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Impact of international trade on ethical norms (updated 2016)

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Introduction

Consumers have become aware of the importance of international trade for animal welfare thanks to the Transatlantic Trade and Investment Partnership negotiations between the European Union and the United States. They now know that national norms, the most visible, are often the consequences of negotiations on a supra-national level. Establishing high animal welfare and biodiversity standards adds costs to the production of marketed goods. For this reason, national norms are often perceived as “impediments to trade” during international exchanges, and are therefore strictly regulated by the World Trade Organization (WTO) and bilateral free trade deals negotiated outside the WTO.

I. The "*extraterritorial consequences*” of animal welfare regulations

The "*extraterritorial consequences*" of a norm[1], sometimes inherent in certain provisions governing animal welfare or biodiversity, are highly likely to be “contentious” on an international level. Indeed, laws that only regulate the production and sale of national goods have no impact on international trade. Only some national norms affect the production and trade of goods by foreign companies. This is the case with laws that ban the import and sale of a non-ethical product within a state’s territory, or that require certain practices or formalities for a product to enter. These laws often serve a dual purpose: to encourage foreign companies to use production methods that are more respectful of animals and the environment, and to safeguard national companies from international competitors whose national laws are less restrictive, allowing them to produce at lower costs.

The EU's ban on beta-agonist veterinarian drugs, such as ractopamine, illustrates the national lawmaker's motivations and the trade barrier created by such a regulation[2]. Ractopamine is a feed additive used in powder or granule form by some countries (United States, Canada, Japan and Mexico) in the last few weeks of the fattening phase for some livestock, particularly pigs, cattle and turkeys, for rapid muscle gain and increased leanness. The drug also causes great mental and physical distress to the animal: scientific studies (EFSA, 2009)[3] have observed that the administration of ractopamine induces hyperactivity and tachycardia as well as joint pain due to the abnormally rapid muscle gain. In addition, ractopamine seriously impacts the animal's welfare when being transported to the slaughterhouse and during killing, as studies on pigs have shown that ractopamine makes these animals highly active and difficult to handle: this increases the risk of injury during transport and failed stunning[4]. The US Food and Drug Administration (FDA) requires that American ractopamine manufacturers to include the following warning on their packages: *"CAUTION: Ractopamine may increase the number of injured and/or fatigued pigs during marketing"*[5]. Based on studies carried out by the EFSA (European Food Safety Authority) showing a potential risk to the end consumer due to ractopamine residues in meat and proven compromise to the animal's welfare, the European Union banned the use of ractopamine for fattening among its Member States. Yet the practice provides a financial gain from the rapid weight growth of around $2 per hog (Alemanno & Capodieci, 2012). So that European farmers are not

disadvantaged against US farmers, the European Union also bans the import of animals to which ractopamine was administered. Through this ban, Europe is limiting a foreign farming practice that causes harm to animals: to continue to export meat products to the European Union, farmers from other countries must not use ractopamine for their export products. As a result, a restrictive national provision on imports protects European Union farmers from unsustainable competition while also changing the farming conditions for some livestock in countries outside the Union. These national legislations with "*extraterritorial consequences*" are undeniably an effective tool for promoting high animal welfare standards worldwide, but their international reach can easily lead to disputes[6]. With the case of ractopamine, countries that export meat treated with this growth hormone disapproved of the European Union's ban on their products. In 2012, they took international action and persuaded the Codex Alimentarius to vote (by a small majority) for "maximum residue levels" of ractopamine for meat products for human consumption. The Codex Alimentarius establishes international scientific standards that the World Trade Organization uses when assessing the merits of a national bill that has the potential to restrict trade[7]. While the ractopamine case has not yet led to a dispute before the WTO's Dispute Settlement Body, the total ban on imports of these meat products has been described by some authors as "*another endless transatlantic dispute*". In the case of ractopamine, the ban on imports essentially comes from the potential risk to the end consumer's health. Animal welfare certainly is a factor in the EFSA studies and documents published by European institutions state animal welfare requirements, but it comes after food safety. This human-focused motivation is common, as C. Deffigier and H. Pauliat note: "*It is a drive for food safety that boosts animal welfare demands"*[8] (Deffigier & Pauliat, 2009). It could also be a strategic choice made by Europe's lawmakers, aware that a ban on imports is more likely to be validated by the WTO's Dispute Settlement Body if it is based on a scientifically proven risk to human health than if it is based on animal welfare[9].

