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Protecting Animals In International Trade: A Study Of The Recent Successes At The WTO And In Free Trade Agreements

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PROTECTING ANIMALS IN INTERNATIONAL TRADE: A STUDY OF THE RECENT SUCCESSSES AT THE WTO AND IN FREE TRADE AGREEMENTS

ANDREW LURIÉ* & MARIA KALININA**

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I. INTRODUCTION

Over the past several years, the World Trade Organization (“WTO”) began recognizing the protection of animals as a legitimate objective that can justify trade restrictions. Scholars and animal welfare organizations have written extensively about the WTO’s negative impact on animal welfare legislation. Almost since the WTO was established, animal welfare organizations have been sounding the alarm and arguing that the free trade rules focus almost entirely on ensuring that trade flows as smoothly as possible and leaving little room for protecting animals.¹ One example used by

1. See, e.g., Peter Stevenson, *The Greatest Threat Facing Animal Protection Today: Post Cancun Briefing*, WORLD TRADE ORG. 1 (Oct. 2003),

animal welfare groups relates to the WTO concept of “like” products. Non-discrimination between similar or “like” products is one of the WTO’s bedrock principles. As has been well-chronicled and lamented, the WTO Dispute Settlement Body’s interpretation of like products has completely ignored “processes and production methods” in the analysis.² For WTO purposes, this means an egg is an egg, whether it comes from a hen kept in a cramped battery cage or one allowed to forage freely in the yard, and no WTO member may discriminate between eggs produced in different countries.

This interpretation impedes animal welfare regulations in production industries because countries often aim to improve animal welfare by prohibiting certain production methods. A country will be hesitant to pass an industry-practice ban that applies only to domestically-produced products because it may place domestic producers at a disadvantage against foreign producers that are able to produce the products more cheaply using the inhumane practice in question. However, also applying the ban to imported products will likely cause much handwringing among legislators because of the WTO’s perceived approach toward discrimination.

The European Union’s (“E.U.”) recent legislation epitomizes the dilemma that States face when trying to implement animal welfare regulations without violating WTO rules. Although the E.U. is arguably the most progressive government in the world in terms of

https://www.ciwf.org.uk/includes/documents/cm_docs/2008/p/post_cancun_mep_briefing.pdf (“[T]he WTO rules are blocking progress on animal protection that would otherwise be made – progress that is justified by scientific research and wanted by much of the public is often simply not happening because of the WTO’s destructive influence.”); *see also* Leesteffy Jenkins & Robert Stumberg, *Animal Protection in a World Dominated by the World Trade Organization*, in *THE STATE OF THE ANIMALS* 149, 149 (Deborah J. Salem & Andrew N. Rowan eds., 2001) (noting that many “animal protection measures . . . have been reversed or stymied in the face of WTO challenges or threatened challenges.”).

2. *See, e.g.*, Stevenson, *supra* note 1, at 2 (explaining that WTO rules against discrimination of “like products” result in a powerful disincentive to States who want to ban the import of animal products when those animals have been reared in inhumane conditions); *see also* Chris Fisher, *Who’s Afraid of PPMs?*, EUROPA (May 31, 2001), http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122187.pdf (highlighting the general reluctance to consider processes and production methods in reforming WTO policies in response to consumer and policy makers’ concerns and that some argue that such policies might even undermine the entire international trading system).

animal protection,³ the E.U. proceeded very cautiously in the years after the WTO was formed. Wary of facing challenges before the WTO, the E.U. held back and/or weakened several well-publicized animal protection laws because they could potentially impact trade, such as the ban on the import of furs caught in leghold traps,⁴ the ban on battery cages for laying hens,⁵ cosmetics animal testing regulations,⁶ and labeling requirements for shelled eggs.⁷

Recently, however, WTO case law suggests that countries may have less to fear in imposing animal welfare standards on foreign products than previously thought. Two cases—the first WTO disputes involving animal welfare—reveal that the WTO appreciates the growing worldwide awareness that animal welfare is an ethical

3. See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 49 (incorporating animal welfare and protection into the E.U.'s constitutional framework). The E.U. has also worked to promote animal welfare through several Council Directives. See, e.g., Council Directive 2001/88/EC, 2001 O.J. (L 316/1-2) (prohibiting extreme animal confinement systems such as certain sow stalls); Council Directive 1999/74/EC, Laying Down Minimum Standards for the Protection of Laying Hens, 1999 O.J. (L 203/53) (banning the barren battery cage in the E.U. from 2012); Council Directive 2008/119/EC, Laying Down Minimum Standards for the Protection of Calves, 2009 O.J. (L 10/7) (prohibiting the use of crates to constrain young calves and inhibit movement). In addition, the E.U. has worked to improve the lives of research animals. See Council Directive 2010/63, On the Protection of Animals Used for Scientific Research, 2010 O.J. (L 276/33) (EU) (extending legal protections to a larger range of species used for scientific purposes and requiring application of the '3Rs,' the Replacement, Reduction and Refinement of animal use in testing).

