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Introduction

Farm animal welfare has become an increasingly discussed area of the law, as regulations attempt to adapt to the growing concern of consumers. The shift from a traditional agrarian model to an industrialized farming system has allowed producers to capitalize on profit margins through the justification of efficiency, while ignoring animal welfare concerns. Originally hailed as a technological triumph, the industrialization of farming has resulted in maximized production output and minimized production costs. The efficiency of industrialized farming comes paired with a severe confinement of animals, antibiotic use, and lowered standards for producers.

Each country has the authority to regulate their own agricultural production standards, facilitating the disparity of both food quality and animal welfare protection. This paper will focus specifically on the different regulatory regimes between the European Union (EU) and Canada, which have been the subject of recent attention due to trade agreement negotiations. The provisionally implemented EU/Canada Comprehensive Economic and Free Trade Agreement (CETA)¹ will allow for free trade between the European Union and Canada, subject to limitations of sensitive agricultural products. This is a great concern for the European member states, as the two signatories to this agreement have significantly diverse animal welfare regulations and production standards. Member States of the EU have expressed their discontent with the agreement, as it shows a willingness to open up European markets for Canadian food products, which are widely recognized as being subject to lower production standards. The qualms of the European public rely on differences in societal morals specifically towards animal welfare regulations.

The protection of public morality is an issue that has been previously addressed by the World Trade Organization, and more specifically, through the General Agreement on Tariffs and Trade (GATT).² While the GATT's purpose is to promote international trade, it allows member states to make trade restrictions through the listed exceptions under Article XX. The public morality exception has been

¹ European Commission, 'Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States' (2016) (CETA).

² *General Agreement on Tariffs and Trade* (1947) 61 Stat A-11 55 UNTS 194 (GATT).

nuanced throughout the jurisprudence, which will be discussed below. As a highly valued public moral in the European communities, member states will have a great chance of success in arguing the protection of any trade barriers used in an attempt to protect their high welfare regulations. Only time will show whether the majority of EU member states will formally adopt CETA and whether retaliatory trade barriers will take effect.

1. Animal Welfare

Animal welfare can be defined in a number of different ways. For trade purposes, the World Organization for Animal Health (OIE) provides the following definition of good animal welfare, '[a]n animal is in a good state of welfare, if it is healthy, comfortable, well-nourished, safe, able to express innate [natural] behavior, and if it is not suffering from unpleasant states such as pain, fear and distress.'³ The subjective qualifications of this definition allows industrial standards and governments to regulate for themselves what should be seen as 'good animal welfare.' Despite no clear explanation of what animal welfare entails, there has been a growing acceptance that it must include three elements: (1) the emotional state of the animal, (2) its biological functioning, and (3) its ability to show normal patterns of behavior.⁴ Additionally, the Farm Animal Welfare Council (FAWC) has recognized the five freedoms, which have served effectively as a starting point in identifying the main problems of animal welfare. The five freedoms are used to recognize ideal states, including: (1) freedom from hunger and thirst, (2) freedom from discomfort, (3) freedom from pain, injury and disease, (4) freedom to express normal behavior, and (5) freedom from fear and distress.⁵ Despite state acknowledgment of these goals, in order to effectively protect animal welfare, legislation with adequate enforcement mechanisms is required.

³ World Organization for Animal Health (OIE), 'About Us', online: <www.oie.int/about-us/> accessed 4 August 2019.

⁴ Xavier Manteca and others, 'Animal Welfare Components' (2009), In: FJM Smulders, *Welfare and Production Animal: Assessment Management of Risks* (Wageningen Academic Publishers: The Netherlands, 2009).

⁵ Xavier Manteca and others, 'What is Animal Welfare?' (2012) Farm Animal Welfare Education Centre, online: <https://www.fawec.org/media/com_lazypdf/pdf/fs1-en.pdf> accessed 25 July 2019.

History of the Animal Welfare Movement

In order to understand how states can come to such different regulatory standards for farm animal welfare, it is necessary to examine the development of the animal welfare movement itself. Animal welfare denotes the desire to prevent unnecessary suffering of animals. It is based on the emotional, ethical, and religious arguments, claiming that it is simply wrong to subject animals to unnecessary suffering or stress. The philosophical basis facilitates the extension of legal rights for animals as sentient beings. Prior to this point, animals were assumed to act in a machine-like manner without any conscious thought process. Growing evidence has shown that animals have far more cognitive abilities than they were traditionally believed to.⁶ Animals are sentient creatures. Sentience suggests a level of conscious awareness, acknowledging that animals are able to have feelings and able to suffer. While animal welfare can also refer to the species itself deserving protection, the focus of this discussion will be on individual specimens and their daily welfare in the agricultural industry.

The origins of the animal welfare movement began in a time of intellectual and philosophical renaissance. The Age of Enlightenment was momentous for the development of numerous civil rights, and saw a shift in the attitudes towards animals.⁷ Philosophers began to question the presumption that animals were exclusively seen as property for human utility, and began to give animal rights a more deliberate recognition.⁸ Cruelty to animals developed as a social cause along with the abolition of slavery, child welfare, prison reform, and care for the elderly.⁹ It was posed that a creature's need for considerate treatment did not depend on the possession of a soul or the ability to reason, but on the capacity to feel pain.¹⁰ This shift meant that animals were no longer only deserving protection for the utility to man, but through an inherent value.

⁶ Christian Nawroth and others, 'Farm Animal Cognition – Linking Behaviour, Welfare and Ethics' (2019) 6 Front Vet Scie 24.

⁷ Nathaniel Wolloch, 'Animals in Enlightenment Historiography' (2012) 75 University of Pennsylvania Press 1 at 53.

⁸ Raymond Giraud, 'Rousseau and Voltaire: The Enlightenment and Rights' (1995) Stanford University at 4.

⁹ Gerald Carson, *Men, Beasts and Gods*, (1972).

¹⁰ Elaine Hughes & Christiane Meyer, 'Animal Welfare Law in Canada and Europe' (2000) 6 Animal Law 23 [Hughes].

Following the enlightenment of the late 18th Century, legal recognition was needed to reflect the shifting values of the public. In the 19th Century, England was the first country to formally legislate protection against unnecessary suffering of animals. In 1822, the British Parliament passed *Martin's Act*, the first anti-cruelty statute directly meant to protect livestock.¹¹ Consolidated in 1911 as the *Protection of Animals Act*, it remains the principle statute in England for anti-cruelty towards animals. Despite this early progress, animal rights did not see significant momentum in North America or Europe until massive social reform during the 1960s. The movement had two diverging priorities, including animal welfare and animal rights.¹² Advocates who believe in animal rights believe in an animal's natural right to life, and seek to establish basic rights to stop the exploitation of animals by humans. Contrastingly, those who believe in animal welfare accept the human use of animals, as long as it is conducted in a humane manner.

Industrial Agricultural System

Farming began as a way of life, in which each family unit was responsible for their own food production. The 18th Century saw the shift in production methods due to the Agricultural Revolution. Technological improvements and scientific developments allowed the capability to support more livestock in larger farm operations.¹³ The available farmland increased due to changes in landholding patterns spurred on by the new methods of cultivation. Developments in farming lead to the shift from small scale privately owned farming operations, to large profit motivated corporations. Throughout the developing world, farm businesses increased in size in order to reduce costs per unit of production. No longer were the majority of farms traditional agrarian models, in which families engaged in decentralized subsistence farming to provide for themselves.

The new standard is an industrial farming model, using technology in order to enable mass production and intensive livestock production. The majority of food

¹¹ Simon Brooman and Debbie Legge, *Law Relating to Animals* (Cavendish Publishing: 1997) at 42.

¹² 'Brief History of the Animal Protection Movement,' World Animal Net, online: <<http://worldanimal.net/brief-history>> accessed 4 August 2019.

¹³ 'Jethro Tull and the Agricultural Revolution' (11 February 2015) Intriguing History, online: <<https://www.intriguing-history.com/jethro-tull/>> accessed 4 August 2019.

throughout the developed world is now being produced by a small percentage of mass-scale farm businesses.¹⁴ Intensive animal agricultural methods are the norm in Europe and North America, and are increasingly common in Asia and Latin America.¹⁵ According to the UN, CAFOs account for 72% of poultry, 42% of egg, and 55% of pork production internationally.¹⁶ Intensive livestock farms, also called Concentrated Animal Feeding Operations (CAFOs) raise animals in confinement at high stocking density. Confinement production raises animals in structures that are isolated from the outside environment, and make use of mechanical or automated systems for ventilation, waste handling, feeding and watering. This shift to commercial farming allows a decreased reliance on human labor, while increasing the efficiency of production through mechanized and automated farming. The rise of industrialized ‘mega farms’ has allowed cheaper food and lower production costs, while simultaneously allowing the disengagement of consumers with the animals that are being slaughtered for their consumption.

Confinement production has been widely adopted in industrialized countries; however, they quickly became a focus of public concern. Scrutiny from animal welfare advocates is focused on the extreme confinement and management of animals. The reality is that an increasing number of livestock operations are ‘zero-graze’, spending most or all of their time indoors in large warehouse type facilities. In confinement production, the higher the stocking density, the higher the profits but the more difficult it is to meet specific animal needs.¹⁷ Many of the major animal welfare issues can be directly attributed to high confinement systems. Confinement systems are associated with higher injury and mortality rates, as well as higher prevalence of aggression and other stress-related behaviors.¹⁸ It was quickly recognized that industrial agriculture needed a strict regulatory landscape.

¹⁴ Bill Brown, 'Large-scale farms account for most of the production in the sector, but agricultural policy must also reflect the unique needs of the smaller players' (5 May 2017) Policy Options, online: < <https://policyoptions.irpp.org/magazines/may-2017/farm-size-and-agricultural-policy/>> accessed 31 July 2019.

¹⁵ Danielle Nierenberg, 'Rethinking the global meat industry,' In: L Starke, 'State of the World' (2006) Nortonj & Company.

¹⁶ Fiona Harvey and others, 'Rise of Mega Farms: How the US Model of Intensive Farming is Invading the World' (18 July 2017) The Guardian, online: <www.theguardian.com/environment/2017/jul/18/rise-of-mega-farms-how-the-us-model-of-intensive-farming-is-invading-the-world> accessed 23 July 2019.

¹⁷ 'Animal Welfare in the EU: Closing the Gap Between Ambitious Goals and Practical Implementation Special Report' (2018) European Court of Auditors at 16 [Auditors].

¹⁸ Amos, N and Sullivan, R, 'The Business Benchmark on Farm Animal Welfare Report' (2018) Chronos Sustainability Ltd at 7 [Amos].

The UK was the first to address the concerns of animal welfare advocates, in which they formalized a public policy on the issue with an *Act of Parliament* in 1968. The Act made it an offense to cause or permit unnecessary pain or distress to livestock and also commissioned the writing of Codes of Recommendations for the Welfare of Livestock.¹⁹ It is here we can illustrate the ongoing balance between industrial farming and animal welfare. The introduction of animal welfare legislation is inconsistent with the primary goals of CAFOs, in which efficiency and cost-reduction are prioritized.

Commoditization of Farmed Animals

The shift from small local farming to mass industrial systems has allowed for the commoditization of farmed animals, ultimately detrimental to the previously existing relationship between humans and the animals that provided them sustenance.²⁰ The lack of transparency in industrialized factories, due to private property protections, results in consumers being completely unaware of how the animal products they consume are actually produced. The industrial livestock system depends on consumers not understanding that animals qualify as fellow sentient beings who deserve empathy or attention.²¹ With growing consumer awareness of the outright disregard for animal welfare concerns within the agricultural industry, consumer demand may serve as the incentive for industries to engage in humane practices. Unfortunately, the legislation itself can serve as a barrier, such as in Canada, when it provides no incentive for humane practices and allowing agricultural corporations to formalize their own standards.

The categorization of animals as property is a legacy of the common law system, which Canada inherited from the UK. As a piece of property, animals are easily commoditized within the agricultural industry.²² The assumption that humans are able to own animals as property has never been directly asserted or proven, yet it

¹⁹ This series of litigation set the model for modern animal welfare regulation development, as exemplified in Canada's attempt to copy the British model.

²⁰ Heather McLeod-Kilmurray, 'Commoditizing Nonhuman Animals and Their Consumers: Industrial Livestock Production, Animal Welfare, and Ecological Justice' (2012) 32 *Bulletin of Science Technology & Society* 1 at 72 [McLeod-Kilmurray].

²¹ *Ibid* at 79.

²² *Supra* note 20 at 74.

is the inevitable premise on which legislation is created and interpreted.²³ For example, principles such as legal welfarism allow the interpretation of law in favour of the property owner maximizing the value of his own property, thereby, ‘... putting the fox in charge of the henhouse.’²⁴ As recognized by philosopher John Stuart Mill, inequality is seen as completely natural from the position of domination. “But was there ever any domination that didn’t appear natural to those who possessed it?”²⁵ Legislation that recognizes the sentience of animals challenges this presumption, ultimately giving animals their own inherent worth.

As property, animals are legal non-persons, objects relegated to instrumental status for the purpose of their owners. Let us not forget that hierarchy is reminiscent of a time in history when reliance on natural differences between diverse groups grounded legal distinctions, including: slaves, women, children, persons with disabilities, and First Nations peoples.²⁶ The oppression of farmed animals is not dissimilar than the domination of other vulnerable groups before they gained the status of legal persons. The ease in which western society finds the ability to classify vulnerable groups as undeserving is intolerable. An intersectional approach begs the question, why is it permissible that legislation allows for the institutionalized maltreatment of beings based on biological differences?

While this is descriptive of legal status of animals in North America, European countries have taken a different approach. The most significant difference is that the European Union has constitutionally recognized that animals are sentient beings and their welfare must be taken into account in law and policy making.²⁷ The Civil Codes of Austria, Germany and Switzerland contain provisions that specifically relate to the legal status of animals. For instance, Article 285 of the Austrian *Civil Code*, which became operational in 1988, provides that ‘animals are not objects, they are protected by special laws.’²⁸ It further provides that laws relating to objects, ‘do not apply to animals unless there is a contradictory provision.’ Similar provisions exist in the German and Swiss Civil Codes.²⁹ These provisions have modified the degree to which

²³ Lesli Bissgould, *Animals and the Law* (2011) Irwin Law at 7 [Bissgould].

²⁴ *Ibid* at 49.

²⁵ John Stuart Mill, *The Subjection of Women* (London, UK: 1869) at 7.

²⁶ Bissgould, *supra* note 23 at 50-51.

²⁷ McLeod-Kilmurray, *supra* note 20 at 74.

²⁸ General Civil Code of Austria (Allgemeines Bürgerliches Gesetzbuch) (ABGB), 1812 (1988 amendment), ABGB s 285. art 285.

²⁹ German Civil Code, Bürgerliches Gesetzbuch (BGB) 2 January 2002 (revised version) s 90;

animals are subject to the law of objects, however, they do not go as far as to place animals in the category of ‘persons’ under the law.