National norms with "*extraterritorial*" scope run the risk of litigation that may result in a penalty for the state that created the provision ruled to be illegitimate. International agreements and treaties have internal dispute settlement systems or refer the parties to an external court; they are thus able to have a state penalised if it breaches the provisions of the treaty. Within the WTO, the Dispute Settlement Body (DSB) fulfils this quasi-jurisdictional role: it can only be approached by a Member State and does not apply any financial sanctions. The DSB can authorise the aggrieved state to take an economic countermeasure, which in principle should be temporary because the aim of the DSB is to have the parties comply with the provisions of the WTO agreement. However, the WTO does not allow for investors to appeal[10]. As the Court of First Instance of the European Union indicated regarding the WTO "hormone beef" dispute, the aim of WTO agreements "*is to settle and manage relations between states or regional economic integration organisations, and not to protect individuals*"[11]. Free trade agreements often have a system to settle disputes between states[12] that can include an amicable solution or economic countermeasures like those of the WTO. Furthermore, these agreements increasingly include a second mechanism to allow an investor to take a state to an international arbitration court and obtain a financial penalty: Investor State Dispute Settlement (ISDS). National lawmakers are aware of the risk of being sanctioned by the WTO and by arbitral tribunals[13] when drafting a bill. As a result, if there is a risk that a legislative initiative to protect animals or biodiversity could oppose international agreements signed by the state and lead to sanctions, lawmakers may be reluctant to act. National laws on imports allow national law makers transmit their own values: by imposing certain ethical conditions for accessing its domestic market these encourage foreign producers to change their methods. However, states are not entirely free to legislate because in application of the adage "*Pacta sunt servanda*"[14], they must respect the international agreements that they have signed and which strictly regulate restrictive international trade laws.

II. The World Trade Organization and animals

The main international trade framework forum is the GATT, which became the WTO in 1995. At the time of the GATT, the purpose of the treaty was to clarify international trade relations: it promoted free trade and non-discriminatory trade practices without really taking into account the environmental or ethical aspects of trade in goods. As a result, when a state placed a restriction on the importation of certain goods that showed little respect to animals, this state's laws were often deemed to oppose the principles of the GATT. These laws were often seen as "disguised restrictions on international trade" used to allow a state, acting under the cover of seemingly legitimate environmental or moral grounds, to discriminate against contracting parties of the GATT, which is prohibited by the Treaty. The Dispute Settlement Body, mandated to settle trade disputes between contracting parties and interpret the provisions of the GATT, worked to make sure these types of laws did not remain in force. The structure has evolved considerably since its creation in 1947 and in a direction that is more favourable to animals. In 1995, when the GATT changed into the WTO, greater emphasis was placed on the environment and the protection of animals, which was not self-evident[15]. On the one hand, the WTO finally accepted the link between international trade and the environment: the organisation changed its structure to include a Committee on Trade and Environment[16], and now works with various animal protection organisations such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) to prevent trafficking of wild animals in international trade. On the other hand, the terms "animal welfare" and "welfarism" appeared in the decisions of the WTO's Dispute Settlement Body[17], which is increasingly accepting ethically or environmentally-orientated laws.

One of the fundamental rules of the WTO, as defined in Article XI of the GATT, is the prohibition of non-tariff barriers: in principle, the only trade restrictions authorised are tariff barriers such as "*duties, taxes or other charges*". However, there are WTO agreements containing provisions that, as an exception, allow international trade restrictions for ethical reasons:

- Article XX a) of the GATT relates to national laws necessary to protect public morals;
- Article XX b) of the GATT provides an exception for the adoption of national laws necessary to protect human, animal or plant life or health[18];
- Article XX g) of the GATT covers national laws relating to the conservation of exhaustible natural resources of which wild animals are a part.