4. This proposed ban has been largely abandoned over WTO concerns. See Stevenson, *supra* note 1, at 1; see also Chris Fisher, *Farm Animal Welfare and the WTO*, EUROGROUP FOR ANIMAL WELFARE (Nov. 6, 2000), http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122238.pdf.

5. See Council Directive 1999/74/EC, *supra* note 3 (banning the use of barren battery cages for egg production in E.U. Member States only, without affecting eggs imported into the E.U.).

6. See Council Directive 2010/63/EU, *supra* note 3 (attempting to neutralize disparities between the national implementing measures that "ensure a high level of protection of animals used for scientific purposes" and those that "only apply the minimum requirements laid down" in an earlier directive because these "disparities are liable to constitute barriers to trade"); see also Stevenson, *supra* note 1, at 1 (noting that this Directive, originally set to be implemented in 1998, finally came into force in 2013 after years of delay because of WTO concerns).

7. See Council Regulation 5/2001, 2000 O.J. L 2/1 (EC) (placing mandatory requirements for the inclusion of the production method in the marketing of shelled eggs but providing additional generic options for imported products).

concern and should trump free trade in certain circumstances.⁸ While these disputes involve wildlife, the principles motivating the decisions could easily be applied in other contexts, such as farm animals and research animals.

At the same time, bilateral and multilateral free trade agreements (“FTAs”) have begun to incorporate important provisions on wildlife conservation and animal welfare. Historically, trade agreements have been perceived to have purely negative outcomes for animals, and for good reason.⁹ FTAs are intended to increase the flow of goods and services between countries, including animal products, live animals, and other products that affect animals and/or their habitats. Reducing or eliminating barriers to trade, such as tariffs and quotas, enables countries with large supplies of sought-after animals and animal products to satisfy the demands of other countries. These demands continue to grow as the previously rare goods become increasingly easier to obtain and further strain wild animal populations and animals in production systems.

However, more recently, FTAs have included measures to try to address these negative impacts that often accompany increased trade. In certain FTAs, parties have agreed to (1) reaffirm commitments made under important multilateral environmental agreements (“MEAs”); (2) combat global issues that undermine legal trade, such as wildlife trafficking and illegal, unregulated, and unreported fishing (“IUU”); and (3) address animal welfare concerns related to farm animal products and animal testing and research.

8. See Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶¶ 303-06, WT/DS381/AB/R (May 16, 2012) [hereinafter US—Tuna Appellate Body Report] (revealing that the Panel found “that the objectives of the U.S. dolphin-safe provisions, as described by the United States and ascertained by the Panel, are legitimate,” but that the United States’ measures were more restrictive than necessary to achieve the objective); see also Appellate Body Reports, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶¶ 2.196, 5.138, WT/DS400/AB/R, WT/DS401/AB/R (May 22, 2014) [hereinafter EC—Seal Products Appellate Body Reports] (“[T]he evidence as a whole sufficiently demonstrates that animal welfare is an issue of ethical or moral nature in the European Union.”) (internal quotes omitted).

9. See Stevenson, *supra* note 1 at 1 (describing the WTO’s free-trade rules as “wrecking progress on animal welfare”).

In the United States, the Dominican Republic-Central America-United States Free Trade Agreement (“CAFTA-DR”) and the U.S.-Peru Trade Promotion Agreement (“PTPA”) highlight the recent positive impact of FTAs for wildlife protection. Globally, two major trade agreements currently under negotiation, the Trans-Pacific Partnership (“TPP”) and the Transatlantic Trade and Investment Partnership (“TTIP”), are also promising in terms of wildlife protection. In both TPP and TTIP, the United States has advocated for including strong environmental provisions present in previous agreements, while also proposing additional species-specific protections and new, inventive methods for combating illegal wildlife trade. If these agreements include the robust provisions advocated by animal protection groups, they may even address some of the animal welfare problems embedded in industrialized animal production as well as animal testing and research.