Farmed animals can be considered a particularly vulnerable population due to the arbitrary distinction that has been drawn between animals with perceived social value, and those without. The dichotomy results in farmed animals being confined to stalls and cages for the entirety of their lives, while protections are only afforded to them in an attempt to keep consumers safe.³⁰ As recognized by Ruth Harrison,

“...where a lot of people are unkind to animals, especially in the name of commerce, the cruelty is condoned and, once large sums of money are at stake, will be defended to the last by otherwise intelligent people.”³¹

This quote suggests the absurdity and hypocrisy in protecting animals with perceived social value while taking advantage of farmed animals for profit. The agricultural industry allows for their bodies to be commoditized, and their value is restricted to their fair market price.³² Any physical pain and cruelty is downplayed, and their emotional and psychological suffering denied.

Shifting Values Among Consumers

The change in production methods has opened the door for a shift in cultural values. Farm animals are no longer located on idyllic pastures kept by local families, they have been transported indoors and out of the sight of the consumers. The past half-century has seen increased scrutiny towards animal welfare, predominantly in industrialized countries. More recently, since 2000, attention to farm animal welfare has spread well beyond industrialized countries.³³ Most notably, in 2005 the 170 member states of the World Organization for Animal Health (OIE) unanimously passed their first animal welfare standards, and in 2009 the Food and Agriculture Organization of the United Nations (FAO) began visible engagement in promoting animal welfare among their member countries, especially in the developing world.

Swiss Civil Code, art 641a.

³⁰ Bisgould, *supra* note 23 at 2.

³¹ Ruth Harrison, *Animal Machines* (Oxfordshire, UK: 1964) Vincent Stuart Publishers Ltd at 5.

³² McLeod-Kilmurray, *supra* note 20 at 74.

³³ National Farmed Animal Health and Welfare Council, ‘A National Farm Animal Welfare System for Canada’ (2011), online: < http://www.ahwcouncil.ca/pdfs/animal-welfare-statement/NFAHWC%20animal%20welfare%20vision_cover%20page_2012.pdf > accessed 19 July 2019 [NFAHW].

The international recognition has fostered an increasing expectation, that animals will be raised, transported and slaughtered humanely, and that producers must be able to demonstrate adherence to the appropriate standards. There are increasing expectations of producers to demonstrate human standards in order to be competitive in the farming market, not only for moral reasons, but understanding that production methods affect meat quality.³⁴ This will understandably have a significant effect on the cost of production and efficiency. However, the general thought is that farmers should be compensated for the high production costs related to the improvement of animal welfare.³⁵ Consumers are increasingly aware of the inherent value of humanely raised and slaughtered products and the higher costs that these standards require.

A recent study shows the high degree of concern among European consumers for farm animal welfare, and their willingness to bear the costs of higher standards. The Eurobarometer was conducted between 25 member states, interviewing 29,152 citizens in 2016. Respondents were asked the level of importance that they personally assign to the protection of farmed animal welfare on a scale from 1 to 10. Here, a considerable majority of respondents answer towards the higher end of the scale, where a third saying that animal welfare is of the highest possible importance (rating of 10).³⁶ A majority showed a willingness to change their usual place of shopping in order to be able to purchase more animal welfare-friendly products.³⁷ Even further, 62% expressed their willingness to buying high welfare animal based products.³⁸ Consumers may be purchasing in this way due to the perception of such products as being healthier and of higher quality. There is also an ethical motivation to buy these products: animal welfare friendly products originate from animals that do not suffer (55% of the vote) and so buying these, help farmers treat their animals better (49%).³⁹ Animal welfare, in addition to health safety and quality of the meat, have led the

³⁴ Paola Sechi, and others, 'Animal Welfare: Data from an Online Consultation' (2015) 4 *Ital J Food Saf* 4 at 5504 [Sechi].

³⁵ *Ibid.*

³⁶ Special Eurobarometer, 'Attitudes of EU Citizens Towards Animal Welfare' (2016), European Commission, online: ec.europa.eu/commfrontoffice/publicopinion/index.cfm/ResultDoc/download/DocumentKy/71348 accessed 24 July 2019 at 2 [Eurobarometer].

³⁷ Eurobarometer, *supra* note 36 at 49.

³⁸ Sechi, *supra* note 34 at 5504.

³⁹ *Ibid.*

European public to find high animal welfare standards as a priority in their current consumer habits.

The purpose of the survey was to find out whether consumers would be willing to accept a higher price and change their purchasing habits because of animal welfare considerations. The surveyed population responded extremely positive to this, varying on how much they would be willing to pay. A majority of citizens polled are willing to pay a premium for higher-welfare products. Further, almost complete agreement was in response to imported products being subject to the same standards as those applied in the EU.⁴⁰ These findings are incredibly significant for arguing the protection of animal welfare standards as a established public moral.

2. Canadian Farm Animal Welfare

History

In order to understand the complex and multi-actor regulatory system for animal welfare in Canada, it is necessary to first discuss the historical development of the system. Animal welfare has been gaining traction in North America since the 1950s, when the public became increasingly aware of the extent of animal cruelty in typical agricultural practices.⁴¹ The *Humane Slaughter of Animals Act* in 1960 formally acknowledged the first standards for animal welfare. The *Act* was repealed in 1985 when alternative legislation concerning the humane slaughter of farm animals was incorporated under the *Meat Inspection Act* and Regulations. These regulations outline requirements for the humane treatment of animals leading up to slaughter, as well as humane methods of slaughter. While the early attempts to legislate were beneficial for slaughter and modes of transportation, it left a glaring gap of protecting animal health and safety while on the farm.

⁴⁰ Animal Welfare Infogroup, 'New Eurobarometer on Attitudes of Europeans Towards Animal Welfare' (16 March 2016) The European Parliaments Intergroup on the Welfare and Conservation of Animals, online: <www.animalwelfareintergroup.eu/2016/03/16/new-eurobarometer-on-attitudes-of-europeans-towards-animal-welfare/> accessed 14 August 2019.

⁴¹ 'Farm Animal Slaughter in Canada' Humane Canada, online: <https://www.humanecanada.ca/farm_animal_slaughter_in_canada> accessed 4 August 2019.

Regulatory Bodies

The National Farm Animal Care Council (NFACC) is the national leader in Canada for the codes of practice and farm animal welfare. The organization serves as a, ‘cohesive, capable body with an infrastructure and staff support,’ in order to address concerns about the farming industry.⁴² The NFACC has made significant progress in organizing multi-stakeholder involvement for the development of codes of practice, including government agencies, animal protection advocates, veterinary professionals, producers, and consumers. Its prominent activity is the revision of the Codes of Practice for the Care and Handling of Farm Animals. The NFACC is in a great position to play a central role in leadership for reform of farm animal welfare, with the broad involvement of members as well as an extensive mandate to provide a national approach.

Despite being an ideal position to provide guidance, the NFACC’s role and efficacy has been quite limited. The daily operations are largely funded through membership dues and reliance on temporary and project based funding related to the revision of the Codes of Practice. Therefore, there is a significant risk that the lack of consistent and predictable funding will prevent the NFACC from fulfilling its leadership potential.⁴³ There is also a risk that industry support for animal welfare activities will become diluted over competing initiatives across various areas of animal welfare protection.

To ensure accountability of the agricultural industry, the Canadian Food Inspection Agency (CFIA) is dedicated organ. Their mandate provides for safeguarding food, animals, and plants, which enhances the health and well-being of Canada’s people, environment, and economy.⁴⁴ The CFIA administers thirteen Federal Acts and their regulations. In regards to inspection of humane slaughter and transportation of animals, they work in tandem with provincial officials, their enforcement staff, or non-government organizations in jurisdictions.⁴⁵

⁴² NFAHW, *supra* note 33 at 15.

⁴³ *Ibid* at 17.

⁴⁴ Canada Food Inspection Agency, ‘Compliance and Enforcement Operational Policy’ Government of Canada, online: <<https://www.inspection.gc.ca/about-the-cfia/accountability/compliance-and-enforcement/operational-policy/eng/1326788174756/1326788306568>> accessed 4 August 2019.

⁴⁵ Many provinces/territories have animal protection enforcement officials who, although active in areas where animal transportation occurs, are not empowered to enforce the federal Transportation of Animals Regulations.

Current Standards in Canada

Canada has been considered by the international community to have a relatively weak animal welfare protection regime. The World Animal Protection Agency has graded Canada with a ‘D,’ which can largely be attributed to weaknesses in its legislative framework.⁴⁶ Demonstrating adherence to animal welfare standards is challenging due to the complex interplay between criminal and non-criminal animal protection law, regulations for transportation and slaughter, and Codes of Practice principally for on-farm production.⁴⁷ In situations of neglect and other unacceptable treatment of animals, it is unclear which is the appropriate enforcement body and whether it falls under provincial or federal jurisdiction.

Anti-cruelty legislation in Canada prohibits causing any unnecessary pain and suffering towards animals. In prohibiting only what is considered ‘unnecessary,’ the legislative landscape consequently creates an allowable amount of pain and suffering necessary and normalized within the farming industry.⁴⁸ The determination of what is ‘necessary’ is reliant on the very corporations involved in the agricultural production, as governments have opted to defer their authority to standards created by the industry itself.⁴⁹ The application of anti-cruelty provisions looks only to a specific act, while failing to consider the broader context surrounding the animal use and living conditions. The agricultural industry is able to conduct their business practices within this gap, allowing for an acceptable standardized violence for farm animals.

The final area of standards that must be discussed is the National Codes of Practice. The Codes serve as the national understanding of animal care requirements and recommended practices. The Codes were written as voluntary guidelines and they have achieved a broader degree of recognition in two ways: (1) they serve as the basis of national, industry-driven Animal Care Assessment programs for some species, (2) requirements specified in Codes may provide guidance for courts in identifying ‘generally accepted practices’ of animal management. Therefore, adherence to the requirements of Codes may provide a defense for industries accused of animal cruelty.⁵⁰ Nevertheless, there continues to be confusion over the application of the

⁴⁶ ‘Canada,’ World Animal Protection Index, online:

<<https://api.worldanimalprotection.org/country/Canada>> accessed 4 August 2019.

⁴⁷ NFAHW, *supra* note 33 at 5.

⁴⁸ Bisgould, *supra* note 23 at 3.

⁴⁹ Bisgould, *supra* note 23 at 49.

⁵⁰ NFAHW, *supra* note 33 at 5.

Codes, as provinces and territories vary in how they reference the codes in animal protection law.

Legislation

1. *Criminal Code of Canada*

Federal animal protection law is found in the *Criminal Code of Canada*.⁵¹ The provisions regulate the transport of animals, humane handling and slaughter at abattoirs that are inspected by the Canadian Food Inspection Agency. The anti-cruelty provisions set out within the *Criminal Code* are of general application, applying to all animals and industries. While these provisions acknowledge that animals have an interest in being subject to as little pain and suffering as possible, they recognize the breadth of allowable violence for human utility.⁵² Cruelty towards animal provisions are set out in sections 445.1, 446, 447, and 447.1, however at no point is the word ‘cruelty’ defined within the provisions.⁵³ Generally these vague provisions have been interpreted to include willfully killing, maiming, wounding, poisoning, or injury cattle,⁵⁴ and willfully causing unnecessary pain, suffering or injury to an animal.⁵⁵ Despite the lack of clarity within the *Criminal Code* provisions, the use of the concept of ‘necessary suffering’ is thoughtlessly accepted for the purposes of which the animal is put to use.⁵⁶ In this case, the intended use is human consumption. The broad definition of ‘necessary’ allows for the weighing between human use and animal suffering.⁵⁷ This language permits the infliction of a certain amount of pain for the benefit of the consumer, consistent with a utilitarian approach.

Enforcement through the *Criminal Code* has been troublesome for many reasons, including: failure to encourage compliance, overly cumbersome, time consuming, expensive, failure to recognize animal sentience, and relying primarily on punishment as a deterrent.⁵⁸ The mens rea for these anti-cruelty provisions is a higher

⁵¹ *Criminal Code*, RSC 1985, c C46, Part XI [*Criminal Code*].

⁵² Bisgould, supra note 23 at 58.

⁵³ *Criminal Code*, supra note 51 at ss 445, 446, 447.

⁵⁴ *Criminal Code*, supra note 51 at s 445.

⁵⁵ *Criminal Code*, supra note 51 at s 445.1(1)(a).

⁵⁶ Bisgould, supra note 23 at 70.

⁵⁷ Hughes, supra note 10 at 55.

⁵⁸ Mohan Prabhu, Efficacy of Administrative Monetary Penalties in Compelling Compliance with Federal Agri-Food Statutes (2011) Faculty of Law at 157 [Prabhu].

standard of willfulness, known as ‘wilful neglect’, resulting in an increasingly high burden on the Crown to establish that the accused intended the outcome or virtually knew it certain to occur.⁵⁹ This suggests that the *Criminal Code* is inherently protecting the rights of animal owners, rather than lowering the standard of proof to allow animal cruelty charges to be litigated successfully. The concept of ‘willful neglect’, results in an ongoing lack of clarity and a barrier in successfully prosecuting animal cruelty offences.

2. Provincial Legislation

Most animal welfare legislation in Canada exists at sub-national level, typically by provincial and territorial governments. The *Constitution Act* of 1867 gives the provinces power to make laws with respect to ‘property’ and ‘all matters of a merely local or private nature in the province.’⁶⁰ Animals are considered property under the law, and therefore the provinces have jurisdiction to adopt their own regulatory system over animals kept within that province.⁶¹ Provincial animal welfare laws often include provisions that: (1) describe a duty of care toward animals, (2) prohibit causing or permitting animal distress, (3) specify exemptions from prosecution, and (4) reference various national and other standards. Across the ten provinces and three territories within Canada, there is often lack of consistency in the protection afforded to farmed animals.⁶²

Despite the differing attempts to afford protection to farmed animals, provincial legislation is undermined by the exemptions for agricultural industry standards.⁶³ The provincial animal welfare laws explicitly exempt most forms of institutionalized exploitation, allowing for the systemic pain and suffering of animals in Canada.⁶⁴ Similarly seen in the federal legislation, industry norms and accepted practices are accepted and serve as a barrier in the enforcement of any animal welfare provisions. Consequently, anti-cruelty laws are unable to reduce systemic violence

⁵⁹ Bisgould, *supra* note 23 at 69.

⁶⁰ *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, s 92.

⁶¹ David Fraser and others, ‘Toward a Harmonized Approach to Animal Welfare Law in Canada’ (2018) CVJ 59 at 293 [Fraser].

⁶² *Ibid.*

⁶³ *Prevention of Cruelty to Animals Act* of British Columbia recognizes the National Farm Animal Care Council (NFACC) Code of Practice for the Care and Handling of Dairy Cattle as ‘reasonable and generally accepted practices of dairy farming.’

⁶⁴ Bisgould, *supra* note 23 at 71.

within the industry due to normalized pain and suffering on behalf of animals. Two examples of this failure are the *Farming and Food Production Protection Act* and the *Ontario Society for the Prevention of Cruelty to Animals Act*. Any amendments attempting to address the institutionalized maltreatment of farmed animals must first eliminate the deference given to the agricultural industry.