These exceptions, which derogate from the prohibition on imposing non-tariff barriers and run a high risk of state protectionism, are strictly regulated by the WTO legal texts: the "chapeau", which recalls that the terms of the laws made in application of these exceptions must be enforced, stipulates that *"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 the aforementioned measures[19]. Certain decisions show that the Dispute Settlement Body, whose mandate is to clarify the terms of the agreements, is increasingly more inclined to validate these exceptions. During the dispute settlement procedure, where two conflicting states are unable to reach an amicable settlement, a “Special Group” of three or five experts is set up to produce a report that will be adopted or rejected (only by consensus) by the DSB. If the DSB adopts the Special Group report, it becomes a "decision" of the body. The parties to the dispute can appeal this initial decision by citing legal errors committed by the Special Group. Appeals are handled by three of the seven members of the WTO’s permanent Appellate Body, who can uphold or reverse the findings of the Special Group. The Appellate Body Report must then be adopted by the DSB[20]. Two decisions illustrate this favourable development for animals:

1. United States - Shrimp case of 12 October 1998[21]:

This dispute arose from a law on commercial shrimp fishing enacted by the United States (Act No. 101-162 of 21 November 1989, Section 609). The environmental provisions of this law placed a prohibition on certain shrimp fishing methods that were causing the accidental capture and death of protected species of sea turtles in large quantities. Domestic shrimp trawlers were required to install turtle excluder devices and foreign producers were banned from exporting shrimp harvested using techniques harmful to turtles to the United States. The ability to invoke article XX g) regarding the protection of animals was debated: indeed, certain states contend that the terms "exhaustible natural resources" means "*finite resources such as minerals, rather than biological or renewable resources*"[22], in keeping with the traditional interpretation (Carreau & Juillard). The Appellate Body ruled in favour of the United States on this point, stating: "*We are not convinced by these arguments. [...] modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense, "renewable", are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities. [...] The words of Article XX(g), "exhaustible natural resources", were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment*"[23]. It was not however a complete success for the United States because the Appellate Body dismissed the environmental measures in question, ruling them to be contrary to Article XX g) of the GATT. The purpose of protecting sea turtles was not at issue, the DSB was only penalising the discriminatory application of the measure as it only provided leeway for complying and technical assistance to some of the United States' trade partners, and excluded other WTO members from benefiting from these. The Appellate Body insisted on the legitimacy of domestic ethical laws in a noteworthy statement: "*In reaching these conclusions, we wish to underscore what we have not decided in this appeal. We have not decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have not decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should*"[24]. This passage from the findings, which shows that the WTO is willing to take an approach respectful of the environment and biodiversity, is a break away from the way Article XX g) was traditionally interpreted. Furthermore, the Appellate Body quashed the Special Group's decisions whose reasoning could have been fatal to domestic environmental laws. By concentrating on an analysis of the chapeau of Article XX g), the Special Group considered that a national measure should be challenged if "*such type of measure, if it were to be adopted by other Members, would threaten the security and predictability of the multilateral trading system*"[25]. This legitimate fear for the WTO's multilateral system could have prompted the Appellate Body to adopt the same reasoning, but this was not the case: it chose to simply state that the Special Group had not followed the key steps for analysing Article XX g). It then used the same two-tiered analysis method as the "United States - Gasoline" case, then validated the principle of environmental laws provided that they are not used in a discriminatory manner.

2. EC - Seal Products case of 25 November 2013 and 22 May 2014[26]:

This is a decision related to the European Regulation of 16 September 2009 banning the import and sale of seal products for commercial purposes[27]. It focused on commercial hunting and certain exemptions were made for hunts conducted by Inuit or indigenous communities for subsistence purposes, and for hunts conducted for marine resource management purposes. The regulation, which explicitly protects seals for ethical reasons based on these animals' sentience[28], was challenged before the WTO by Canada and Norway, for whom commercial hunting is a significant economic activity. Other than certain exceptions deemed to be discriminatory, the regulation was

validated by the DSB panel[29]. The Panel recalled the meaning and scope of the terms "public morals" under the meaning of Article XX a) of the GATT: these are standards of right and wrong conduct maintained by or on behalf of a community or a nation, the content of which can vary depending on prevailing social, cultural, ethical and religious values[30]. The term "animal welfare" appeared in this decision through the intervention of human interest where the Special Group notes that "*the principal objective of adopting a regulation on trade in seal products was to address public concerns on seal welfare*"[31]. It then needed to establish that these "*public concerns*" fell within the meaning of public morals in the European Union, and specifically that the protection of seals was part of European societies' moral ideals, to be able to demonstrate that the regulation was within the scope of application of Article XX a) of the GATT concerning public morals. In opposition to Canada's claims, the Special Group felt that the evidence[32] showed that "*animal welfare is an issue of an ethical or moral nature in the European Union*"[33] and that the European Union regulation fell within the scope of application of Article XX a) of the GATT. In addition, the Special Group felt that alternative import ban measures, despite being less trade-restrictive, were not applicable due to the high risk they posed to animal welfare[34]. In this case, the WTO gave ethical concerns for animal welfare precedence over trade concerns. This decision, in which the DSB declared that public moral concerns relating to animal welfare were of "*highly important interest or value*"[35], is both fundamental and new for animal welfare: for the first time, the DSB based its reasoning on public morals and animal welfare and not on the preservation of a species as a component of the environment. As well as marking a shift from a logic of protecting a species as a whole to protecting an individual wild animal, this precedent laid the foundations of a new legal basis for the protection of wild animals and possibly owned animals on an international scale.

