendencies are likely to be harmful to (global) animal law in the long term and have not been prioritised in animal law research thus far.

Third, second wave animal ethics was able to reveal and critique global animal law scholars for favouring universalised approaches to animal issues without prioritising deep and wide participation or addressing the particularities of local contexts.

Further novel conclusions were reached in relation to the norms, policies and laws governing international trade. First, these analyses provide deeper insight than most animal law scholarship on issues of trade. Animal law scholars have developed abilities to engage with the WTO framework of rules and to weigh domestic animal law policies against these laws. However, animal law scholars have proven less capable of engaging with more overarching, normative and functional questions regarding international trade law, including the WTO.

This research fills this gap by introducing critical trade law scholarship of Andrew Lang, Sara Dillon and others. Thus, conceptual moves were possible here that have not been made before. These include: treating animal welfare as a 'trade impact issue'; engaging with levels of trade law and policy ranging from unilateral to multilateral in order to investigate the opportunities for evolution at each level; contemplating difficulties experienced at the WTO and what they mean for animal welfare; and analysing the relative positions of trade law and animal law in international, transnational and global legal spaces and what this means for animals' lives and animal law.

A second novel contribution of the analysis of trade norms, policies and laws is the consideration of how non-WTO multilateral law may contribute to the protection of animal welfare in the context of trade policy.

Third, I identify and categorise a four-part impact of trade on animal welfare, conducting novel empirical research. The impacts are: open markets, low animal welfare havens, a chilling effect, and a lack of labelling.

Fourth, I provide a novel critique of leading trade and animal welfare scholarship. This critique identifies shortcomings therein that are due to an internalisation of certain neoliberal norms and an attachment to first wave animal ethics priorities. These shortcomings include: the knowledge gaps in the literature regarding the empirical impact of trade on animal welfare, a neglect of WTO governance outside its dispute settlement mechanism and a focus on unilateralism despite its inability to resolve many of the problems trade causes for animal welfare. The research conducted in this thesis both identifies and fills these gaps.

A fifth novel contribution is the consideration of international trade law as a subject of global law scholarship. Currently, scholarship on trade and animal welfare is overly focused on Westphalian modes of governance, neglecting questions of interconnectivity between legal regimes. It is also true that on occasions where scholars do pick up on such trends, such as in Syke's work on norm-building potential of the WTO, there is not an express recognition of the landscape of global law research and risks associated with coloniality. Again, this thesis has filled those gaps by providing an analysis of the trade and animal welfare question from a global law perspective.

Finally, this thesis also provides novel contributions to critical WTO scholarship by presenting to trade law scholars the potential results of evolving international trade law and underlying norms in a way that provides deep listening to animals' interests and which prioritises intersectionality. Thus, the novelty of this second stage of research results primarily from the marrying of insights from disparate traditions of legal and socio-legal research, and the application of the second wave lens.

Using the methodology in this way to reveal unaddressed problems of global animal law and international trade law has facilitated various novel contributions in the third stage of this research. The recommendations provided in chapter V are unlike anything suggested in the scholarship on global animal law, or on trade and animal welfare. This was made possible by the unique perspective of second wave animal ethics and the detailed analysis of the law, policy, norms and scholarship set out in chapters II, III and IV.

The first novel contribution is the suggestion to improve global animal law directly through addressing deficiencies in international trade law. Scholarship has recognised the links between these two areas and suggested how to incorporate animal welfare into trade law. However, there

has not been an express recognition of the way trade law is impacting the development of global animal law and suggestions for improving this situation.

A second novel contribution is an approach to trade and animal welfare that ties together internal and external reform of international trade law, identifying the interconnectivity between each. This is borne of the global law focus of this thesis and results in recommendations that are uniquely capable of responding to the realities of globalisation and legal normativity in a global age.

A third novel contribution is the inclusion of scholarship at the core of the recommendations. This is mindful of the jurisgenerative potential of global lawyers.

Finally, this chapter includes multiple novel contributions of substance, due to the influence of second wave animal ethics. The recommendations prioritise an indistinction of the human-animal dichotomy and a focus on animal flourishing, an abandonment of moral circles of concern in favour of boundlessness (through a precautionary principle), a preference for feminist ethics of care over liberal conceptions of justice and rights, and situatedness in place of universalisation of norms and policies.

As a final reflection on the recommendations set out in this thesis, I would like to point out that the overarching objectives of the recommendations, and this thesis, garner wide support from other areas of legal and socio-legal scholarship. This thesis has introduced a broad range of research that supports objectives to improve animals' lives and the rejection of systemically oppressive mechanisms in law and policy that work toward improving animals' lives. In this way, this thesis has added gravity and legitimacy to its conclusions.