Weaknesses of the Canadian Welfare System

An examination of the regulatory bodies and legislation within Canada's animal welfare system elucidates significant weaknesses. These weaknesses have led to their international reputation for lower standards of welfare and agricultural production. These concerns are threefold, including: (1) the multiple attempts to address regulations have resulted in a fractured and incoherent system, (2) the responsibility for compliance is divided among various agencies, (3) the widely acknowledged concept of 'reasonable and generally accepted' practices.

1. Fractured and Incoherent System

The abundance of legislation which attempts to address animal welfare, as evidenced above, has resulted in a patchwork regulatory system. The standards are confusing to both agricultural industries and the public. Without clear guidelines, Canada is prevented from demonstrating a consistent approach to animal protection.⁶⁵ This fractured and incoherent situation allows producers, retailers and jurisdictions to adopt different standards and compliance programs. For example, the regulatory framework is distinct for the inspection of slaughter plants, depending on whether the plant is provincially or federally regulated, and which province has jurisdiction to regulate.⁶⁶ This complexity between differing standards creates no standardized practice across Canada. While some provinces may regulate and strictly enforce higher production methods, other provinces are notoriously known to have poor standards.⁶⁷

⁶⁵ Fraser, *supra* note 61 at 293.

⁶⁶ NFAHW, *supra* note 33 at 11.

⁶⁷ Dene Moore, 'Abuse of Cattle at BC Dairy Farm Prompts Industry "Disgust," Calls for Reform' (10 June 2014) *The Canadian Press*, online: <<https://www.theglobeandmail.com/news/british->

The Animal Legal Defense Fund released a study in 2017, which confirms the wide degree of disparity that exists between the provinces of Canada. The rankings rate the overall strength and comprehensiveness of the provinces animal protection laws. The report found that Alberta, Saskatchewan, Northwest Territories, and Nunavut were in the bottom tier.⁶⁸ This is a significant concern, as both Alberta and Saskatchewan are predominantly reliant on their agricultural industry. Alberta has the most cattle in Canada accounting for 41.6% of the national herd, followed by Saskatchewan at 30%.⁶⁹ This provides animal welfare advocates no clear assurance whether animal welfare standards are being protected in local agricultural products. The disparity between provinces suggests that while some provinces are more proactive in enforcing their provincial legislation⁷⁰, others are failing to meet expectations.

2. Responsibility for Compliance

Compliance and enforcement of agricultural standards is a responsibility that is shared by a number of agencies, most importantly, the NFACC and the CFIA. In addition to these two federal organizations, the provinces of Canada also have enforcement bodies and organizations. Unfortunately, the increasing number of organs claiming responsibility has created a complex area of jurisdiction. Both slaughter and transportation have been recognized as two areas of concern, due to the lack of clarity and consistent level of enforcement across the country.⁷¹ Escaping culpability for the transportation of animals is merely left to a question of jurisdiction, and allowing the provinces to argue amongst themselves over who is responsible for enforcement.

The ineffective enforcement of animal welfare regulations results in problematic practices that go unchecked. Government inspection is not a frequent

columbia/animal-cruelty-charges-urged-as-bc-dairy-suspends-workers-over-grisly-video/article19088343/> accessed 22 July 2019.

⁶⁸ '2017 Canadian Animal Protection Law Rankings' (2017) Animal Legal Defense Fund, online: <<https://aldf.org/wp-content/uploads/2018/06/2017-Canadian-Rankings-Report-1.pdf>> access 22 July 2019.

⁶⁹ Statistics Canada, 'Alberta Has the Most Beef Cattle in Canada and the Second Largest Total Farm Area' Government of Canada, online: <<https://www150.statcan.gc.ca/n1/pub/95-640-x/2016001/article/14808-eng.htm>> accessed 4 August 2019.

⁷⁰ Such as PEI, according to the 2017 Canadian Animal Protection Law Rankings.

⁷¹ NFAHW, *supra* note 33 at 7.

occurrence, and requirements under the regulations are rarely upheld.⁷² Animals are frequently rough-handled, frightened and subjected to repeated shocks with electric prods as they are moved toward slaughter. Animals are sometimes inadequately stunned, left partially conscious, before being hoisted upside down to have their throats cut. Such inhumane treatment has been documented extensively through research and, more recently, through undercover video footage taken at Canadian slaughter facilities.⁷³

Additionally the National Codes Practice have predominantly served as an educational tool for producers, rather a tool for compliance. The NFACC recently took a stronger stance in its Codes and adopted mandatory requirements.⁷⁴ Despite the stronger language, however, there is no legal means to ensure that the requirements in the Codes are followed. While Canada has national regulations pertaining to humane transport and humane slaughter, together with criminal law which prohibits acts of willful cruelty or neglect toward animals, there is no federal law that regulates methods of keeping animals on farms and that might give legal weight to the codes. Most provinces have some form of animal protection law, and several provinces reference the codes as appropriate standards.⁷⁵ However, in most cases the provincial legislation fails to make the requirements of the Codes mandatory.

3. 'Reasonable and Generally Accepted' Practices

Most jurisdictions within Canada allow industrial producers to access an exemption from prosecution as long as they follow industry accepted standards. All provinces⁷⁶ include an exemption for cases in which a person has followed 'reasonable and generally accepted practices' of animal management.⁷⁷ Other provinces include similar exemptions, such as the treatment of an animal is, 'reasonable in the circumstances' or that which is, 'consistent with a standard or code of conduct, practice, or procedure specified in Schedule A.'⁷⁸ There is a lack of

⁷² 'Three BC Dairy Workers Who Pleaded Guilty to Animal Cruelty Get Jail Time' (18 May 2017) The Canadian Press, online: <<https://www.ctvnews.ca/canada/three-b-c-dairy-workers-who-pleaded-guilty-to-animal-cruelty-get-jail-time-1.3420385>> accessed 21 July 2019.

⁷³ Ibid.

⁷⁴ 'Dairy Cattle: Code under Revision' National Farm Animal Care Council, online: <https://www.nfacc.ca/codes-of-practice/dairy-cattle> accessed 4 August 2019.

⁷⁵ David Fraser, 'Turning Science Into Policy: The Case of Farm Animal Welfare in Canada' (2015) 5 *Animal Frontiers* 3.

⁷⁶ All provinces and Yukon.

⁷⁷ Fraser, *supra* note 61 at 297.

⁷⁸ Fraser, *supra* note 61 at 297.

guidance on the interpretation of what is ‘reasonable’ or ‘generally accepted.’ These exceptions allow producers to argue their lack of culpability in following the accepted practices within their agricultural industry.

3. EU Animal Welfare

Our attention now turns to the regulation of animal welfare within the European Union (EU). The development of animal welfare policy in Europe can be attributed to the innovative work of the Council of Europe. Founded in 1949, the Council of Europe is an organization dedicated to facilitating human rights and unity across Europe. Member States are intended to use the organization as a forum for discussion of common social problems and facilitating harmonized policies.⁷⁹ Most notably, in the period between 1968 and 1987, Council members reached consensus on a number of animal protection issues, resulting in the adoption of six conventions. Five consisted of anti-cruelty standards, while the sixth addressed wildlife conservation.⁸⁰ As an organization dedicated to human rights, the Council recognized at a remarkably early date that animal welfare and the dignity of mankind are two interrelated concepts. Human beings owe a respect to their environment and the animals, which inhabit it. While the obligations established by the Council of Europe are exclusively moral, the EU has passed regulations, directives, and decisions on these Council Conventions.⁸¹ Additionally, these international agreements have proved extremely influential in domestic efforts, through both the Council of Europe and the EU.

The early attempts to establish animal welfare standards were principally concerned with economic interests, as animal welfare concerns had not yet reached

⁷⁹ ‘About the Council of Europe Overview’ Council of Europe, online:

<<https://www.coe.int/en/web/yerevan/the-coe/about-coe/overview>> accessed 4 August 2019.

⁸⁰ European Convention for the Protection of Animals During International Transport (1968) TS No 65 as amended by Additional Protocol Europe TS No 103; European Convention for the Protection of Animals Kept for Farming Purposes (1976) TS No 87 and Protocol of Amendment, Europe TS No 145; European Convention for the Protection of Animals for Slaughter (1979) TS No 102; Convention on the Conservation of European Wildlife and Natural Habitats (1979) TS No 104; European Convention for the Protection of Vertebrate Animals Used for Experimental and Other Scientific Purposes (1986) TS No 123 and Protocol of Amendment, Europe TS No 170; and European Convention for the Protection of Pet Animals (1987) TS No 125.

⁸¹ European Conventions: 87 (farm animals), 65 (transport), 102 (slaughter) and 123 (experimentation).

the level of community objectives.⁸² The EU member states were left to regulate animal welfare in their own jurisdiction, due to the substantial differences in animal welfare philosophies. Despite original disagreement and debate over animal regulation, slowly member states began to recognize the need for improvement of animal welfare and the official recognition of animals as sentient beings.⁸³ The European agreements reflect a compromise of various welfare standards, based on the notion that an improvement of the quality of human life also entails the respect for animals in the member states.⁸⁴ Now that animal welfare standards are recognized as a community standard across all member states, it is left to the EU to set standards and enforce standards across all European agricultural industries.

European Union

The EU is known to be the leader in developing an innovative legislative model on animal welfare. The legislation aims to improve the quality of animals' lives, while also meeting citizens' expectations and market demands through the administration of minimum standards. The application of this legislative model is twofold: (1) the EU has access to three legal instruments in order to maintain member state compliance with the minimum standards, and (2) member states are given jurisdiction over enforcement and implementation of the minimum standards. The delegation of authority to member states is significant for the strategy, as it was early recognized that dissemination must be prioritized in order to ensure consistent application of high standards.⁸⁵

As an increasingly powerful global actor, the EU is held to incredibly high standards in facing the challenges of globalization. The sheer size of the EU's market gives it incomparable influence on international trade issues. Therefore, it is

⁸² Caroline Jackson, 'Europe and Animal Welfare' In: Derek Blackman, *Animal Welfare Law* (1989) 222 [Jackson]. The six Conventions cover transport (1968), farm animals (1976), slaughter (1979), wildlife (1979), experimentation (1986), and pets (1987) at 227.

⁸³ Consolidated Version of the Treaty of the European Union, Preamble of Protocol 33, 2010 OJ C82/01.

⁸⁴ Jackson, *supra* note 82 at 224.

⁸⁵ 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the European Union Strategy for the Protection and Welfare of Animals 2012-2015' (2012) European Commission, online: <https://ec.europa.eu/food/sites/food/files/animals/docs/aw_eu_strategy_19012012_en.pdf> accessed 4 August 2019.

significant that the EU continues to recognize promoting animal welfare and fair competition as one of its priorities.⁸⁶ Promoting EU values, in order to raise awareness and encourage high animal welfare standards, drives the EU's international commitment to animal welfare. This is mutually beneficial for the EU and other countries, as improving animal welfare as an international standard contributes to ensuring fair competition between EU and non-EU competitors.

Launched in 1962, the EU Common Agricultural Policy (CAP) serves as the main policy for food and the environment for all EU member states. Notably, the CAP serves to educate farmers' to their legal obligations and incentivize them to pursue higher standards.⁸⁷ The legal basis for CAP is formalized in the Treaty on the Functioning of the European Union (TFEU) and is managed by the European Commission's department on agriculture and rural development. CAP is able to contribute to animal welfare objectives by ensuring cross-compliance and financing projects for animal welfare. Cross-compliance is the main mechanism of CAP, linking subsidy payments to a set of minimum requirements on the environment, maintaining land in good agricultural condition, animal welfare, and animal health. This penalty system does not apply to small farmers, who continue to represent approximately 40% of the total number of EU farmers.⁸⁸ By excluding small local farmers, the CAP is able to provide financial incentives for mass agricultural industries to ensure the maintenance of high animal welfare standards.

European Union Treaties

There are two principal treaties significant for the recognition of animal welfare, including: (1) the Treaty of Amsterdam, and (2) the Treaty of Lisbon. Due to these two treaties, all animals are recognized in the EU as sentient beings. Sentience acknowledges that animals are not just goods, products, or possessions, but have some

⁸⁶ 'Report from The Commission to The European Parliament And The Council: On The Impact Of Animal Welfare International Activities On The Competitiveness Of European Livestock Producers In A Globalized World' (2018) European Commission, online: < <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:0042:FIN>> accessed 25 July 2019.

⁸⁷ Auditors, *supra* note 17.

⁸⁸ Regulation EU No 1306/2013 of the European Parliament and of the Council of 17 December 2013 OJ L 347, 2013 at 549. Small farmers are however not exempt from complying with the applicable animal welfare legislation and are subject to official inspections verifying their compliance with that legislation.

intrinsic value and must be treated accordingly. The principle should therefore underlie all EU legislation and policy that has any bearing on living animals.

In 1997, a Protocol on the Protection and Welfare of Animals was annexed to the Treaty of Amsterdam.⁸⁹ The Treaty, agreed in June 1997, was officially signed by member states of the EU on 2 October 1997 and entered into force on 1 May 1999. The Protocol serves as the first recognition of animals as 'sentient beings' in European law.⁹⁰ The recognition of animals as sentient is particularly meaningful, recognizing their feelings, suffering, and well-being. The Protocol of 1997 creates clear legal obligations to pay full regard to the welfare requirements of animals as sentient beings. However, the Protocol is not a legal basis for introduction of specific legislation to improve animal welfare. All animal welfare legislation of the EU must be based on other objectives of EU policy, such as the CAP. This suggests that animal welfare continues to be a lesser priority than other issues, such as the environment or consumer affairs.

The Treaty of Lisbon came into force in 2009. It amended the Treaty on the Functioning of the European Union (TFEU) and introduced the recognition of animals as 'sentient beings.' The recognition of animals, not merely as property, is a momentous gain for animal welfare. The Protocol Concerning Protection and Welfare of Animals, as mentioned above, is modified and incorporated as Article 13.⁹¹ Article 13 applies to policies that affect animals both directly and indirectly. Nevertheless, the recognition within the Treaty of Lisbon still only provides for very general rules, and fails to provide the legal basis for measures relating to animal welfare.

Competence between the EU and Member States

The enforcement of animal welfare regulations falls within the principle of the subsidiarity. In areas in which the EU does not have exclusive competence, the

⁸⁹ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Final Act 1997 OJ C 340.

⁹⁰ Prior to this Protocol, the only reference to animal welfare was in an EU declaration, which does not create any legal obligation on member states.

⁹¹ Article 13: "In formulating and implementing policies of the Union in the field of agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and Member States take full account of the requirements for the welfare of animals as sentient beings, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage."

principle of subsidiarity⁹² defines the circumstances in which it is preferable for action to be taken by member states, rather than the EU. This principle seeks to safeguard the ability of member states to take decisions and action, in order to ensure the powers are exercised as close to the citizen as possible.⁹³ The divide of legislative responsibilities provides that EU member states are responsible for the day-to-day enforcement of their own national legislation. This leaves the responsibility to transpose EU directives into national legislation to member states.⁹⁴ Meanwhile, the EU is responsible for ensuring proper implementation and oversight.