Not all WTO decisions are as satisfactory to animal, environmental and consumer protection campaigners as the United States - Shrimp and EC - Seal Products cases. For instance, the Special Group report for the United States - Tuna II case[36], on the compliance of eco-labelling with the WTO's Technical Barriers to Trade (TBT) Agreement was heavily criticised by environmentalists[37]. However, the WTO is opening up to non-commercial, ethical concerns, whether in its multilateral negotiations or DSB decisions, and this is considerable progress for animals used in international trade. But the WTO is not the only entity that provides a framework for international trade and faces stiff competition from bilateral and multilateral free trade agreements that contain their own dispute settlement systems. The proliferation of these agreements has become a threat to the WTO, just as the forum is beginning to accept the relationships between international trade, environmental issues and ethical consumption.

III. Free trade agreements and ethical standards

When a state wishes to favour a single trade partner, the WTO authorises it do so through a free trade agreement[38]. Although these economic matters unite some WTO member states and forsake others that contradict the multilateralism promoted by the WTO, an exception to the most-favoured-nation clause (Article I of the GATT) was introduced for two reasons: economic integration promotes international trade in the manner of the WTO, and in a post-war context, it was important to favour peaceful relations between states and "*isn't economic integration the surest way to ensure peace between two states?*" In the beginning, WTO member states only used this faculty occasionally. However, since the failure of the WTO's multilateral negotiations in the Doha Development Round, due in part to negotiations over non-market cultural values and no longer over economic concessions such as customs duties[39], the number of free trade agreements has risen sharply. While the WTO agreements and the jurisprudence of the DSB are beginning to provide certain guarantees in terms of animal welfare and biodiversity, many uncertainties remain as to how they will be implemented by these free trade agreements and their dispute settlement systems. Not all international agreements have the same impact on the level of protection for wild

animals and animal welfare. We need to determine which agreements provide a levelling-up of ethical standards and those that could hinder this type of legislation. With this in mind, two factors can be taken into consideration: the economic weight of the contracting parties and their capacity to impose their legal model; and the inclusion of an Investor-State Dispute Settlement (ISDS) in the agreement, which could, if it is not written in a restrictive manner, lead to a freeze on environmental and ethical standards.

The European Commission and the European Parliament regularly stress the importance of the issue of animal welfare in international agreement negotiations[40]. However, this political will is unfortunately not always enough because, in practice, the outcome of the talks depends on the economic and political weight of the states party to the agreement. So agreements signed between a developed country and developing countries are generally likely to export high animal welfare standards. These can even become tools for the protection of nature, animals and the fight against the poverty of local economic actors. For instance, the Cariforum-EC Economic Agreement signed on 15 October 2008 imposes sustainable agricultural and fishing resource management practices, farming training and the promotion of organic farming practices on the contracting parties. These provisions permit the conservation of biodiversity and implementation of more animal welfare-friendly farming practices. The European Union feels that this intentional agreement "*is a pioneering agreement in the international trading system*. It is the first genuinely comprehensive North-South trade agreement that promotes sustainable development, builds a regional market among developing countries and helps eliminate poverty"[41]. However, this is not the case of agreements signed between two developed countries: when two trade partners of an equivalent economic level negotiate, and their values differ, it is unlikely that either one is able to impose its own ethical laws. Trade disputes[42] between the United States and the European Union over food safety and the use of very different farming practices illustrate this difficulty. The European Union has some of the world's highest animal welfare norms[43], and despite certain initiatives in the United States (on a state or federal level) that are highly protective of animals[44], a large portion of American farming practices are sources of suffering for animals[45] (Frash *et al.*). Despite these ethical differences, which are as notable as they are persistent, these two states would like to reach a free trade agreement and are currently in talks. Unsurprisingly, this trade initiative has citizens and politicians alike perplexed and worried about their ability to reach a balanced agreement on these sensitive issues. Moreover, even though the European Union has an economic advantage over the United States[46], the United States' negotiating skills are far greater than those of the European Union. Powerful American lobbies will undoubtedly not make it easy for the European negotiators. In addition, American negotiators have a track record of being tough and persistent, as perfectly illustrated by a statement made by Clara Hills, U.S. trade representative from 1989 to 1993: "*We wrench open foreign markets with a crow bar if necessary, but with a handshake if possible*"[47]. So, despite the political willingness of European institutions to include animal welfare in their free trade agreement talks, it is uncertain whether they can systematically negotiate a sufficient level of protection.