I have introduced scholarly ideas from a number of research streams that support the avoidance of systemically oppressive mechanisms. Critics of misappropriated global law discourse denounce coloniality and false generalities. Global constitutionalism scholars prioritise democracy in governance, entailing deep and wide participation. TWAIL scholars point to the exclusion of the Global South from international law. Intersectionality theorists and decolonisation scholars, including critical race theorists and indigenous scholars, also point to the exclusion of marginal voices. Feminist animal ethics and critical animal studies also point to the value of marginal voices. While each group of voices may articulate their message differently, each supports the central objective to democratise participation and representation in law and legal scholarship. This lends direct support to the recommendations toward deep and wide participation of marginalised Others, the diversification of ideas, and the inclusion of situatedness in global animal law (scholarship).

Of course, many of these scholars do not prioritise animal flourishing in their work. However, many of their concepts, methods and normative insights are compatible with second wave-inspired animal law and policy which prioritises animal interests. This thesis has also introduced other areas of scholarship that support the second wave prioritisation of animal interests. Of course, second wave animal ethics is already broadly inclusive, encompassing a diversity of ideas and norms capable of improving animals' lives if incorporated into governance. In addition, I have pointed to scholarship on Earth System Governance and rights for nature which support an evolution beyond anthropocentrism in law. Also, the WTO critical scholars included in this thesis that argue for wider systemic and normative change to the WTO's operation leave space for insights such as second wave animal ethics to impact the development of trade governance. For these reasons, I believe that the recommendations reached in chapter V have added legitimacy because they are consistent with or actively supported by scholarship in other areas.

2. The Journey Onward

I have many hopes for the potential impact of this research. Ultimately, I hope for global animal law and trade governance that provides deep listening to animals and which takes animals' interests seriously. I want this to materially improve animals' lives and I think that this ought to result in the outlawing of trade in animals and their bodies. However, this outcome can only be ethical if pursued through mechanisms that reject systemic oppression and which do not actively discriminate against or oppress Othered groups of humans.

Firstly, I do not think animal liberation through systemically oppressive means will ever be effective or lead to the abolition of trade in animals and their bodies. Secondly, I would not be satisfied if, somehow, this were to occur. Oppressive means with liberative goals still amounts to oppression and casts suspicion upon the goals of the supposed liberators. Indeed, I reached these conclusions from my situated, western and white perspective and this requires that I make my proposals and communicate my priorities as a contribution to a conversation, not as a final word. Ultimately, systems of law and governance that can facilitate the oppression of Others are not systems that will be beneficial to animals or humans. Thus, my preference for halting animal trade must be put into conversation with, for example, indigenous' subsistence hunters' desires to hunt and trade animals to make a living.

My immediate hopes are that this research might inspire (global) animal law scholars and activists toward a deeper integration of intersectionality into their work. I hope that this research will demonstrate to environmental law scholars and activists that various mechanisms in common between animal law and environmental law have been neglected and that second wave animal ethics presents new potential to facilitate and enhance collaborations. Additionally, I hope that this work might find an audience amongst global law and international trade law scholars who may be surprised to see the insights animal law has to offer for their own work. Through inspiring further academic work, and in hopefully reaching activists directly, I hope that this work will come to have an impact on approaches to activism on trade and animal welfare. It is through such impacts that this work may eventually come to have an impact on animals' lives.

This thesis has also had a more immediate impact upon my own work and it has inspired a future research agenda. I think the onward direction of this work is integral to its quality and speaks to its potential to inspire further scholarship. I have developed a proposed project entitled *Law's Other: Animals and Posthumanist Legal Subjectivity in the Anthropocene*. This project builds upon key insights in this thesis whilst also embarking upon new, related research activities.

This project would build on the intersectional insights of this thesis to launch a more fundamental critique of fragmentation in law and advocacy around social justice movements. The project posits that law's pressing emergency is that it must identify and connect law's Others to avoid perpetuating the countless harms and systemic oppression that necessitate #BlackLivesMatter, #MeToo, Love Wins, and the vegan movement. This research would encourage an intersectional, posthumanist turn to counteract the oppressive functioning of animal law in the globalised context of the Anthropocene.

This proposed project entails four connected strands of research, overarched by the concept of the Other and themes of connection. These strands represent the prime areas for further research identified in this thesis. These streams are: intersectionality theory, posthumanism, law in the Anthropocene and global law.

The original contributions of this postdoctoral research project are made clear through four key questions that it will answer. These are: (1) what harms are caused (to sentient and non-sentient lifeforms) by animal law's avoidance of intersectionality and adoption of oppressive tactics? (2) Can the posthumanist continuum between humanity and animality nuance law's human-animal dichotomy and negate animal law's oppressive function? (3) Can law in the Anthropocene, such as the rights for nature discourse, inspire animal law to turn away from liberal individualism that masks intersectionality? And (4) how can the globalisation of legal normative transfer entailed by global law serve non-human subjects?