The EU has access to three types of legal instruments to ensure member state compliance, including: regulations, directives, and decisions.⁹⁵ If a regulation is passed, it becomes binding law within all member states and prevails over conflicting domestic legislation. Directives are not internalized in the same way as regulations. When a directive is issued, it binds the governments of member states without automatically becoming national law. Member states are then obliged to enact domestic laws of their choice to implement the standard set out in the directive. Decisions are of somewhat unclear effect, but if a decision is made by the EU to join an existing treaty, the EU member states should bring their national laws into compliance with the treaty. Despite these mandatory obligations flowing through EU law, the failure of member states to transpose and apply EU law is frequent.⁹⁶ This can have a significant effect on ensuring consistency in animal welfare standards.

In regards to the jurisdictional divide between the EU and member states, the EU maintains authority for legislating areas such as rearing, transport, slaughter of farm animals, and specific requirements for certain species.⁹⁷ The EU currently has a series of regulations and directives covering different species at all stages of the farming process, to guarantee minimum levels of protection. Council Directive 98/58/EC formalizes the minimum standards for the protection of all farmed animals,

⁹² European Union, *Treaty on European Union (Consolidated Version)*, *Treaty of Maastricht*, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002 [TEU].

⁹³ TEU, supra note 92 at art 10(3).

⁹⁴ 'Legislative Aspects of Farm Animal Welfare,' European Commission, online: <https://ec.europa.eu/food/animals/welfare/legislative_aspects_en> accessed 26 July 2019.

⁹⁵ EU Legal Instruments, Eur-Lex, online: <https://eur-lex.europa.eu/summary/glossary/community_legal_instruments.html> accessed 4 August 2019.

⁹⁶ Collette Vogeler, 'Why Do Farm Animal Welfare Regulations Vary Between EU Member States? A Comparative Analysis of Societal and Party Determinants in France, Germany, Italy, Spain and the UK' (2018) 57 JCMS 2 [Vogeler].

⁹⁷ 'Animal Welfare in Practice,' European Commission, online: <https://ec.europa.eu/food/animals/welfare/practice_en> accessed 25 July 2019.

and additional directives are provided for specific animals. Additionally, EU wide bans are in place to protect against the worst forms of cruelty.⁹⁸ For example, a recent directive on pigs prohibited the use of gestation stalls for sows as of January 1, 2013.⁹⁹

Member State Responsibilities

As recognized above, each individual member state is responsible for transposing regulations and directives into their domestic law. Member states are required to implement these minimum standards and oversee animal owners.¹⁰⁰ The minimum standards set in Council Directives, allow member states the flexibility to adopt a stricter approach, provided they are compatible with the EU mandatory standards. For example, thirteen member states have adopted additional national measures on slaughter.¹⁰¹ As a generalization, scholars have recognized that northern European laws are more strictly concerned with animal welfare, while southern and eastern European laws are aimed primarily at protecting human proprietary interests in animals.¹⁰² Requiring member states to abide by minimum standards has effectively ensured that no state goes below the regulated standard, however, it also provides the opportunity for states to deviate considerably.

Austria provides an excellent example of a member state that has enacted legislation beyond the minimum standards. Austria has been known to have relatively high standards of animal welfare and has received the highest rating from the Animal Protection Index. The Austrian *Animal Welfare Act* of 2004 is the country's principal legislation.¹⁰³ The aim of the *Act* is the protection of life and welfare of animals, as a responsibility that mankind bears to animals as fellow creatures of mankind. While the concept of sentience is not explicitly defined, the *Act* does recognize physical and mental aspects of animal sentience by prohibiting the infliction of unjustified pain,

⁹⁸ Canadian Centre for Policy Alternatives, 'Making Sense of CETA – 2nd edition' (2016) Powershift CCPA at 54 [Making Sense].

⁹⁹ Ivana Katsarova, 'Animal Welfare Protection in the EU' (2013), Library of the European Parliament, online: <europa.eu/RegData/bibliotheque/briefing/2013/130438/LDM_BRI(2013)130438_REV1_EN.pdf> accessed 26 July 2019, at 3.

¹⁰⁰ Animal owners and keepers are required to take reasonable steps to ensure the welfare of animals under their care and to ensure that those animals are not subject to any unnecessary pain, suffering, or injury.

¹⁰¹ Auditors, *supra* note 17 at 8.

¹⁰² Hughes, *supra* note 10 at 42.

¹⁰³ *Federal Act on the Protection of Animals (Animal Protection Act – TSchG)* (2004), Part I, No118.

suffering or injury to animals and exposure of animals to ‘heavy fear.’¹⁰⁴ Additionally Article 13 requires animals to be kept in ways that correspond to their physiological and ethological needs, including satisfying the need for social contact. Austria’s legislation provides an implicit recognition of equivalence between humans and animals, while fulfilling the EU obligation to consider the sentient nature of animals.

Enforcement

Enforcement is an area of joint responsibility, requiring both member state and European Commission¹⁰⁵ participation. The Directorate General for Health and Food Safety (DG SANTE) is the European Commission department responsible for policy and monitoring state implementation of EU legislation. Member states are responsible for applying EU animal welfare laws at a domestic level, including the responsibility to carry out official inspections.¹⁰⁶ In addition to conducting regular inspections on farms and during transport, member states are required to engage in annual reporting to the Commission.¹⁰⁷ This leaves a large portion of implementation up to the member state. Any member state that fails to correctly implement EU legislation is subject to legal action from the Commission.

The European Commission is able to conduct enforcement throughout the Union through three main bodies, including: (1) the Food and Veterinary Office, (2) the Standing Committee on the Food Chain and Animal Health, and (3) the European Food Safety Authority.¹⁰⁸ The Food and Veterinary Office is designated to implement inspections and controls, and to ensure that competent authorities in member states apply EU legislation in an effective and uniform manner. The Standing Committee on the Food Chain and Animal Health provides a public forum for representatives of member states to bring issues of animal health and welfare to the forefront, and if

¹⁰⁴ ‘Austria’ World Animal Protection, online: <<https://api.worldanimalprotection.org/country/austria>> accessed 30 July 2019.

¹⁰⁵ The European Commission is the executive body of the European Union. It is responsible for developing legislation and enforcement of the treaties of the EU.

¹⁰⁶ Performed in accordance with Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules (OJ L 165, 30.4.2004, p. 1). The legislation does not require a minimum control rate for animal welfare inspections.

¹⁰⁷ Animal welfare in the EU: closing the gap between ambitious goals and practical implementation Special Report (2018) European Court of Auditors, at 10.

¹⁰⁸ ‘Legislative Aspects of Farm Animal Welfare’, European Commission, online: <https://ec.europa.eu/food/animals/welfare/legislative_aspects_en> access 27 July 2019.

necessary take emergency action. Lastly, the European Food Safety Authority is the organ used for scientific opinions.¹⁰⁹ These agencies allow the Commission to monitor the application, implementation, and enforcement of EU animal welfare legislation in member states.

Increasing international trade has caused the European community to experience growing apprehension about animal welfare regulations of countries outside the Union. European standards are ineffective and useless in international trade. EU animal welfare standards apply only to EU production, and not to imported products, subject to one exception.¹¹⁰ Therefore, when animals are exported for the purpose of trade, only certain requirements regarding their transport are applicable when they leave the EU. For all other animal welfare standards, the Commission has a very limited ability to persuade non-EU countries to conform to higher standards of animal protection.¹¹¹ Any animal welfare provisions in subsequent trade agreements are only agreed to out of a high level of cooperation in trade partners. As evidenced in the CETA, which will be examined below, not all countries are willing to accommodate EU standards.

Weaknesses

Despite being known as an international leader in progressive animal welfare protection, the EU suffers from the weaknesses of a multi-actor regulatory system. The European Court of Auditors issued a report in 2018 assessing the Commission's achievements in ensuring animal welfare compliance within the agricultural industry. The Auditors report further validates concerns voiced by the animal welfare movement, such as the shortcomings of EU animal welfare legislation and their enforcement mechanisms.¹¹² The report was ordered in response to the Eurobarometer of 2016, showing overwhelming support of European citizens for improved animal

¹⁰⁹ Auditors, *supra* note 17 at 25.

¹¹⁰ Standards of Slaughter as formalized in Article 12 of Regulation (EC) No 1099/2009 on the protection of animals at the time of killing.

¹¹¹ 'Report from The Commission to The European Parliament And The Council: On The Impact Of Animal Welfare International Activities On The Competitiveness Of European Livestock Producers In A Globalized World' (2018), online: < <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:0042:FIN> > accessed 25 July 2019.

¹¹² 'European Court of Auditors Report Calls for Greater Animal Welfare Impact' (14 November 2018) EuroGroup for Animals, online: < <https://www.eurogroupforanimals.org/european-court-of-auditors-report-calls-for-greater-animal-welfare-impact> > accessed 27 July 2019.

welfare standards.¹¹³ More than 90% of EU citizens reported that they believe it is important to protect the welfare of farmed animals while 82% believe the welfare of farmed animals should be better protected than it currently is.¹¹⁴ Based on the findings of the Auditors report, the European Court of Auditors called on the Commission to take action to better align the use of public money with citizens' overwhelming support for farm animal welfare. While the audit recognized a number of successes and improvements, there are two areas of concern that I will discuss, including: (1) unreliable reporting of member states, and (2) late implementation of EU directives.

1. Unreliable Reporting

Member states are required to send reports to the Commission on an annual basis, containing the results of their mandated inspections on farms and transportation.¹¹⁵ There is significant room for improvement in the efficiency and quality of this reporting requirement. The Audit Report underlines the poor quality of monitoring data, which is often insufficient to provide a clear analysis or to provide corrective measures specifically to the member state's failures.¹¹⁶ While, the Commission is able to engage in occasional spot checks and audits,¹¹⁷ the official inspections are predominantly conducted by the member state. Failure of member states to engage in quality reporting and oversight of their producers is further compounded by preventing the Commission from adequately responding to failures of producers. The joint responsibility allows producers to take advantage of an area of regulation that suffers from a lack of proficient reporting.

2. Late Implementation

¹¹³ Reineke Hameleers, 'Animal Welfare Top of Mind: Eurobarometer 2016', EuroGroup for Animals, online: <<https://www.eurogroupforanimals.org/eurobarometer>> access 27 July 2019.

¹¹⁴ DG SANTE, 'Special Eurobarometer 442 Report: Attitudes of Europeans towards Animal Welfare' (2015) European Commission, online: <<http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/ResultDoc/download/DocumentKy/71348>> accessed 27 July 2019.

¹¹⁵ Annex II presents an overview of the results of inspections reported by the Member States visited.

¹¹⁶ Supra note 112.

¹¹⁷ Enforcement, The European Parliament's Intergroup on the Welfare and Conservation of Animals (2013), online: <<http://www.animalwelfareintergroup.eu/issues/enforcement/>> accessed 25 July 2019.

The area of most significant concern is the uniform application of animal welfare standards across all member states. Efforts to improve animal welfare can be seriously impeded by the manner in which the legislation is being enforced in practice. Late implementation or unreliable enforcement can render the legislation ultimately futile. Some of the areas of difficulty include: (1) routine tail docking of pigs, (2) compliance with long distance transport rules and transport of unfit animals, and (3) derogation from slaughter¹¹⁸ and inadequate stunning procedures.¹¹⁹ Live animal transport has been widely recognized¹²⁰ as a particularly difficult area to guarantee effective monitoring, due to its nature crossing borders and jurisdictions.

Despite member states obligation to transpose directives into national law, there may be difficulties in fulfilling this requirement right away. Delay can be the result of the high complexity of the directive itself, the structure of the national legislation, or policy specific factors.¹²¹ The European Court of Auditors assessed the timeliness of state responses to Commission's recommendations in the 2012-2015 audit reports on animal welfare. Of the five member states examined, the auditors found that they addressed almost half of the Commission's recommendations in two years or less.¹²² A period of two years allows for significant discrepancies between member states and industries within Europe.¹²³ Delayed implementation risks the fragmentation and divergence of animal welfare standards across European producers.

To serve as an example, Spain and Italy are two member states with particularly weak enforcement of EU animal welfare regulations. Both countries have no regulations that go further than the bare minimum requirements as mandated by the EU Directive. Spanish and Italian domestic law now contains animal welfare

¹¹⁸ Derogation: The practice of ritual slaughter as part of which an animal may be killed without first being stunned, which is authorized by way of 'derogation' in the European Union and solely in order to ensure observance of the freedom of religion, is insufficient to remove all of the animal's pain, distress, and suffering as effectively as slaughter with pre-stunning.

¹¹⁹ Auditors, *supra* note 17 at 6.

¹²⁰ 'Report on the implementation of Council Regulation No 1/2005 on the protection of animals during transport within and outside the EU,' European Parliament, 2018/2110(INI), online: <www.europarl.europa.eu/doceo/document/A-8-2019-0057_EN.html?redirect> accessed 4 August 2019.

¹²¹ Melanie Smith, 'Challenges in the Implementation of EU Law at National Level' (2018) European Parliament Briefing, online: <[europarl.europa.eu/RegData/etudes/BRIE/2018/608841/IPOL_BRI\(2018\)608841_EN.pdf](http://europarl.europa.eu/RegData/etudes/BRIE/2018/608841/IPOL_BRI(2018)608841_EN.pdf)> accessed 30 July 2019.

¹²² Auditors, *supra* note 17 at 26.

¹²³ DG SANTE, 'Evaluation of the EU Policy on Animal Welfare and Possible Policy Options for the Future' (2010) European Commission, online: <https://ec.europa.eu/food/sites/food/files/animals/docs/aw_arch_122010_full_ev_report_en.pdf> accessed 4 August 2019.

regulations, only subsequent to repeated demands from the EU to implement directives. Additionally, Spain has been the subject of repeated proceedings¹²⁴ by the EU, as a result of the failure to enforce EU regulations.¹²⁵ These two member states reveal the weaknesses of the joint responsibility of animal welfare enforcement across the EU. Efforts to improve animal welfare can be impeded by member states that fail to transpose and implement minimum standards in an effective and timely manner, only creating fragmentation and dilution of the high EU standards.