The inclusion of an ISDS in a free trade agreement can also jeopardise national animal welfare standards. This dispute settlement mechanism allows a foreign investor to file suit against a state before an international arbitral tribunal if this state breaches the terms of the agreement. This would not directly affect national norms because under no circumstance may the arbitral tribunal require the state to change its legislation as a sanction. However, states, which need to pay the high fees of this private court[48] as well as fines that can reach into the millions, are placed under considerable financial pressure by these arbitral disputes. As the Comprehensive Economic and Trade Agreement CETA (Canada - European Union) and the TTIP (United States - European Union) talks include ISDSs, European institutions, aware of the risks of steep financial sanctions, have implemented a European regulation[49] to have the arbitral dispute fees shared between the

European Union and Member States. The second consideration of the regulation states that, with regard to complaints filed in application of an ISDS, that "*significant costs of administering the arbitration as well as costs relating to the defence of a case will inevitably be incurred*". Because participating in arbitral disputes mobilises considerable public resources, states may be reluctant to impose stricter ethical standards in the future or be compelled to abrogate a law; this phenomenon is known as a "freeze on standards". Other than the costs incurred by these disputes, ISDSs do not provide any foreseeable legal framework for the states given that they often authorise claimants to take the matter to an arbitral tribunal of one of the numerous existing arbitration centres (ISCID, UNCITRAL, ICC, etc.)[50]: the absence of a single court covering international trade disputes between investors and states is blocking the development of a unified, coherent and predictable system of law. This lack of predictability can also weigh heavily on a state's willingness to legislate in favour of animal welfare or the environment. Nevertheless, ISDSs should not be demonised, they do not set out to hinder the production of ethical standards but to provide investors with protection in order to facilitate international trade. These dispute settlement mechanisms provide a neutral judicial forum for investors, who, without this, would only be able to appeal to the sometimes-corrupt national jurisdictions of the state they are suing. By protecting investors against state abuses such as direct expropriation and providing them with a neutral legal framework, they favour international trade. In addition, some authors of legal doctrine encourage the protection of investors and even regret that this is not ensured by the WTO because after all, "*where the rules of international trade systems are breached, it as much by these operators as by states, and states are less reprimanded for these than the operators*" (Carreau & Juillard). Granting investors access to a means of appeal is beneficial but it remains vital that the risks of including an ISDS in a free trade agreement are reduced as much as possible during international negotiations.

To eliminate most of the harmful effects of ISDSs on national ethical norms, the first step is to remain vigilant when an agreement is signed between two developed countries because statistics show that it is these agreements that lead to the highest number of arbitral rulings[51], and therefore run a higher risk of a freeze on standards. The UNCTAD, a United Nations organisation in charge of international development and trade, even indicates that the United States and the European Union are the main users of the ISDS mechanism. Together they account for 75% of ISDS claims[52]. The second stage is to provide a clear framework around investors' right to appeal through arbitration. In theory, the ISDS mechanism can protect investors from a large number of state decisions, from direct expropriation (by which a public body can force a private entity to hand over property, usually in return for fair compensation) to indirect expropriation (where in the absence of a transfer of property, a state measure has an effect equivalent to direct expropriation). Indirect expropriation can be problematic for state ethical norms because this can be invoked by investors before an arbitral tribunal in order to challenge certain environmental[53] or public health[54] laws that have caused them a significant loss of revenue or closure of their business. It is therefore important that the conditions by which investors can act against a state are listed in full and that it is specified in the agreement and the ISDS that the right to legislate for national policy reasons is preserved. The European Commission deemed the CETA, a free trade agreement between the EU and Canada that was finalised on 26 September 2014, to be risk-free, stating that it "*does not limit the capacity to regulate in the future in any manner*". Indeed, the agreement mentions how important it is that global trade respects the environment (CETA, 2014) (but overlooks animal welfare, therefore also excluding owned animals). In addition, it preserves the parties' right to legislate to achieve legitimate political goals in health, the environment and public morals (CETA, 2014). This could be a ban on growth activators in farming for health purposes, a ban on certain fishing or animal husbandry methods, provided that the arbitral tribunals' interpretation is similar to that of the DSB, or cruel farming or slaughter techniques in the name of public morals[55]. The