I believe that situating this new project in the Anthropocene and incorporating scholarship regarding law and the Anthropocene will facilitate appropriate evolution of animal law for connected global contexts and problems including climate change and pandemics. This entails intense conversations between animal law scholarship and systems-oriented environmental law scholarship, particularly rights of nature discourse. The goal here would be to inject individualistic animal law with the connectivity required due to the conditions of the Anthropocene. At the same time, the project would rectify the neglect of individuals within rights for nature literature. This is because such neglect of individuals precludes intersectional and posthuman considerations. The hope is that this would produce novel animal law concepts more suited to the Anthropocene. Global law is the natural overarching legal discourse for this, given that it focuses upon connectivity and post-Westphalianism.

The methodology for this project would be anchored in the concept of the Other, employing Braidotti's concept of 'becoming animal' and Haraway's concept of 'making kin'. Each entails connection and dissolving the self into relationality and posthumanity. This is achieved in two ways: embodied praxis and reflexive theorising. Embodied praxis of being with animals and storytelling will enrich and situate the philosophical and socio-legal desk-based research streams.[1] This entails presence and deep listening with non-humans in daily interactions, inspired by Jacques Derrida's philosophising about mundane interactions with his cat.[2] The outcomes of each encounter are stories, evidence of posthumanism, and subjects for theoretical reflexion. Regarding theoretical reflexion, I will use my queer subjectivity and lived experience of oppression to enlighten philosophical and socio-legal reflections on animal oppression. I will couple this positionality and research on queer theory with my second wave animal ethics methodology developed in this thesis.

This proposed methodology results in a number of mandates. These include: committing to reflexiveness and inclusive discourse, noting my western, white positionality and favouring marginal perspectives on animal ethics; queering the humanities by rejecting dichotomies and favouring continuums; investigating the normative, systemic oppressions entrenched in colonial doctrinal (animal) law research; and addressing the unique harms for marginalised/Othered communities caused by law's contexts of globalisation and the Anthropocene.

The envisaged outcomes for this proposed project are as follows: (1) a critique of law's systemically oppressive/Othering functions facilitated by novel intersectional animal law. (2)

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[1] Irus Braverman, 'The Life and Law of Corals: Breathing Meditations' in Andreas Philippopoulos-Mihalopoulos and Victoria Brooks (eds), *Research methods in environmental law: a handbook* (Edward Elgar 2017).

[2] Jacques Derrida, *The Animal That Therefore I Am* (Marie-Louise Mallet (ed) and David Wills (trs) eds, Fordham University Press 2008).

Ground-breaking critical and ethical analyses of law's human subject and its animal Other in posthumanist, non-anthropocentric legal futures. (3) Animal law revealed as key contributor to solving problems of the Anthropocene (including climate change and pandemics). And (4) future-proofing animal law by formulating its legal normativity around realities of global law.

3. Feathers, Boots (Revisited)

To close this thesis, I wish to revisit the story of feathers and boots to unpack the instances of second wave animal ethics and law therein. It is clear the feathery corpse was owed nothing, legally speaking. If alive, they might have been owed a little: more if they were an endangered bird of prey, less if they were a chicken. But protecting them from a boot does little when we continue to produce boots en masse, disseminate them to the most privileged among us, and provide lessons in kicking. That circle of booted boys triggers comparison with homophobic and transphobic attacks and with armed police officers in North America restraining and killing countless black men. Each pair of boots are empowered by systems of laws that facilitate and perhaps even require Othering. So, the view from the margins oftentimes feels bleak. But change is coming.

The feathery corpse and the twenty-years-ago boy could not see law operating in that tranquil space made cruel. And yet, it was. Knowing you can kick someone without retribution requires knowledge of a disparity of power. For those boys, the feathery corpse sat somewhere between a football and a cat, and kicking either would not have seen them significantly punished. Law gives them this knowledge, entrenching a disregard for animal life into the disciplinary fabric of our societies. In other times and places, societies' legal fabrics provide boys with wider arrays of subjects for kicking without retribution.

Twenty years later, those boys will use their boots in other ways legitimised by law: to lead farm animals to slaughter, to traverse a wildlife park to go trophy-hunting, or to the market to buy products of animal suffering. For how long will we (Others and allies) accept legal societies that so wilfully disregard flourishing of animals and others in order to facilitate some trivial, unnecessary whim or habit of humans?

The Otherhood will have significant input to efforts at conceptualising systems of laws that will evoke real change. The realms of global animal law and the tools within international trade law are just one iteration of this wider objective. Though, I believe that the recommendations for change in these areas can be informative more widely. I believe the journey to our collective rebellion will pass through new critical and radical spaces of research, new legal normativities borne

of systemic anti-oppression, and new laws that safeguard any and all progress we make toward utopia. But, as I have stressed throughout, this is just the position of one white, western, queer man and I present these merely as ideas for a discussion, not as a final word. No final word can be independently proposed and, in putting this thesis out into the world, I hope to join diverse conversations in order to help carve a path for the journey forward. In the end, all I can do is put forward my belief and my research that says that taking this journey and taking care of animals, and each other, and Others, will serve all of us. In journeying on, I leave you with a suggestion.

Feel into legal futures, still boys' boots.
See Mothers and make odd kin.
Embrace queer and liminal roots.
Leave feathery corpses at faint
trail's edge.

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