4. CETA

Development of CETA

The EU and Canada have an extensive history of conflict over agricultural standards. This is, of course, a reference to the hormone dispute, which began in 1996. The dispute has finally come to an end with cooperation and liberalization through the EU/Canada Comprehensive Economic and Free Trade Agreement (CETA).¹²⁶ With its entry into force on September 21, 2017, the trade agreement has settled a 21-year disagreement over hormone treated meat. At the heart of the CETA agreement, Canada forfeits its right to reignite the complaint, which alleged that the EU was breaching WTO rules by banning Canadian hormone treated beef.¹²⁷ Eventually it was agreed upon that Canada can raise exports to the EU to 50,000 tonnes of duty-free beef¹²⁸, as well as increased amounts of pork and wheat. The EU has been adamant throughout discussions, that CETA will not alter the way the EU regulates food safety, including prohibitions on genetically modified products or hormone treated beef.¹²⁹

CETA is encouraged as an agreement that will stimulate both markets and create growth, by fostering trade between Canada and the EU. As a regional free trade agreement, it will reduce tariffs in order to foster international trade. Upon a further

¹²⁴ The proceedings were in regards to the deficiencies in slaughter practices, failure to ban battery cages for laying hens, and no systemic monitoring of animals welfare by a government agency.

¹²⁵ Vogeler, *supra* note 96 at 2.

¹²⁶ CETA, *supra* note 1.

¹²⁷ Tom Miles, 'EU and Canada Settle Cattle Battle at the WTO' (3 October 2017) Reuters, online: <<https://uk.reuters.com/article/us-canada-eu-wto-meat/eu-and-canada-settle-cattle-battle-at-the-wto-idUKKCN1C81HY>> accessed 31 July 2019.

¹²⁸ The 50,000 tonnes of duty free beef must meet EU requirements.

¹²⁹ Miles, *supra* note 127.

examination of its provisions, it is clear that it is intended to go further than a traditional trade agreement. As acknowledged on the European Commission's website, CETA is intended to be exceptionally progressive, containing significant commitments to promote labor rights, environmental protection, and sustainable development.¹³⁰ These obligations are intended to be binding. By influencing domestic policies in both the EU and Canada, the agreement will limit regulation and burdens on businesses.¹³¹ As formalized in Chapter 5 objectives, measures (by either side) to ensure food safety and animal health should not create unjustified barriers to trade, but rather facilitate trade.¹³² CETA has been promoted to agricultural businesses of both parties as a way to open the door for international expansion.

The impacts on the agricultural industry will be significant, effectively ending all customs duties on food products. The agreement will benefit both European and Canadian companies by reducing 99% of the duties they have to pay at customs.¹³³ Europe will be able to export 92% of its agricultural and food products to Canada duty-free, allowing Canada to access European products for a lower price, and in the reverse. The European Commission has publicized this as an opportunity for European producers and farmers to access new export opportunities to a high-income market. Additionally, producers were assured that CETA continues to contain quotas for sensitive products such as beef, pork, and sweet corn for the EU, and dairy products for Canada.¹³⁴ All other imports from Canada will be required to meet EU rules and regulations on technical standards, consumer safety, environmental protection, and animal health.

As of September 21, 2017, CETA has provisionally entered into force. The agreement must be approved by the national parliaments in a majority of the 28 EU member states before becoming fully operative.¹³⁵ To date, 13 EU Member States have ratified CETA: Austria, Croatia, Czech Republic, Denmark, Estonia, Finland,

¹³⁰ 'CETA Explained' (21 September 2017) European Commission, online: <<http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/>> accessed 31 July 2019 [CETA Explained].

¹³¹ IATP, Greenpeace and CCPA, 'CETA, Regulatory Cooperation and Food Safety' (20 September 2017) Institute for Agriculture & Trade Policy, online: <www.iatp.org/documents/ceta-regulatory-cooperation-and-food-safety> accessed 31 July 2019 [IATP].

¹³² CETA, *supra* note 1 at article 5.2.

¹³³ CETA Explained, *supra* note 130.

¹³⁴ *Ibid.*

¹³⁵ IATP, *supra* note 131.

Latvia, Lithuania, Malta, Portugal, Spain, United Kingdom¹³⁶ and Sweden.¹³⁷ Until its entry into force, provisional application of the agreement will take place. While the majority of the agreement is already in force,¹³⁸ it awaits the remaining member states to ratify or cancel the EU's trade deal with Canada. The recent decision of the European Court of Justice found CETA in conformity with EU law,¹³⁹ and will likely lead to additional Member States approving the agreement.

Regulatory Cooperation

Turning now to the goals of the Agreement, regulatory cooperation is a fundamental principle of CETA, as formalized in Chapter 21. The institutionalized regulatory cooperation implemented in CETA aims to remove restrictions to trade through policy measures. The chapter encourages regulators to exchange experiences and information, and identify areas where they could cooperate even further. Regulatory cooperation can include many activities in order to eliminate differences between the countries regulations. This ensures the parties will engage in future cooperation on regulatory matters, typically through harmonization.¹⁴⁰ Cooperation will apply to all regulations relevant to trade in goods and services, including both the EU and member states.

CETA has delegated authority to a primary committee (CETA Joint Committee)¹⁴¹ and sub-committees (CETA Regulatory Cooperation Forum) to assist with the alignments of regulations.¹⁴² Both signatories are represented in these committees in order to fairly address regulations of both sides. New and existing laws will go through a burdensome process in order to converge or otherwise make them

¹³⁶ The UK ratified CETA on 8 November 2018, prior to its official exit from the EU. The UK is due to leave as per their extension on 31 October 2019, and with the signing of a withdrawal agreement.

¹³⁷ CETA, supra note 1.

¹³⁸ Areas not yet in force include: investment protection, investment market access for portfolio investment, and the Investment Court System.

¹³⁹ 'CETA Complies with EU Law – Austria Signs Free Trade Agreement with Canada' (2 May 2019) Vienna International News, online: <www.vindobona.org/article/ceta-complies-with-eu-law-austria-signs-free-trade-agreement-with-canada> accessed 31 July 2019.

¹⁴⁰ Peter-Tobias Stoll and others, 'The Planned Regulatory Cooperation Between the EU and Canada According to CETA Draft' (2015) Legal Opinion Commissioned by the Chamber of Labour at 2 [Stoll].

¹⁴¹ Joint Management Committee for Sanitary and Phytosanitary Measures. CETA, supra note 1 at article 5.14.

¹⁴² The Regulatory Cooperation Forum. CETA, supra note 1 at article 21.6.

equivalent.¹⁴³ The areas covered by regulatory cooperation are extensive and will have wide-ranging effects, including regulatory authorities that are covered by the TBT Agreement, the SPS Agreement, the GATT, the GATS, and other chapters of CETA.¹⁴⁴ Therefore, CETA opens an opportunity for foreign governments to express opinions in the creation of new domestic regulations, which could have a significant delay or prevention of new public interest legislation.¹⁴⁵

Regulatory cooperation within the European Union specifically, will prove quite challenging due to the unique nature of the Union as a formation of member states. CETA affects areas, which according to EU law, fall within the jurisdiction of the member states. The EU itself, but not the member states, is the signatory involved in regulatory cooperation. This creates a complex balancing act for the EU, on one hand, the EU will desire maintaining a unified foreign policy position in upholding CETA obligations, however, must also consider the right of member states to autonomously exercise the competences they are entitled to.¹⁴⁶ The conflict between state sovereignty and unified policy is recognized in the text of the agreement itself. Under Article 21.2, CETA explicitly states the intention not to limit the ability of each party to carry out regulatory, legislative, or policy activities, while parties are still obligated to further regulatory cooperation. As discussed above, member states have the authority to enact higher standards of animal welfare provided they comply with the minimum standards as set by the EU. This could prove quite challenging and potentially create tension between member states and the EU. This tension is not new. When realizing the legitimate claim of the EU to a unified external representation, the member states partial loss of sovereignty is unavoidable.

Pressure to Harmonize

While there are three predominant methods of regulatory cooperation, Article 21.4 relies on harmonization to eliminate differences across EU and Canadian regulations. This method establishes common standards intended to apply equally in

¹⁴³ Making Sense, supra note 98 at 43.

¹⁴⁴ CETA, supra note 1 at article 21.1.

¹⁴⁵ Making Sense, supra note 98 at 10.

¹⁴⁶ Stoll, supra note 140 at 19.

both economic regions, and replace existing national standards if necessary.¹⁴⁷ The use of harmonization in an international field has been limited, as it requires a high degree of willingness from the parties to agree on standards and abandon their national regulatory schemes. Harmonization can be characterized by compelling the adjustment of national regulations to common standards.

Pressure on the parties to harmonize is formalized in Chapter 21 of CETA, committing parties to participate in cooperative measures whenever is practicable and mutually beneficial. Article 21.2.6 states, '[p]arties may undertake regulatory cooperation activities on a voluntary basis.' One method in securing harmonization exists in Articles 21.4(b) and 21.4(e).¹⁴⁸ Referred to as the 'early warning system,' parties are required to consult and share information throughout the regulatory development process. Consultations must take place as early as possible in order to consider the objectives of the other party. A party is enabled to express its concern and disapproval for new regulations before the European Parliament has had a chance to approve them. This is a significant amount of authority to give a foreign entity over a domestic democratic institution.¹⁴⁹

(Voluntary) Obligation to Cooperate

As recognized in Article 21.2.6, regulatory cooperation activities are only required on a voluntary basis.¹⁵⁰ A party is authorized to refuse or withdraw cooperation if they choose. They are able to decline, but... '[i]f a Party refuses to initiate regulatory cooperation or withdraws from such cooperation, it should be prepared to explain the reasons for its decision to the other Party.'¹⁵¹ While this provides member states with the assurance that they will not be compelled to harmonize with other standards, the justification provided by the state will be subject to extensive critique.¹⁵² Article 21.5 states, '[a] Party is not prevented from adopting

¹⁴⁷ Stoll, supra note 140 at 7-8.

¹⁴⁸ CETA, supra note 1 at article 21.2.6.

¹⁴⁹ Making Sense, supra note 98 at 44.

¹⁵⁰ CETA, supra note 1 at article 21.2.6.

¹⁵¹ Making Sense, supra note 98 at 44.

¹⁵² Stoll, supra note 140 at 4.

different regulatory measures or pursuing different initiatives for reasons including different institutional or legislative approaches, circumstances, values or priorities...¹⁵³ While this provision should be reassuring, these exceptions fail to clarify what the standards will be to justify such refusal to cooperate. The lack of detail suggests that any refusal will be held to an incredibly high standard, justified by the ultimate goal of convergence and compatibility.

It is emphasized throughout CETA, that regulatory cooperation should not impair the right of contracting parties to autonomously stipulate protective standards. Despite assurances that the right to regulate will not be affected, this will prove a difficult mandate to keep and likely does not provide any genuine protection.¹⁵⁴ Through the mere existence of binding regulations regarding regulatory cooperation, the contracting parties regulatory sovereignty is limited to a certain extent.¹⁵⁵ The intention behind trade agreements is to allow each party to regulate within the scope of contractual parameters and in consultation with other contracting parties.¹⁵⁶ It must be considered how the right to regulate of each member state will be reconciled with a regulatory landscape so inherently different. Thus, the comprehensive protection of the right to regulate, apparently intended in the drafts of the agreements, can hardly be implemented to the extent that the text of the agreement sometimes suggests.

A wide-ranging refusal to cooperate on regulations could be prohibited under general international law. For example, if a member state's refusal to harmonize brought regulatory cooperation into question altogether, this could be considered a violation of international contract law, which prohibits the frustration of contracts.¹⁵⁷ International contract law requires the duty to fulfill contracts in good faith. While, the threshold for meeting these contract law breaches is incredibly high, these principles will likely be considered in the use of the CETA dispute resolution mechanism.¹⁵⁸

¹⁵³ CETA, *supra* note 1 at article 21.5.

¹⁵⁴ Stoll, *supra* note 140 at 2.

¹⁵⁵ *Ibid* at 11.

¹⁵⁶ *Ibid*.

¹⁵⁷ Stoll, *supra* note 140 at 5.

¹⁵⁸ With the formal approval of CETA, the dispute resolution mechanism and adjudication will also come into effect and can require member states to conform their behavior to the contract.

CETA and Effects on Animal Welfare

With an understanding of how CETA will affect the regulatory schemes of Canada and the EU, it is appropriate to now consider the effects upon animal welfare. CETA has become the target of progressive social justice groups and environmental organizations, which view the Agreement as a threat to democracy in both countries.¹⁵⁹ More than just a trade agreement, CETA is seen as a wide-ranging constitution-style document, restricting public policy options in areas such as food safety.¹⁶⁰ In Article 21.4(s), the Parties commit to undertake regulatory cooperation activities in a wide variety of areas, including by ‘exchanging information, expertise and experience in the field of animal welfare in order to promote collaboration on animal welfare between the Parties.’ It restricts governments’ ability to regulate in areas of public policy, allowing for the rights of corporations and foreign investors to be elevated above the broader public interest. The lack of attention given to animal welfare in the agreement, demonstrates the concerning reality that governments are willing to sacrifice ethical principles and social values in an effort to encourage international trade.

There are four significant areas of concern, including: (1) market access for Canadian agricultural products, (2) the difference in quality, (3) abandoning the precautionary principle, and (4) other concerns relating to Canada.

1. Market Access for Canadian Products

CETA quota increases will expose both Canadian and European farmers to considerable competitive pressure, which may encourage more profitable, but ultimately less sustainable and animal welfare conforming farming practices.¹⁶¹ The CETA provisions relating to reducing business costs and limiting regulations, in reality, mean stronger EU policies will be weakened under pressure from large Canadian agribusiness companies. Granting market access to foreign products will put small-scale farming and animal welfare friendly practices under severe pressure.¹⁶² The EU has opened its doors to sensitive agricultural products, which up until CETA,

¹⁵⁹ Making Sense, supra note 98 at 5.

¹⁶⁰ Making Sense, supra note 98 at 7.

¹⁶¹ Making Sense, supra note 98 at 11.

¹⁶² Making Sense, supra note 98 at 51.

had been protected from imports.¹⁶³ The ratification of CETA would be a severe setback for efforts to encourage non-industrial farming and sustainable agriculture in both Canada and the EU. Due to increasing competitive practices, farmers will have no choice but to engage in cost-reducing methods of production.

Production standards are widely known to be much higher in Europe than they are in Canada, and the larger number of small-scale farmers in Europe has a large influence on this. European standards continue to be high, banning growth hormones and antibiotics, resulting in significantly more expensive production methods.¹⁶⁴ Comparatively in Canada, economies of scale in meat processing have created horrendous sanitary conditions in giant processing operations that slaughter up to a million cattle a year at each plant. With the provisional application of CETA, EU small farmers will be driven into bankruptcy, as was seen in the 1980s across North America. Giant agribusinesses with 25-30% lower costs drove smaller farms out of business.¹⁶⁵ With the flood of cheaper Canadian agricultural products, European small-scale producers will be pressured to adapt to the changing market.

Despite CETA coming into provisional application in 2017, Canadian producers have not been able to take advantage of their newly increased duty-free quotas for pork and beef. The steep regulatory barriers and technical irritants frustrate new efforts to access European markets.¹⁶⁶ This largely depends on the Canadian farmer's ability to fill the new quota without the use of hormones, ractopamine, or carcass washes, and to be certified as 'EU Compliant.'¹⁶⁷ The problem is largely rooted in European health and quality standards, which still apply to Canadian products under CETA even as 93% of agricultural tariffs disappeared. Nevertheless, an increased quota provides plenty of incentive for Canadian producers to produce hormone-free meat for export. The ultimate increase in imports from Canada will put

¹⁶³ To date the EU agriculture associations have largely contained the economic cost-reduction pressure that has destroyed family farming smaller units in North America since the 1980's and replaced it with cartel formations of giant food industry.