ISDS of the CETA[56] and its appendix provide an effective framework for investors' legal proceedings while stressing that public policy measures taken to protect the environment, public health and safety do not constitute "indirect expropriations" and therefore do not entitle investors to take court action against a state. However, it is unfortunate that the concept of public morals, although stated in the agreement, is not reiterated in the provisions of the ISDS. While the use of precise terms and the strict framing of the notion of indirect expropriation ensure that the right to legislate is preserved in the areas of health and the environment, the absence of a reference to animal welfare is a sign that they are inadequately protected.

The current free trade agreement system and ISDS mechanism are being called into question, to an extent that the two international mechanisms are now at the centre of several reform projects, both in the European Union and globally. Aware that the "*traditional form of dispute resolution suffers from a fundamental lack of trust*"[57], the European Commission has proposed a reform of the investor-state dispute settlement. This reform process, of which the future is uncertain given that the Commission must first convince its trading partners to accept it, aims to create a first instance tribunal and an appeal tribunal whose judgements would be made by publicly appointed judges, comparable to the International Court of Justice and the WTO Appellate Body. This system will provide an improved framework for investors' right to act and free trade agreements will ensure that "*governments' right to regulate are enshrined and guaranteed*"[58]. While this reform presents greater guarantees than the current system, the Commission remains silent as to the nature of the sanctions that this new court could impose and whether it would allow for mitigation of damages on criminal sentences. Furthermore, there is still a risk of diverging interpretations between the Dispute Settlement Body and this new court. Despite these shortcomings, the reform project complies with the wishes of the UNCTAD, which feels there is a pressing need for a reform of the international free trade agreements to bring them in line with today's sustainable development imperative[59].

References

1. Dictionnaire de droit international public, éd. Bruylant 2001, p. 491: in public international law, extraterritoriality is defined as "a situation in which the competences of a State (legislative, executive or jurisdictional) govern legal relations outside of that State". The national laws presented in this case do not hold authority within another State. As such, this is not strictly extraterritoriality and therefore this article will use the terms "extraterritorial consequences" when referring to the economic and factual consequences that national laws on animal welfare can have.
2. Under the Directive 96/22/EC of 29 April 1996, it is prohibited to use veterinary beta-agonist drugs to fatten animals for human consumption. It is still legal for these substances to be used for therapeutic purposes on some categories of animal.
3. The report, in particular, notes tachycardia in dogs and humans to whom ractopamine was administered.
4. J. N. Marchant-Forde, D. C. Lay, E. A. Pajor, B. T. Richert, A. P. Schinckel, 2002, The effects of ractopamine on behavior and physiology of finishing pigs, Purdue University. *Swine Research Report*, p. 4.
5. Drug label information for the trademark Elanco, Paylean 45 Ractopamine Hydrochloride: "CAUTION: Ractopamine may increase the number of injured and/or fatigued pigs during marketing".
6. European Council conclusions, Follow-up to the adoption of a standard setting maximum residue levels (MRLs) for ractopamine by the Codex Alimentarius Commission at its 35th session, 3,193rd Agriculture and Fisheries Council meeting, 22 and 23 October 2012, p.2: The Council states that the ban on ractopamine is to serve the dual interests of public health and animal welfare.
7. The EU ban on imports of hormone-treated meat products led to a high-profile international dispute: EU-Hormones Case, Appellate Body report, 16 January 1998.
8. C. Deffigier, H. Pauliat, Le bien-être animal en droit européen et en droit communautaire, *Les animaux et les droits européens*, ed. A. Pedone, p. 72.
9. By virtue of Article 3 of the SPS agreement, health measures, such as the ban on imports of meat products treated with ractopamine, benefit from a presumption of conformity with the GATT agreements where these are founded on international standards or recommendations, in particular those of the Codex Alimentarius.
10. The Appellate Body confirmed the interstate nature of the DSB dispute in the United States/imposition of countervailing duties case of 10 May 2000, points 40 and 41.