This article reviews the last two decades of intergovernmental regulation of trade affecting animals. Section II provides background on the WTO and analyzes the outcome of two recent WTO disputes involving animals. Section III focuses on FTAs, analyzing wildlife protection in two recent FTAs of the United States and two FTAs currently under negotiation and discussing the potential impacts on wildlife conservation and animal welfare. Ultimately, the article concludes that the future looks a bit brighter for governmental and non-governmental organizations seeking to improve worldwide protections for wildlife seriously impacted by international trade. It also provides some hope that the evolving worldwide consciousness of animal welfare as a matter of ethical concern will lead to greater protections of animals involved in international trade.

II. THE WTO AND ANIMAL WELFARE

A. BACKGROUND

The WTO was created in 1995 to regulate trade among nations, replacing the General Agreement on Tariffs and Trade (“GATT”), which had been in place since 1947.¹⁰ The WTO aims to help trade between countries flow as freely as possible by removing

10. *What Is the WTO: Overview*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm (last visited Feb. 6, 2015).

unnecessary obstacles to trade and by ensuring that trade rules are transparent and predictable.¹¹ Obstacles to trade arise from discriminating against the products of one country in favor of domestic products of another country through various arbitrary or unjustifiable means, such as import bans, quotas, tariffs, and laws that depart from relevant international standards.¹²

However, a country can create a trade roadblock if it is “necessary.”¹³ Whether it is necessary depends on policy goals that trump free trade concerns, such as protecting human, animal, or plant health, and national security.¹⁴ Essentially, the WTO attempts to balance its goal for liberalizing trade while recognizing that certain regulatory goals are superior, but also keeping a sharp eye out for trade protectionism cloaked in a lofty purpose.¹⁵

Measures restricting trade to protect animals have formed the basis for numerous WTO challenges.¹⁶ However, prior to the latest stage of the *US—Tuna*¹⁷ dispute, cases had focused on either species conservation as an environmental matter or disease as a health issue.¹⁸ *US—Tuna* was the first WTO dispute to closely examine a

11. *What is the WTO: Who we are*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm (last visited Feb. 6, 2015).

12. Agreement on Technical Barriers to Trade pmb., Apr. 12, 1979, 1186 U.N.T.S. 276.

13. *See id.* ¶ 2.2 (noting that regulations cannot be more restrictive “than necessary to fulfill a legitimate objective.”).

14. *Id.*

15. General Agreement on Tariffs and Trade art. 18, Oct. 30, 1947, 55 U.N.T.S. 194 [hereinafter GATT] (“[T]o implement programs and policies of economic development designed to raise the general standard of living of their people [and] take protective or other measures affecting imports [certain] measures are justified in so far as they facilitate the attainment of the objectives of [the GATT].”).

16. *WTO Rules and Environmental Policies: Introduction*, WORLD TRADE ORG. (2015), http://www.wto.org/english/tratop_e/envir_e/envt_rules_intro_e.htm (last visited Feb. 5, 2015) (listing the *US—Gasoline* case, the *US—Shrimp* case, the *EC—Asbestos* case, and the *Brazil—Retreaded Tyres* case).

17. *US—Tuna* Appellate Body Report, *supra* note 8.

18. *See* Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 171, WT/DS58/R (May 15, 1998) (involving a dispute about harm to sea turtles in which the United States argued that a measure banning countries from importing shrimp into the United States—unless the shrimp were caught by boats using turtle excluder devices—was justified as necessary to protect an exhaustible natural resource under article XX(g) of the GATT); *see also* Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶

measure intended to protect animals by focusing on harm to individual members of the species as a welfare issue. Thus, how this animal welfare measure would fare in a WTO challenge was far from certain.

B. US—TUNA (“II”)

The *US—Tuna* dispute arose out of a U.S. labeling law that aimed to curb the use of a controversial tuna fishing technique referred to as “setting on dolphins.”¹⁹ For reasons still unknown, a mysterious phenomenon in the Eastern Tropical Pacific Ocean (“ETP”) exists where schools of tuna congregate below pods of dolphins.²⁰ Once fishermen discovered it in the 1950s, they routinely exploited this relationship between dolphins and tuna.²¹ Fishing boats would locate pods of dolphins and then set weighted nets encircling the dolphins, a practice that came to be known as “setting on dolphins.”²² Once the dolphins are completely enclosed in the netting, the fishermen slowly close the circle, capturing the tuna below in the nets but also making it difficult for the dolphins to escape. As hundreds of thousands of dolphins were killed each year as a result of the dolphin sets,²³ many more suffered physical injuries, psychological stress, and disrupted breeding patterns.²⁴

Animal protection organizations quickly called for an end to this cruel practice. Once the public outcry reached a fever pitch,²⁵ the

4, WT/DS332/AB/R (Dec. 3, 2007) (acknowledging the importance of protecting animal life and health as a general matter).