¹⁶⁴ Making Sense, supra note 98 at 52.

¹⁶⁵ F William Engdahl, 'Austria's New Coalition Betrays on CETA Trade Agreement: Giant Agribusiness Threatens EU Family Farm' (28 May 2018) Centre for Research on Globalization, online: <<https://www.globalresearch.ca/austrias-new-coalition-betrays-on-ceta-trade-agreement/5642134>> accessed 31 July 2019 [Engdahl].

¹⁶⁶ Naomi Powell, "'Beef and Pork for Cheese Deal' Sours as Strict EU Health Rules Hinder Canadian Exports Under CETA' (23 May 2019) Financial Post, online: <<https://business.financialpost.com/news/economy/beef-and-pork-for-cheese-deal-sours-as-strict-eu-health-rules-hinder-canadian-exports-under-ceta>> accessed 31 July 2019 [Powell].

¹⁶⁷ Making Sense, supra note 98 at 53.

a significant pressure on European meat prices, in a market already categorized by a production surplus.

Canadian businesses have already voiced their discontent with the operation of the Agreement. The Canadian meat producing, packing and processing industries have complained of ‘technical barriers’ that remain in place even after CETA’s signing that prevent export of their products to the EU.¹⁶⁸ Despite the new opportunities afforded by the deal, pork and beef exports to Europe have hardly increased, despite being ‘one of the most important elements for Canada in this negotiation’ according to a summary of the CETA negotiations.¹⁶⁹ Canadian producers argue that subjecting their products to strict food safety standards is inconsistent with CETA. However, with the CETA Investment Court System,¹⁷⁰ Canadian businesses will be able to directly challenge EU and member state food safety laws on the basis of alleged discrimination or loss of potential profits. While EU food standards serve as a temporary barrier for Canadian agricultural products, these restrictions may not be effective for much longer with CETA’s full entry into force.

2. Quality Concerns

CETA poses a great threat to upholding food safety standards throughout the agricultural sector. Any attempt to harmonize regulations between the EU and Canada will allow standards to be lessened to the lowest common ground. Weakening regulations surrounding food production could lead to even further deregulation, in an attempt for all producers to remain profitable.¹⁷¹ Understandably, the deregulatory measures of CETA were strongly advocated by big corporations, intended to weaken the EU’s risk assessment standards for food products.¹⁷² For example, weakening regulations surrounding slaughtering practices would enable businesses to engage in more cost effective practices, making it profitable for both the Canadian and

¹⁶⁸ IATP, supra note 131.

¹⁶⁹ Powell, supra note 166.

¹⁷⁰ The Investment Court System will come into effect when the entirety of the CETA agreement is enforced.

¹⁷¹ Making Sense, supra note 98 at 53.

¹⁷² IATP, supra note 131.

European industries. Reducing regulations will lead to a further industrialization of slaughtering processes, while reducing standards in order to maximize profits.

The text of CETA shows an intention to safeguard standards by stipulating a ‘high level of protection,’ as seen in Article 21.2.¹⁷³ The drafters make a clear attempt to address the concerns for legal harmonization, with an intention to ensure that regulatory cooperation does not lead to a lowering of existing standards. But unfortunately, this objective will be shown little priority. Despite the stated disfavor of lowering standards, the rules within CETA have a strong bias towards trade facilitation and convergence of regulation. The extent to which CETA provisions specifically contribute to ensuring European standards remain is vague and unclear, as there is no detailed explanation as to what can be considered a ‘high standard.’¹⁷⁴ The only provision that addresses animal welfare is Article 21.4¹⁷⁵, on regulatory cooperation, in which collaboration between the parties is the ultimate goal. This language ensures no respect to the high standards for animal welfare that have been developed in the EU, and suggests they will fall victim in favor of cooperation.

As was illustrated above, the regulatory landscape between Canada and the EU is significantly different, particularly in the rigor of animal safety and health standards. The Canadian government has largely followed US corporate regulations in recent years, which would ultimately threaten to diminish the strict EU regulations. According to an Institute for Agriculture and Trade Policy and Greenpeace-Holland study, ‘Canada has weaker food safety and labeling standards than the EU, and industrial agriculture more heavily dependent on pesticides and GMO crops.’¹⁷⁶ There are practices, which are considered common in Canada, such as the cleaning of carcasses with antimicrobial chemicals such as chlorine. In European countries, carcasses are typically untreated after slaughtering, or washed with water. As of 2013, applications to the EU have led to the approval of lactic acid 9 for carcass washing.¹⁷⁷ There are two remaining applications to the EU for other antimicrobial washes: citric

¹⁷³ CETA, *supra* note 1 at article 21.2.

¹⁷⁴ Stoll, *supra* note 140 at 11.

¹⁷⁵ See: Article 21.4. The Parties endeavour to fulfil the objectives set out in Article 21.3 by undertaking regulatory cooperation activities that may include (s) exchanging information, expertise and experience in the field of animal welfare in order to promote collaboration on animal welfare between the Parties.

¹⁷⁶ Engdahl, *supra* note 165.

¹⁷⁷ Commission Regulation (EU) No 101/2013 of 4 February 2013 concerning the use of lactic acid to reduce microbiological surface contamination on bovine carcasses.

acid and peroxyacetic acid. The progressive relaxing of standards in the EU is a significant concern for health standards in all agricultural industries.

From an animal welfare perspective, this trend of deregulation is incredibly problematic. An increase in the trade of animal products under CETA, without any assurances of keeping animal welfare standards at all phases of the production process, will erode current standards and may undermine future efforts to strengthen animal welfare rules in both the EU and Canada.¹⁷⁸ Facilitating the de-regulation in the agricultural industry poses a great concern for animal welfare advocates in both Canada and the EU.

NAFTA Example

Canada has prior experience in this trade predicament. Concern over lower trade standards can be illustrated through the adoption of the North American Free Trade Agreement (NAFTA), entered into by the United States, Canada and Mexico.¹⁷⁹ The high level of integration within the US and Canadian agricultural markets, as a result of NAFTA, resulted in a substantial amount of harmonization of food safety regulations. Despite the voluntary deregulatory initiatives in NAFTA, similar to those contained in CETA, the harmonization of standards was inevitable.¹⁸⁰ Since coming into force in 1994, NAFTA has facilitated the deregulation of the Canadian industry, which now heavily relies on self-reporting in order to reduce burdens on business. Canada has seen deterioration in food safety standards, reduced concern over toxic chemical use, and a greater use of pesticides. While there are similarities between the two trade agreements, CETA will go even further in solidifying the protections for investors and restricting government regulatory capacity.¹⁸¹ Prioritizing producer rights will ultimately affect state regulatory sovereignty and public policy flexibility.

3. Abandoning the Precautionary Principle

¹⁷⁸ Making Sense, *supra* note 98 at 54.

¹⁷⁹ *The North American Free Trade Agreement*, (1994) Washington, DC :Dept. of the Treasury, US Customs Service [NAFTA].

¹⁸⁰ IATP, *supra* note 131.

¹⁸¹ Making Sense, *supra* note 98 at 69.

The precautionary principle is a fundamental principles of the EU governing public policies, including food safety. Article 174(2) of the European Community Treaty (ECT) provides that all community policy on the environment shall be based on the precautionary principle, and this has now been extended to health and safety policy.¹⁸² In the EU, the regulation of the activities covered by these areas can be based on the precautionary principle. The principle enshrines that in case of insufficient evidence on the existence of a risk, the decision-maker can take action or apply regulatory restrictions on the producer or product. It is essential that science must not be the only factor to take into account when deciding on whether to take regulatory action against a potential risk.¹⁸³ The application of the European precautionary principle is used to address bans and restrictions regarding the use of hormones in meat, and regarding genetically modified organisms (GMOs).

The precautionary principle has broad application for ensuring high standards of animal welfare regulations, in addition to considering animal sentience. In the absence of any certainty that an animal feels pain, the precautionary principle requires giving the animal the benefit of the doubt. As termed by one scholar, the Animal Sentience Precautionary Principle (ASPP) is:

Where there are threats of serious, negative animal welfare outcomes, lack of full scientific certainty as to the sentience of the animals in question shall not be used as a reason for postponing cost-effective measures to prevent those outcomes.¹⁸⁴

The CETA text is formulated in a way that there is no direct and open contradiction to the precautionary principle. However, the basic methods and assumptions of regulatory cooperation do not sufficiently safeguard the precautionary principle as a regulatory approach. The focus lies on the reduction of trade barriers and efficiency, and the precautionary principle is not mentioned explicitly. However, provisions of WTO law are confirmed in the text of the agreement, which suggests the underlying science based approach of the WTO is also to be utilized.¹⁸⁵ WTO law limits the effect of precautionary aspects, requiring that all regulations require a

¹⁸² Consolidated versions of the treaty on European Union and of the treaty establishing the European Community. Official Journal of the European Communities (2002) C 325:1–184 at article 174(2).

¹⁸³ Stoll, *supra* note 131 at 12.

¹⁸⁴ Jonathan Birch, 'Animal Sentience and Precautionary Principle' (2017) *Animal Sentience*, online: <<https://pdfs.semanticscholar.org/f26e/ad7c7b5d33775ca71c93885304b9d175e039.pdf>> accessed 3 August 2019.

¹⁸⁵ Stoll, *supra* note 131 at 13.

science based approach.¹⁸⁶ Article 21.4(n)(iv) urges the Parties to ‘conduct cooperative research agendas in order to [...] establish, when appropriate, a common scientific basis.’¹⁸⁷ Practices that are considered safe in Canada, such as the surface treatment of meat with acetic acid, the use of hormones in beef production, and the use of genetically modified organisms, are restricted in the EU on the basis of the precautionary principle. Under CETA, those precautions could be attacked on the basis of the ‘aftercare principle’ employed in Canada’s ‘science-based’ regulatory approach.¹⁸⁸ An attack on the precautionary principle could weaken EU animal protection laws and hinder the introduction of new rules and regulations to protect the animal health and food safety in the future. In order to safeguard the precautionary principle in European regulations, it is necessary that efforts be made to include it in the CETA regulatory framework beyond that of exception clauses.

4. Canada Specific Concerns

The differences in regulatory landscapes create intensely different animal welfare schemes, however, there is a weakness that exists in both regimes. Labeling continues to be a voluntary requirement with no standardized structure.¹⁸⁹ While this does not have a direct effect on animal welfare, it has greater effects for the regulation of animal health and consumer knowledge for purchasing products from different countries. Consumers are increasingly interested in information on how animals are treated on farms and in livestock facilities. In both Canada and the EU, the voluntary welfare labelling scheme allows producers to continue to use arbitrary labels and terms that have no real significance, due to the unregulated nature of labeling. While this is significant in its own right, it is of substantial concern when importing agricultural products from Canada, threatening the EU regulations surrounding GMOs, growth hormones, cloning, and animal welfare.

A horrifying example of the lack of labeling requirements is the decision by the Canadian authorities to approve AquAdvantage Salmon, the first genetically

¹⁸⁶ Ibid at 3.

¹⁸⁷ CETA, supra note 1 at Art 21.4.

¹⁸⁸ Making Sense, supra note 98 at 11.

¹⁸⁹ ‘EU Quality Standards,’ European Commission, online: https://ec.europa.eu/info/business-economy-euro/product-safety-and-requirements/eu-labels_en accessed 4 August 2019.

modified (GM) animal to be approved for human consumption in Canada.¹⁹⁰ Canada did not require labeling. As of 2018, Canadian consumers purchased 4.5 tonnes of unlabeled GM salmon, unknowingly.¹⁹¹ Through CETA, unlabeled GM salmon will be sold across the EU. That concern holds for other unlabeled Canadian GM foods as well as industrial agribusiness products such as beef.

CETA brings with it concerns over practices that occur in the USA, such as cloning. Cloning is a practice that has shown to increase the frequency of malformations and is likely to increase animal suffering. Cloning of farm animals occurs in the US, but is still prohibited in Europe and Canada. However, the lack of mandatory labeling laws in the US for cloned animals, and the frequent trading of livestock between the US and Canada, make the presence of cloned animals in the Canadian agricultural industry highly likely.¹⁹² CETA will cause an increase in the trade of meat between the EU and Canada, and will likely lead to further deregulation of labeling or traceability requirements, as they are often seen as a burden to businesses. Further, many large US corporations have subsidiary companies in Canada, ultimately allowing CETA to allow backdoor access of US products into the EU.

5. WTO Protection of Animal Welfare

With the implementation of CETA, EU member states have become increasingly concerned with the threats to European agricultural production. As members of the World Trade Organization (WTO), it is necessary to examine how trade can legitimately be restricted or justified on the basis of public morals. The protection of animal welfare has traditionally been viewed as incompatible with free trade and the obligations of the WTO.¹⁹³ With the WTO's evolving role in sustainable development, it has become increasingly open to using the exceptions as seen in General Agreement on Trade and Tariffs (GATT) Article XX. Absolute free trade has

¹⁹⁰ Engdahl, *supra* note 165.

¹⁹¹ Alex Gillis, 'Canadians Ate 4.5 Tonnes of Unlabelled GM Salmon Without Knowing it this Past Year' (5 June 2018) *Maclean's*, online: <www.macleans.ca/society/environment/canadians-ate-4-5-tonnes-of-unlabelled-genetically-modified-salmon-without-knowing-it-were-you-one-of-them/>, accessed 3 August 2019.

¹⁹² IATP, *supra* note 131.

¹⁹³ A Thiermann and S Babcock, 'Animal Welfare and International Trade' 24 *Rev Sci Tech* 2.

never been the ultimate goal of the WTO.¹⁹⁴ Rather, it seeks to find balance between trade and other societal values of its member states. If not for these exceptions, domestic standards on production would be entirely undermined by inadequately regulated imports. For example, if national standards of animal welfare are higher than those imposed on imports, the imports may be produced at a lower cost.¹⁹⁵ This would put pressure on the importing state to lower their standards in order to maintain the competitiveness of domestic production.

There continues to be no hard law obligations in the WTO Agreements to protect animal welfare, allowing member states no obligation to protect animal welfare in relation to trade. The onus is on member states to enter into international agreements, and act in a manner upholding animal welfare concerns. If a WTO member chooses to enact a trade barrier to ensure animal welfare protection in relation to trade, they can only do so to the extent these measures do not come into conflict with WTO law. However, conformity with WTO obligations is not the last chance for animal welfare measures. The legality of trade restrictions will depend on whether these measures violate the ‘substantive obligations’ of a WTO Agreement, and whether the measure can be justified under a GATT exception.¹⁹⁶ Member states that choose to enact animal welfare measures can utilize the exception provided by GATT Article XX in order to make use of moral trade restrictions. The legality of including animal welfare in the scope of public morals has been highly debated, and will be discussed further below. While the WTO provides no proactive enforcement for animal welfare trade restrictions, it also does not prevent the protection of such measures as a subsequent justification.¹⁹⁷ It merely allows the flexibility to include such measures under the GATT exceptions.