11. Court of First Instance of the European Union of 11 January 2002, Biret International v Council, point 62, concerning the direct effect of the EC-Hormones Case decision, Appellate Body report of 16 January 1998.
12. This type of dispute settlement court, which often transfers jurisdiction to the DSB, only presents difficulties if it diverts the WTO's international trade dispute and creates a contradictory jurisprudence to that of the DSB. This type of court is not presented in detail in this article, which mainly looks at the WTO and ISDSs and their impact on the creation of ethical norms. For more detail on the distribution of authority between dispute settlement systems and their impact on animals, read Mercier, 2016.
13. Regulation (EU) No. 912/2014 of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party: "significant costs for administering the arbitration as well as costs relating to the defence of a case will inevitably be incurred in any such case." (Whereas 2).
14. Vienna Convention on the Law of Treaties of 23 May 1969, Article 26: "*Pacta sunt servanda*: Every treaty in force is binding upon the parties to it and must be performed by them in good faith."
15. The WTO is not an international organisation that governs the environment or animal protection and does not claim to do so. The purpose of the organisation is to regulate international trade. However, it does take into account certain ethical considerations where these affect international trade.
16. The Committee on Trade and Environment has a mandate to examine trade-related environmental issues and provide technical assistance where changes are to be made to WTO agreements.
17. EC – Seal Products, Special Group Report of 25 November 2013, § 7. 401; EC – Seal products, Appellate Body Report of 22 May 2014, § 5. 143.
18. The SPS agreement, which is one of the WTO agreements alongside the GATT agreement, is based on Article XX b) of the GATT.
19. A two-stage analysis by the WTO is required in order to validate a law adopted in application of Article XX of the GATT: it first verifies whether the law applies to one of the exemptions stipulated under Article XX, then its discriminatory nature is measured with regard to the chapeau of Article XX.
20. Memorandum of understanding on rules and procedures governing dispute settlement.
21. United States — Import prohibition of certain shrimp and shrimp products, Appellate Body Report of 12 October 1998, § 128.
22. Id., § 127.
23. United States - Import prohibition of certain shrimp and shrimp products, Appellate Body Report of 12 October 1998, § 128.
24. United States - Import prohibition of certain shrimp and shrimp products, Appellate Body Report of 12 October 1998, § 185.
25. Cited by United States - Import prohibition of certain shrimp and shrimp products, Appellate Body Report of 12 October 1998, § 112.
26. European Communities — Measures Prohibiting the Importation and Marketing of Seal Products (hereinafter the EC - Seal Products), Special Group Report of 25 November 2013; followed by an Appellate Body decision of 22 May 2014 validating the Special Group's analysis and conclusions.
27. Regulation (EC) No. 1007/2009 of 16 September 2009 on trade in seal products.
28. Id., Whereas: "(1) Seals are sentient beings that can experience pain, distress, fear and other forms of suffering."; Whereas "(4) The hunting of seals has led to expressions of serious concerns by members of the public and governments sensitive to animal welfare considerations due to the pain, distress, fear and other forms of suffering which the killing and skinning of seals, as they are most frequently performed, cause to those animals."
29. The European Union made Regulation No. 1007/2009 comply with the WTO agreements.
30. EC - Seal Products, Appellate Body Report of 25 November 2013, § 7. 379 – 7. 383.
31. Id., § 7. 401.
32. The elements of proof taken into account by the Special Group include legislative texts, legislative history applicable to seal products, actions taken by the EU and Member States in favour of animal welfare, and the ratification of international conventions on animal welfare.
33. Id., § 7. 409.
34. EC – Seal products, Appellate Body Report of 22 May 2014, § 5. 289.
35. EC - Seal Products, Appellate Body Report of 25 November 2013, § 7. 632.
36. United States - Measures concerning the importation, marketing and sale of tuna and tuna products, Special Group Report of 11 September 2011 (United States - Tuna II). This decision was followed by an Appellate Body Report on 16 May 2012.
37. The Special Group felt that the "Dolphin-safe" labelling constituted a technical regulation under the WTO agreement and that the measure taken by the United States was more restrictive on trade than was necessary to achieve the goal of protecting dolphin, although this goal was deemed to be legitimate. Read: A. Acuri, Back to the Future: US-Tuna II and the new environment trade debate. EJRR 2/12, p. 177.
38. The WTO's multilateral system is based on the most-favoured-nation treatment (Article I of the GATT) by virtue of which any advantage granted to a member of the WTO is systematically granted to other WTO members, but there

are a few exceptions to this. Within the derogation relating to regional integrations governed by Article XXIV of the GATT, the WTO authorises free trade areas and customs unions.