19. *Id.* ¶ 172.

20. *The Tuna-Dolphin Issue*, NOAA FISHERIES & SW. FISHERIES SCI. CTR., <https://swfsc.noaa.gov/textblock.aspx?Division=PRD&ParentMenuId=228&id=1408> (last modified Dec. 24, 2014).

21. *See id.* (estimating that approximately six million dolphins have been killed since the fishermen began “setting on dolphins” in the 1950s).

22. *Id.*

23. *See id.* (“[The] bycatch of dolphins in the ETP tuna fishery has now been successfully reduced by more than [ninety-nine percent]”).

24. *See Earth Island Inst. v. Evans*, No. C 03-0007 TEH, 2004 WL 1774221, at *31 (N.D. Cal. Aug. 9, 2004) (noting that the dolphin population is not recovering despite the extremely low mortality rate).

25. *See generally* Susan Reed, *A Filmmaker Crusades to Make the Seas Safe for Gentle Dolphins*, PEOPLE MAG. (Aug. 6, 1990), <http://www.people.com/people/archive/article/0,,20118400,00.html> (describing that, in the late 1980s, Sam LaBudde, who was operating undercover on a Panamanian fishing boat, shot footage of dolphins drowning in purse seine nets in the ETP and of the dead or

United States—the largest market for tuna in the area—created the “Dolphin Safe” label in 1990 to place on canned tuna sold in the United States.²⁶ In doing so, it assured consumers that tuna in cans bearing the Dolphin Safe label were not caught using specified practices known to be harmful to dolphins like setting on dolphins.²⁷ This effort aimed to address the harm to dolphins inherent in the prohibited practices through market forces by making tuna caught without harming dolphins more desirable to consumers. The U.S. Dolphin Safe regime does not prevent the sale of tuna caught with dolphin sets, but ensures that such tuna cannot be labeled Dolphin Safe.²⁸

Because the tuna-dolphin association only exists in the ETP and scientific research showed significant dolphin mortality rates there, the United States focused on tuna-dolphin association in the area and imposed stricter dolphin protection requirements vis-à-vis the Dolphin Safe label for tuna caught there.²⁹ Inside the ETP, fishermen would need an independent observer to certify that no driftnetting or setting on dolphins had occurred and that no dolphins were seriously injured or killed.³⁰ Outside of the ETP, the certification that no

dying dolphins being discarded back into the water while the fisherman kept the tuna). After the footage of dolphins drowning aired on national television, numerous consumer boycotts of canned-tuna emerged causing private companies like StarKist and BumbleBee to pledge not to buy tuna caught in association with dolphins. *See, e.g., About StarKist Co.*, STARKIST, <http://www.starkist.com/about-starkist> (last visited Feb. 2, 2015) (detailing the company’s dolphin-safe policy); *see also FAQs*, BUMBLE BEE, <http://www.bumblebee.com/faqs> (last visited Jan. 31, 2015) (highlighting that the company’s commitment to dolphin-safe practices dates back to 1990).

26. Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385(d)(1) (1999) (providing for the use of a voluntary “Dolphin Safe” label if certain criteria are met, such as prohibiting intentional setting on dolphins for tuna harvested in the ETP).

27. *See id.* § 1385(a)(3) (recognizing that “consumers would like to know if the tuna they purchase is falsely labeled as to the effect of the harvesting of the tuna on dolphins.”).

28. *See* BILIANA CICIN-SAIN & ROBERT KNECHT, *THE FUTURE OF U.S. OCEAN POLICY: CHOICES FOR THE NEW CENTURY* 162-63 (2000) (portraying the Dolphin Safe regime as part of a larger effort in which the United States imposed embargoes on tuna from various nations, such as Mexico, from 1990 to 1998).

29. 16 U.S.C. § 1385(d)(1)(C).