For the purposes of animal welfare, it is significant to advocates how the agricultural industry carries out their treatments of animals. Non-Product-Related Process and Production Methods (NPR - PPMs) are measures affecting trade in goods, which are concerned with the process and production methods, although the

¹⁹⁴ GATT, *supra* note 2 at articles III and XI.

¹⁹⁵ Harald Grethe, ‘High Animal Welfare Standards in the EU and International Trade – How to Prevent Potential “Low Animal Welfare Havens”?’ (2007) 32 Food Policy 315, 318.

¹⁹⁶ Iyan Ofor and Jan Walter, ‘GATT Article XX(a) Permits Otherwise Trade-Restrictive Animals Welfare Measures’ (2017) Global Trade and Customs Journal Vol 12 Issue 4, online: <<http://www.eurogroupforanimals.org/wp-content/uploads/GTCJ-120404.pdf>> accessed 8 August 2019 at 109 [Ofor].

¹⁹⁷ *Ibid* at 158.

final products make be alike. Allowing trade methods based on PPMs has traditionally been seen as illegal under the GATT regime, as violating the national treatment and most-favored nation clauses,¹⁹⁸ that define ‘like’ products as those distinguishable based on their physical characteristics.¹⁹⁹ The legality surrounding the use of a PPM has been examined in the US – Tuna I, as a result of the Marine Mammal Protection Act (MMPA).²⁰⁰ The US implemented a total ban on imports, unless the importer could prove dolphin friendly fishing methods. While the parties to the dispute did not agree that the policy to conserve dolphins fell within the scope of GATT Article XX(b), the panel found the protection of mammal life and health to be within the subsection.²⁰¹ The methods of production have been a significant concern for the EU, as seen through ban on animal pelts unless the producing country has banned leghold traps or the country meets internationally agreed humane trapping standards.²⁰²

The trade measures of specific importance for regulating animal welfare standards are non-tariff barriers (NTB). Non-tariff measures are able to restrict trade without actually imposing a tariff, including import bans, quotas, quality conditions, and import or export licenses. Determining the legality of NTBs in the WTO system is multifaceted, as they can be analyzed under three different agreements, including: (1) the GATT, (2) the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)²⁰³, and (3) the Agreement on Technical Barriers to Trade (TBT).²⁰⁴ The GATT applies to all trade in goods, while the SPS and TBT are specialized agreements.

While it is arguable whether these types of NTB measures are within the scope of Article III, for the matter at hand, we must distinguish between a free trade area and a trade liberalization treaty. As a fundamental principle under the GATT, trade

¹⁹⁸ GATT, *supra* note 2 at articles III, I.

¹⁹⁹ Tuna Dolphin Panel declared PPMs illegal.

²⁰⁰ GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS21/R, 3 September 1991, unadopted, BISD 39S/155 at paras 2.2–2.3.

²⁰¹ *Ibid* at para 3.30.

²⁰² Steve Charnovitz, ‘The Moral Exception in Trade Policy’ 38 *Va J Int’l* 689, at 5 [Charnovitz].

²⁰³ SPS Agreement deals with sanitary and phytosanitary trade measures, dealing with food safety and animal health regulations. Agreement on the Application of Sanitary and Phytosanitary Measures, 15 April 1994, WTO Agreement Annex 1A, Legal Instruments—Results of the Uruguay Round 33 ILM 1125 (1994) [SPS Agreement].

²⁰⁴ The TBT Agreement covers technical regulations, voluntary standards and conformity assessment procedures for all products. The wide range of TBT measures are taken to protect human health and safety, protection of the environment, and other legitimate objectives. Agreement on Technical Barriers to Trade, 15 April 1994, WTO Agreement Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 ILM 1125 (1994) [TBT Agreement].

must flow freely in a free trade area. By signing on to a free trade agreement, such as CETA, the country has surrendered its sovereignty to enact trade barriers which it may feel are appropriate. However, a trade liberalization system, such as the WTO, there is merely a limitation of sovereignty in refraining from enacting certain trade barriers.²⁰⁵ This is particularly troublesome for the current EU member states upset over the CETA agreement.

Scientific Basis of WTO and Agreements

The WTO is dominated by a science based framework. In particular, the SPS Agreement will only allow trade barriers on the basis of scientific evidence. This has been greatly problematic for the EU, as seen in the US-Hormone Treated Beef case, as a union that relies prominently on the precautionary principle.²⁰⁶ Significantly for the application of CETA, this reliance on scientific evidence suggests that the precautionary principle will not be upheld, while additionally, WTO Agreements support international regulatory cooperation²⁰⁷ among members as a fundamental principle. Ultimately, the TBT and SPS aim to reduce any excessive costs arising from unnecessary regulatory divergences amongst members to encourage and facilitate trade, while allowing members to maintain the minimum level of regulatory autonomy.

The SPS and TBT Agreements establish obligations on all WTO members for the preparation, adoption, and application of technical regulations, conformity assessment procedures and standards, as well as SPS measures, in order to facilitate international trade in goods.²⁰⁸ These two agreements play a significant role in ensuring international cooperation, encouraging WTO member states to use international standards. Under these Agreements, members have the right to prepare, adopt and apply regulations necessary to achieve public policy objectives, such as

²⁰⁵ Offor, *supra* note 196 at 266.

²⁰⁶ Stoll, *supra* note 131 at 13.

²⁰⁷ International Regulatory Cooperation can broadly be defined as any agreement, formal or informal, between countries to promote some form of cooperation in the design, monitoring, enforcement or ex-post management of regulation.

²⁰⁸ OECD/WTO, 'Facilitating Trade through Regulatory Cooperation: Case of WTOs TBT/SPS Agreements and Committees' (2019) OECD Publishing, online:<read.oecd-ilibrary.org/trade/facilitating-trade-through-regulatory-co-operation_ad3c655f-en> accessed 4 August 2019 at 4 [OECD].

protection of human health and safety, animal life and health, environmental protection or consumer information, as they would consider appropriate. While ensuring member states maintain their right to regulate, these Agreements are restricted by guiding principles, including: non-discrimination, avoiding unnecessary trade barriers, ensuring a scientific basis for measures, consistency, transparency, using relevant international standards as a basis for measures, measures based on risk-assessment, and promoting equivalence.²⁰⁹ It should be noted that the SPS Agreement does not apply to any morally founded measures, including animal welfare. It is an Agreement designed to deal with scientifically verifiable risks regarding food and production of food.²¹⁰ Similarly, the TBT is of limited use for moral values such as animal welfare, providing protection for processes and production methods scientifically proven to protect human health and safety.

Disputes in the WTO

In order to understand the following case law ensuing from the WTO dispute settlement system, we must first understand the dispute resolution procedure. Following a WTO member enacting a measure that is a violation of their substantive obligations under a WTO Agreement, any affected WTO member can challenge the measure in question.²¹¹ The Dispute Settlement Understanding (DSU) sets the procedure in order to scrutinize the legality of the measure according to WTO law, through a panel and Appellate Body.²¹² The member state need not be injured, but merely consider that any benefit accruing to it directly or indirectly is being nullified or impaired as a result of the violation.²¹³ To relieve the violation of WTO substantive obligations, the panel or Appellate Body can order implementation, compensation or suspension through the DSU.

²⁰⁹ OECD *supra* note 208 at 34.

²¹⁰ *Ibid* at 128.

²¹¹ GATT, *supra* note 2 at article XXIII:1.

²¹² Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401, 33 ILM 1226 (1994) at articles 4, 6, 7, 16 and 17.

²¹³ GATT, *supra* note 2 at Article XXIII:1.

GATT Exceptions Art XX

The remaining hope for animal welfare provisions is left to the GATT. The GATT applies to trade in all goods, unless a more specialized agreement applies. In response to a trade barrier enacted by a member state, the party can expressly invoke examination by a panel. The panel will then undertake a two-step analysis to determine legitimacy of the measure. The first step is to determine whether there has been a violation of one of the ‘substantive obligations’ in the form of GATT Articles I, III, and XI. This threshold ensures that while exceptions may be permitted, they must not frustrate or defeat the legal obligations of the rights holder under substantive GATT obligations.²¹⁴ These substantive obligations are to ensure non-discrimination among importing countries and a general restriction on quotas.²¹⁵ Once a violation has been found, the panel or Appellate Body can proceed to the second step in which an exception will be argued by the implementing party. The General Exceptions in Article XX of GATT contains conditional rights which can justify an otherwise illegal trade barrier.

Moving to the text of GATT Article XX, the provision states:

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

- (a) necessary to protect public morals,
- (b) necessary to protect human, animal or plant life or health,²¹⁶ . . .
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.²¹⁷

Chapeau Requirements

The opening words of Article XX provide limited and conditional rules to its use. Also known as the ‘chapeau,’ it requires that any animal welfare trade measures

²¹⁴ Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB, 29 April 1996, at 22–23.

²¹⁵ As seen in *US - Gasoline*, the Appellate Body found that imported and domestic gasoline were ‘like’ products, thus the importers were treated less favorably than domestic producers under the program. *Ibid* at 22.

²¹⁶ The other exceptions in article XX might shed some light on the interpretation of ‘public morals.’ Some exceptions are as opaque as to their geographic reach as is article XX(a). For example, it is not clear whether article XX(b) - to protect human, animal or plant life or health - is solely inwardly-directed. Other exceptions clearly seem to look outward. Charnovitz, *supra* note 202 at 4.

²¹⁷ GATT, *supra* note 2 at art XX.

must not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries. The rules contained in the chapeau ensure that the exceptions of Article XX are not abused, and applied to all countries in a uniform manner. The requirements under the chapeau have proven quite difficult to meet. The majority of measures that are inconsistent with the GATT, have been able to meet conditions for the specific exception under Article XX, however, have failed to meet the chapeau's requirements.²¹⁸ Therefore, it is incredibly important for an implementing state seeking to rely on a GATT exception to ensure that the measure is carried out in a non-discriminatory means.

This barrier will be particularly troublesome for the successful use of Article XX(a) to defend animal welfare trade measures. The EU has failed this requirement in the attempted justification of the EU seal regime.²¹⁹ Scholars have noted that while the seal protection measures did not strike an appropriate balance between trade and morality, other animal welfare measures could.²²⁰ While the EU seal regime was criticized for a number of reasons,²²¹ these failings provide concrete concerns for how the EU can manage to implement future trade measures which will comply with the requirements of the chapeau.

Interpretation of GATT XX(a)

While the list of exceptions provided in Article XX does not include one directly specifying animal welfare, Article XX provides a broad exception which could be of use if they are found necessary to protect public morals. GATT Article XX(a) provides an exception for the 'protection of public morals', and animal welfare

²¹⁸ L Bartels, 'The WTO Legality of the Application of the EU's Emission Trading System to Aviation' (2012) 23 EJIL 429, 452.

²¹⁹ Lukasz Gruszczynski, 'WTO Panel Report (wt/ds400/r, wt/ds401/r of 2013) and Appellate Body Report (wt/ ds400/ab/r, wt/ds401/ab/r) in EC – Seal Products Case: Public Morality Meets the World Trade Court' (2014) 3 Polish Review of International and European Law 1-2.

²²⁰ Ling Chen, Sealing Animal Welfare into Free Trade: Comment on EC-Seal Products (2015) 15 Asper Rev Int'l Bus & Trade L 171 at 149.

²²¹ EU Seal Regime: (1) there was no rational relationship between the objective of the measure and the IC exception, (2) the design and application of the exception indicated arbitrary or unjustifiable discrimination (ambiguity in the terms of the exception meant that it could be applied with wide discretion and could potentially fail to cover all commercial seal products), and (3) the EU did not make comparable efforts to facilitate access to their market for Canadian Inuit as they did for Greenlandic Inuit. Ibid at 221.

has recently been proven to be of European moral concern.²²² Academics and the judiciary have recognized that there is space in WTO law to find animal welfare as an issue of public morals.²²³ Article XX(a) could be considered directly applicable to animal welfare by the DSB following the EC – Seal Products case.²²⁴ Additionally, as recognized by Australia in the US Tuna I case, ‘Article XX (a) . . . could justify measures regarding inhumane treatment of animals. . . .’²²⁵ Nevertheless, this recognition in the case law has not relieved all issues in attaining Article XX(a) protection. The vagueness of the provision itself fails to specify the nature of public morals and how a member state can regulate morality of its population.

Scope of Public Morals

In considering the scope of public morals, the *Vienna Convention on the Law of Treaties* (VCLT) provides guidelines to interpretation when treaties fail to provide clarity. Article 31 states that, ‘[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’²²⁶ Article XX(a) was drafted by the US government in 1946, therefore it would be appropriate consider an English dictionary to determine the ordinary meaning of the term ‘morals.’²²⁷ Webster's New International Dictionary defines ‘moral’ as ‘conforming to a standard of what is good and right [degrees]’ While this definition does not provide any additional clarity, the object and purpose of the treaty can assist in a deeper understanding. The GATT strives to facilitate, ‘reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.’ It is clear that this object and purpose would not suggest a broad protection of public morals, however, the object

²²² DG SANTE, ‘Special Eurobarometer 442 Report: Attitudes of Europeans towards Animal Welfare’ (2015) European Commission, online: <ec.europa.eu/commfrontoffice/publicopinion/index.cfm/ResultDoc/download/DocumentKy/71348> accessed 27 July 2019.

²²³ Peter Stevenson, ‘The World Trade Organization Rules: A Legal Analysis of Their Adverse Impact on Animal Welfare’ (2002) 8 *Animal L* at 138.

²²⁴ Offor, *supra* note 196.

²²⁵ GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS21/R, 3 September 1991, unadopted, BISD 39S/155 at paras 2.2–2.3.

²²⁶ *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol 1155, article 31 [VCLT].

²²⁷ Charnovitz, *supra* note 202 at 4.

and purpose of Article XX itself seeks to protect the ability of a state to act in accordance with the purposes listed, even when they conflict with obligations of international trade. Therefore, interpretation of public morals is left to Article 32 of the VCLT²²⁸, allowing for supplementary means of interpretation to illuminate the scope of the exception. Parties seeking an Article XX(a) exception are left to persuade the WTO panel or Appellate Body through VCLT interpretation arguments and resulting case law.

According to the Appellate Body in the EC Hormone decision, if the meaning of a treaty is ambiguous, the interpretation to be preferred is the one, ‘...which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.’²²⁹ The Appellate Body’s interpretation suggests a broad role of Article XX(a) and the scope of morals deserving protection. The Appellate Body stated that, ‘[M]erely characterizing a treaty provision as an "exception" does not by itself justify a "stricter" or "narrower" interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words...’²³⁰ The Appellate Body could find no reason why previous panels had relied on a narrow interpretation of the exceptions, other than the assumptions that result from the word ‘exception.’