39. E. Adam, L'impasse des négociations internationales : la nécessité d'un aggiornamento, RDR novembre 2013.
40. See the following documents: European Commission, The Transatlantic Trade and Investment Partnership: the top 10 myths about TTIP, 2014; European Parliament, P8_TA-PROV(2015)0252, European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP), p 13.
41. European Commission Press Release, The Cariforum-EC Economic Partnership Agreement, MEMO/08/624 of 15 October 2008.
42. EC-Hormones Case, Appellate Body Report of 16 January 1998.
43. European Food Safety Authority (EFSA) website, animal welfare section.
44. For example: initiatives aimed at protecting sea animals during commercial shrimp harvesting, protecting dolphins during commercial tuna fishing, the use of ecolabels to inform consumers on the production methods of certain animal products, the ban on foie gras in California and on anal electrocution of fur-bearing animals in the state of New York.
45. On a federal level, the Animal Welfare Act (AWA) excludes livestock from its protective provisions (7. U.S.C §§ 2131-2159), the Humane Methods of Slaughter Act (HMSA) reduce animal suffering during slaughter and the Twenty-Eight Hours Law 49 U.S.C § 80502 pertaining to transport were interpreted by the USDA to exclude poultry from its scope of application; the use of veterinary beta-agonist drugs for rapid muscle growth in livestock is authorised.
46. According to the European Commission (europa.eu, under The Economy), "In terms of the total value of all goods and services produced (GDP), the EU economy is bigger than the US economy".
47. M. Rainelli, L'Organisation mondiale du commerce, Repères économie 9th edition, p. 41.
48. Convention and Regulations of the International Centre for Settlement of Investment Disputes (ICSID): the parties must pay the arbitrators, lawyers, experts, translators and for the hire of the arbitration venues.
49. Regulation (EU) No. 912/2014 of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party.
50. E. Gaillard, La Jurisprudence du CIRDI, vol. 2 (2010), p. 4.
51. Recent development in investor-State dispute settlement (ISDS), United Nations Conference on Trade and Development (UNCTAD), II A Issue note, No. 1, April 2014.
52. Investor-State dispute settlement: an information note on the United States and the European Union, United Nations Conference on Trade and Development (UNCTAD), II A Issue note, No. 2, June 2014.
53. On 31 May 2012, the Swedish company Vattenfall filed a lawsuit against the German state in application of the European Energy Charter Treaty (a treaty that aims to develop the energy potential of European countries and includes an investor-state dispute settlement clause). This action, taken on the grounds of indirect expropriation from the Swedish company, followed Germany's decisions to abandon nuclear energy (Atomic Energy Act, July 2011).
54. Australian Government, Attorney-General's Department, Tobacco plain packaging - investor-state arbitration: In the Philip Morris case in 2011, the Asian subsidiary of this firm attacked the 2011 "Tobacco Plain Packaging Act" by virtue of an ISDS of an agreement between Australia and Hong Kong. The purpose of the Australian state's public health measure was to prevent and reduce smoking-related death by stipulating that tobacco producers were required to sell their products in plain packaging. Philip Morris felt that the loss of revenue caused by the Australian regulation constituted indirect expropriation. The regulation on plain packaging is currently the object of a dispute before the WTO.
55. In the aforementioned EC - Seal Products case, the DSB drew on the concept of public morals to validate the European regulation that bans the import and sale of seal products due to the cruelty of the hunting methods used.
56. The consolidated CETA text published on 26 September 2014, section on the protection of investors, p. 1581.
57. Cecilia Malmström, European Commission Press Release of 16 September 2015, Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations.
58. Id.
59. Taking stock of IIA reform, United Nations Conference on Trade and Development (UNCTAD), II A Issue note, No. 1, March 2016, Original text: "There is a pressing need for systematic reform of the global regime of international investment agreements (IIAs) to bring it in line with today's sustainable development imperative".

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