30. *See* Panel Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 2.12, WT/DS381/R (Sept. 15, 2011) [hereinafter US—Tuna Panel Report] (requiring that the statements be in

driftnetting or setting on dolphins had occurred could be made by the captain, and there was no requirement that dolphins not have been seriously injured or killed.³¹

Mexico, one of the countries that continues to set on dolphins to catch tuna, formally challenged the Dolphin Safe label before the WTO in 2008, arguing that the Dolphin Safe label violated several provisions of both the Agreement on Technical Barriers to Trade (“TBT Agreement”) and the GATT.³² Specifically, Mexico contended that the label is a *de facto* trade ban against Mexican tuna because almost no U.S. consumer would buy canned tuna unless it had the Dolphin Safe label and most Mexican-caught tuna are ineligible for the label. Mexico argued that the Dolphin Safe label regime is discriminatory, does not pursue a legitimate objective, and is more trade-restrictive than necessary.³³

writing).

31. *See id.* ¶ 2.11.

32. In its first two decades, the Dolphin Safe label survived not only several challenges under the GATT, including one from Mexico, but also repeated attempts to legislatively amend it to allow setting on dolphins if no dolphins were injured or killed. *See* Panel Report, *United States—Restrictions on Imports of Tuna*, ¶ 7.3, DS21/R-39S/155 (Sept. 3, 1991) (not adopted) (“The tuna labeling provisions of the Dolphin Protection Consumer Information Act relating to tuna caught in the Eastern Tropical Pacific Ocean are not inconsistent with the obligations of the United States under Article 1:1 of the General Agreement.”); *see also* Taking and Importing of Marine Mammals, 68 Fed. Reg. 2010-03, 2011 (Jan. 15, 2003) (announcing a “no significant adverse impact” finding in response to the question of whether the intentional deployment on or encirclement of dolphins with purse seine nets is having a significant adverse impact on any depleted dolphin stock in the ETP); *U.S. Dolphin-Safe Tuna Labeling Rule Deemed a WTO Violation*, EYES ON TRADE (May 20, 2011), <http://citizen.typepad.com/eyesontrade/2011/05/us-dolphin-safe-tuna-labeling-rule-deemed-a-wto-violation.html> (describing statement of Senator Barbara Boxer, co-author of the Dolphin Safe label law, calling the Dolphin Safe label a victory because it provides the highest level of protection of dolphins). *But see* *Earth Island Inst. v. Hogarth*, 484 F.3d 1123, 1136 (9th Cir. 2007) (rejecting and vacating the Commerce Department’s findings that fishery as having no significant adverse impact on dolphins); Panel Report, *United States—Restrictions on Imports of Tuna*, ¶ 6.1, DS29/R (June 16, 1994) (not adopted) (recommending that the United States bring its measures into conformity with its GATT obligations because no contracting party had agreed to give the right to impose trade embargoes to other parties to protect the health and life of plants and animals). *See generally* Fern L. Kletter, Annotation, *Construction and Application of International Dolphin Conservation Program Act (IDCPA)*, 38 A.L.R. FED. 2D 295 § 1 (2009) (reviewing all U.S. litigation over the IDCPA).

33. *See, e.g.*, US—Tuna Panel Report, *supra* note 30, ¶¶ 4.43, 4.50, 4.54, 4.56-

In defense of the Dolphin Safe label, the United States relied on the measure's two objectives—protecting dolphins and ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that is harmful to dolphins—to justify any alleged negative impact the measure caused Mexico.³⁴ The Panel found and the Appellate Body affirmed that the Dolphin Safe label's objectives were legitimate and justified the trade restrictions that the measure imposed.³⁵ Significantly, in reviewing the Panel's factual findings, the Appellate Body determined that intentionally setting nets on dolphins is “particularly harmful to dolphins”³⁶ not only because it results in observed injuries and deaths³⁷ but also because it has long-term effects on reproductive rates and breeding cycles as a result of stress.³⁸ Thus, the analysis focused on how tuna fishing practices harmed individual and groups of dolphins, not just their effects on species survival.³⁹

Ultimately, the Appellate Body found that the U.S. measure was

.59.

34. See *id.* ¶¶ 1.718, 7.748 (NOTING THAT the United States was never required to apply Article XX of GATT to justify the measure because the Panel chose to exercise judicial economy and not rule on Mexico's claims under GATT); see, e.g., First Written Submission of the United States, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products: Recourse to article 21.5 of the DSU by Mexico*, ¶¶ 316-24, WT/DS381 (May 27, 2014), available at http://www.ustr.gov/sites/default/files/DS381.US_Sub1_Fin_Public.pdf (stating that, in the compliance proceeding, the United States turned to Article XX(b) to justify the amended measure under GATT); see also US—Tuna Appellate Body Report, *supra* note 8, ¶¶ 405-06 (declining to decide on the matter, but determining that the Panel erred in failing to consider the GATT claims, which meant that neither the Panel nor Appellate Body had an opportunity to consider Article XX(b) as part of the U.S. defense).