While there have been holdings by WTO panels that the GATT exceptions must follow a narrow interpretation, this suggestion is fraught with inconsistencies. The US-Tuna I panel was the first notable decision to support a narrow interpretation of Article XX.²³¹ The panel suggests that a narrow interpretation of Article XX is to be used, however, fails to provide any reasonable assessment as to why Article XX should be interpreted narrowly.²³² Even further, US-Tuna II claims the narrow interpretation has been a ‘longstanding practice’ and cited the same two unsupportive

²²⁸ VCLT Article 32 allows for interpretation on the basis of preparatory work or the circumstances upon its conclusion.

²²⁹ Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998.

²³⁰ Charnovitz supra note 202 at 21.

²³¹ See: GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS21/R, 3 September 1991, unadopted, BISD 39S/155 [US-Tuna I]; GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS29/R, 16 June 1994, unadopted [US-Tuna II].

²³² The US Tuna I panel cited two previous panel reports, however, neither of the cited paragraphs provide a precedent for a narrow interpretation.

cases that the US-Tuna I panel did.²³³ Based on the inconsistencies in this reasoning, it seems likely that a broader interpretation, as seen in the EC Hormones case will be followed.

The case of US Gambling provides a helpful analysis of the concept of public morality as set out in the General Agreement on Trade in Services (GATS).²³⁴ The panel of US Gambling found the scope of the term 'public morals' 'denotes standards of right and wrong conduct maintained by or on behalf of a community or nation.'²³⁵ This case highlights that member states have considerable freedom to define what public morality means for themselves. Public morality should have the freedom to vary depending on prevailing social, cultural, ethical, and religious values, therefore, member states should have some flexibility to define for themselves what they see as 'public values.'²³⁶ This is a favorable ruling for members of the EU where animal welfare has been proven to be an imperative value to the public.²³⁷

Should local morals be able to trump economic globalization? This is a controversial question, however, can be contradicted by a moral that is accepted in a number of states.²³⁸ Once a public moral has been specified, it will be necessary to look to the number of states involved. For outwardly directed purposes, multilateral action is much more effective. This type of multilateral action can be illustrated in the EU creating minimum standards for animal welfare regulations, which are followed by all member states. The futility of unilateral moral action is explained by one political scientist, "[a] single state may adopt what it deems to be effective measures to combat certain evils, only to find that its policies are largely defeated by the failure of neighboring states to adopt similar measures."²³⁹ In arguing for the acceptance of EU public morals, it will be significant that 28 member states have implemented animal welfare measures.

²³³ Charnovitz, *supra* note 202 at 15.

²³⁴ *General Agreement on Trade in Services* (1994) Marrakesh Agreement Establishing the World Trade Organization Annex 1B, 1869 UNTS 183, 33 ILM 1167

²³⁵ Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 2005, WT/DS285/AB/R, para. 6.465.

²³⁶ This analysis was quoted with approval in the later *China – Audiovisuals* case which applied the interpretation explicitly to Article XX(a) of the GATT. GATT Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, adopted 19 January 2010, WT/DS/363/R, para. 7.759.

²³⁷ Eurobarometer at 442

²³⁸ Charnovitz, *supra* note 202 at 2.

²³⁹ *Ibid.*

Article XX Three Part Test

Turning our attention to the analysis of the GATT Article XX provisions, the WTO has formulated a three-part test to determine whether a measure qualifies for Article XX(b). Due to the similarities between articles XX(b) and (a), it is likely that panels will follow the same or similar framework for a public morality exception.²⁴⁰ The three-part test includes: (1) does the policy underlying the trade measure fall within the range of policies in article xx(b), (2) is the use of the trade measure ‘necessary’ to fulfill the policy objective, and (3) is the measure applied in conformity with the article XX headnote? The second requirement of the test will likely create an onerous barrier for public morality measures, inquiring whose morality is considered necessary for trade measure to meet its policy objective. The ‘necessity’ threshold requirement maintains that the policy pursued should have a direct link with the products that are being subject to the trade restriction. In order to successfully pass the three-part test and qualify for protection under Article XX, trade restrictions for imports must be considered essential to the protection of animal welfare standards.

Jurisdictional Limit of Article XX

In addition to the vague scope of Article XX(a), there is a persistent deliberation over the jurisdictional limit of the exceptions of Article XX. A jurisdictional limit in the provision would restrict WTO member states to protect societal values only within their own jurisdiction, but not outside of it.²⁴¹ Outwardly directed trade measures are used to protect the morals of foreign trade by the implementing state.²⁴² Alternatively, trade measures used to protect morals within the implementing country are termed as inwardly directed. This brings attention to a broader theoretical discussion of whether public morals differ from country to country, or whether there is a broader international standard? Should public morals be enforced on other states for the benefit of an animal population? Preventing outwardly

²⁴⁰ Ibid at 20.

²⁴¹ Peter Stevenson, ‘The Impact of the World Trade Organization Rules on Animal Welfare’ (2015) <www.ciwf.org.uk/research/animal-welfare/the-impact-of-the-worldtrade-organisation-rules-on-animal-welfare/> accessed 4 August 2019.

²⁴² Steve Charnovitz, ‘The Moral Exception in Trade Policy’ 38 Va J Int’l 689, at 3-4.

directed trade measures through the use of a jurisdictional limit could be detrimental to the EU attempts to standardize animal welfare standards.

There is no explicit jurisdictional limit in Article XX²⁴³, therefore, it has been left to the authority of the Dispute Settlement Body (DSB) to settle the issue. While earlier DSB decisions showed a hesitancy for extra-territorial trade measures, the recent trend departs from this position.²⁴⁴ Prior GATT adjudication concerning Article XX exceptions, specifically environment exceptions under Article XX(b) and (g) can be used to examine whether Article XX(a) can encompass outwardly directed measures. This will be illustrated through the US-Shrimp case and the outwardly directed measures taken in order to protect an endangered species.

The Appellate Body ruled in the US-Shrimp case of 1998 that the extra-territorial nature of trade measures will not exclude justification under Article XX exceptions.²⁴⁵ It went on to state that, '[s]uch an interpretation renders most, if not all, of the specific exceptions under Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.'²⁴⁶ The DSB has subsequently ruled that importing states can require exporters to assume policies that are 'comparable in effectiveness' to their own in order to protect one of the values listed in Article XX.²⁴⁷ This outcome is significant for the matter of animal welfare regulations. However, this case is specific to the protection of endangered sea turtle species as an exhaustible and natural living resource. Comparatively, non-endangered species are not given the same protections.

It is at this point in the analysis of conservation measures, that we must distinguish between species and specimen conservation. Specimen conservation is a term used to describe the protection of animals of a non-endangered species. This distinction is significant for the allowance of animal welfare measures, either to protect public morals or environmental concerns.²⁴⁸ While conservation is the underlying motive of both, an inherent difference lies in the dependence on scientific evidence. Measures based on scientific evidence regarding the survival of the entire

²⁴³ GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS21/R, 3 September 1991, unadopted, BISD 39S/155 at para 5.25.

²⁴⁴ See: US-Tuna I at 5.27 and 5.32; US-Tuna II at 5.24–5.27 and 5.37.

²⁴⁵ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 1998, WT/DS58/AB/R at para 121.

²⁴⁶ Ibid.

²⁴⁷ Ibid at para 144.

²⁴⁸ Charnovitz, *supra* note 202 at 148.

species are ultimately considered environmental protection measures. Measures enacted without scientific evidence of an impending threat are called specimen protection, or animal welfare protection. The distinction can be seen between the US Shrimp case, discussed above, and the US- Tuna I and II cases.

US Tuna was the first successful case involving the conservation of a living natural resource that was not endangered. US Tuna I and II were the first to test the legitimacy of using environmentally harmful processes and production methods as a justification for trade restrictions.²⁴⁹ In US Tuna I, the US enacted an embargo²⁵⁰ on Mexican tuna caught using purse-seine nets that caught a large number of dolphins inadvertently. US Tuna II was brought on the secondary US embargo against countries who re-exported tuna from countries under the US primary embargo. In both cases the panel ruled against the US embargoes, however, neither panel report was approved by the GATT Council.²⁵¹ As neither panel decision was adopted, they serve little utility in protecting animal welfare measures. Nevertheless, these decisions provide clarity on how an Article XX(a) defense for outwardly directed trade measures might be defended.²⁵² Following the pleadings of the Australian representative in US Tuna II, Article XX(a) could potentially justify outwardly directed trade measures, ensuring that both domestic and foreign producers are held to the same high standards. Conversely, the representatives from the European Commission argued that, ‘...it could only make sense for a country to take border measures designed to protect its own public morals, not the public morals outside its national jurisdiction.’²⁵³ The previous renunciation of the European Commission regarding outwardly measures may be unfavorable to its current predicament, seeking to affect Canadian animal welfare regulations.

²⁴⁹ ‘GATTs Tuna-Dolphin Case’ (1994) 15 Michigan Journal of International Law 1043, online: <www.icts.org/gatts-tuna-dolphin-case> accessed 12 August, 2019.

²⁵⁰ *Marine Mammal Protection Act*, 16 USC ss1361-1383b, 1401-1406, 1411-1421h.

²⁵¹ Charnovitz, *supra* note 202 at 14.

²⁵² The panel noted that the language of article XX(g) does not spell out any limitation on the location of the resources being conserved.

²⁵³ US-Tuna II, *supra* note 231.

Conclusion

An examination of animal welfare regulations in the EU and Canada have elucidated the vast differences between these regulatory regimes. While Canada has provided a multitude of legislation and Codes of Conduct for the agricultural industry, the overseeing bodies are numerous and lack any significant enforcement power. Largely the regulations refer to ‘industry standards,’ allowing mass agricultural producers to set their own standards for animal welfare. The EU has developed Directives on animal welfare standards, setting the minimum that each member state must comply with. Concerns have also been recognized in the EU regulation of animal welfare, in particular with inadequate reporting and failure of member states to transpose directives. Despite challenges in both systems, the use of the precautionary principle in the EU is the most significant. The precautionary principle allows for the restriction of products and methods that could be of harm to the animal or consumer population, without direct scientific evidence. Comparatively, Canada relies on a scientific basis, and in the absence of knowledge to the contrary, allows practices that are otherwise banned in the EU. Opening the EU market to Canadian products and increased competitive pressure will have significant effects on standards across the EU.

While CETA claims to maintain the regulatory sovereignty of member states, its ultimate object and purpose is recognized as regulatory cooperation in order to facilitate international trade. In addition to concerns about incoming Canadian products due to their animal welfare concerns, the increasing pressure of market access will create substantial incentives for European producers to lower their own standards in an attempt to remain competitive. The Precautionary Principle continues to have fundamental impact on European regulations, however, the principle receives no recognition under CETA. An attack on the precautionary principle could weaken EU animal protection laws and hinder the introduction of new rules and regulations to protect the animal health and food safety in the future.

As WTO members, EU member states must follow their substantive obligations under the GATT, however, could seek to rely on moral exceptions as provided in Article XX. While the list of exceptions provided in Article XX does not include one directly specifying animal welfare, Article XX provides a broad

exception which could be of use if they are found necessary to protect public morals. The vagueness of the provision itself fails to specify the nature of public morals and how a member state can regulate morality of its population. The case law has prioritized the freedom of member states to define for themselves what is included in public morals, and deserving of protection under Article XX(a). Member States within the EU will have a great chance of success arguing that their higher standards of animal welfare encapsulate a moral exception held by European society.

Abstract

The provisional entry into force of the EU/Canada Comprehensive Economic and Free Trade Agreement (CETA) has been met with substantial resistance from multiple European member states. Not only are member states worried about the increased competition their local agricultural producers will face, but animal welfare advocates have voiced concern about the substantially lower regulations in Canada. A key principle of the CETA agreement is regulatory cooperation, meaning that in order to create homogeneity across producers, the lowest common standard will be accepted. Regulatory cooperation, as facilitated through CETA, encourages harmony in order to reduce trade barriers for members. While CETA has not been formally adopted by a majority of member states, its provisional entry into force allows the majority of provisions to take place, opening up the EU market for agricultural products from Canada, and vice versa. This is particularly troublesome for member states of the EU that have recognized high animal welfare regulations as a public moral obligation. The WTO has recognized public morality as an exception under the General Agreement on Trade and Tariffs (GATT) Article XX(a), and addressed the legality of trade barriers in previous cases, such as the US Tuna I and II cases. Due to the vital reliance on scientific evidence WTO jurisprudence, animal welfare is likely to run into a barrier in asserting itself as a GATT Article XX(a) exception. Nevertheless, previous cases have paved the way in order for animal welfare to be protected under GATT exceptions due to the increasing concern of modern society for the protection of living species.

Das vorläufige Inkrafttreten des umfassenden Wirtschaftshandelsabkommens (CETA) stieß in mehreren europäischen Mitgliedstaaten auf erheblichen Widerstand. Nicht nur sind die Mitgliedstaaten besorgt über den zunehmenden Wettbewerb, dem ihre lokalen landwirtschaftlichen Produzenten ausgesetzt sein werden, auch Tierschützer haben Bedenken geäußert, bezüglich der wesentlich niedrigeren Vorschriften in Kanada. Ein Schlüsselprinzip des CETA-Abkommens ist die Regulierungszusammenarbeit, dies bedeutet zur Schaffung von Homogenität zwischen den Produzenten wird der niedrigste gemeinsame Standard akzeptiert. Die Zusammenarbeit im Regulierungsbereich, wie sie durch CETA erleichtert wird, fördert die Einigkeit zum Abbau von Handelsbarrieren zwischen den Mitgliedern. Obwohl CETA von der Mehrheit der Mitgliedstaaten noch nicht offiziell verabschiedet wurde, ermöglicht das vorläufige Inkrafttreten, die Durchführung eines Großteiles der Bestimmungen, wodurch der EU-Markt für landwirtschaftliche Erzeugnisse aus Kanada geöffnet wird und umgekehrt. Dies ist besonders problematisch für Mitgliedstaaten der EU, welche hohe Tierschutzbestimmungen als eine öffentliche moralische Verpflichtung anerkannt haben. Die WTO hat die öffentliche Moral als Ausnahme im Rahmen des Allgemeinen Handels- und Zollabkommens (GATT) Artikel XX (a) anerkannt und sich mit der Rechtmäßigkeit von Handelsbarrieren in früheren Fällen, wie beispielsweise den US Thunfisch I und II Fällen, befasst. Aufgrund der unerlässlichen Abhängigkeit von wissenschaftlichen Erkenntnissen der WTO-Rechtsprechung, dürfte der Tierschutz auf Schwierigkeiten stoßen, wenn es darum geht, sich als Ausnahme nach Artikel XXa des GATT geltend zu machen. Dennoch haben frühere Fälle den Weg geebnet, damit das Tierwohl im Rahmen der GATT-Ausnahmen geschützt werden kann, da sich die moderne Gesellschaft zunehmend um den Schutz lebender Arten sorgt.

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