35. See US—Tuna Panel Report, *supra* note 30, ¶¶ 7.424, 7.438, 7.444, 7.454 (reminding members, however, that measures must not be more restrictive than necessary to fulfill a legitimate objective); see also US—Tuna Appellate Body Report, *supra* note 8, ¶ 303 (recognizing that the U.S. dolphin-safe provisions were legitimate “within the meaning of Article 2.2 of the TBT Agreement”) (emphasis omitted).

36. See US—Tuna Appellate Body Report, *supra* note 8, ¶¶ 289, 297.

37. See *id.* ¶¶ 244-45 (citing US—Tuna Panel Report, *supra* note 30, ¶¶ 7.438, 7.493).

38. See *id.* ¶ 246 (citing US—Tuna Panel Report, *supra* note 30, ¶¶ 7.504, 7.737)

39. See *id.* ¶¶ 246-47 (explaining that the Panel determined that insufficient evidence existed to support any findings based on the effects of dolphin species survival outside the ETP).

inconsistent with Article 2.1 of the TBT Agreement because it gave Mexican tuna fisheries less favorable treatment.⁴⁰ However, the Appellate Body did not criticize the Dolphin Safe label because it detrimentally impacted Mexican tuna fisheries or it imposed differing regulatory requirements on tuna fishing inside and outside the ETP; instead, it articulated that the Dolphin Safe label created distinctions that improperly calibrated the different risks to dolphins inside and outside the ETP.⁴¹ Specifically, while the Dolphin Safe label fully addressed the greater risk associated with intentionally setting on dolphins inside the ETP, the Appellate Body determined the U.S. measure ignored the lesser risks to dolphins from other tuna fishing methods outside the ETP.⁴² Thus, restricting trade to protect animals passed muster, along with the United States' method of animal protection. It was the specific parameters of the measure that were problematic.

The Appellate Body Report required the United States to take action with respect to the Dolphin Safe label to avoid sanctions.⁴³ However, it did not require dismantling or scaling back the legislation.⁴⁴ Instead the United States was able to amend the Dolphin Safe label to strengthen the standards applying outside of the ETP to address the risks to dolphins in the area, kept intact the strict standards inside the ETP.⁴⁵ After the measure was amended in July 2013, those tuna fishing outside the ETP must ensure that no dolphins are killed or injured in sets in which the tuna is caught to qualify for the label.⁴⁶

The *US—Tuna* dispute was the first to indicate that the WTO was not as hostile to animal protection as is often thought. As an initial

40. *Id.* ¶ 299.

41. *See id.* ¶ 297.

42. *See id.*

43. *See id.* ¶ 408 (recommending “that the DSB request the United States to bring its measure . . . into conformity with its obligations under [GATT 1994].”).

44. *See id.* (highlighting that the Appellate Body merely recommended that the United States modify the measure).

45. *See* Dolphin-Safe Labeling Standards, 50 C.F.R. § 216.91(2)(i)-(ii) (2013) (providing regulations for non-ETP purse seine vessels, such as requiring that no purse seine vessels were “intentionally deployed on or used to encircle dolphins” during the particular trip on which the tuna were caught).

46. *Id.*

matter, the WTO found that the measure's goal to protect dolphins was legitimate and could justify restricting trade.⁴⁷ Indeed, instead of indicating that the means of achieving that goal was impracticable, the Appellate Body declared that the Dolphin Safe label *did not do enough* to protect dolphins from harm.⁴⁸ The measure only violated Article 2.1 of TBT because it failed to adequately address harms to dolphins from tuna fishing outside of the ETP.⁴⁹ In doing so, the Appellate Body also focused on dolphin welfare as opposed to species survival. Perhaps more significantly, the WTO challenge improved the Dolphin Safe label and provided better protections for dolphins by widening the scope of the measure and imposing dolphin safeguards in other oceans.⁵⁰ These new requirements may actually further restrict trade in protecting dolphins, but are likely WTO-compliant.⁵¹

From a broader perspective, the *US—Tuna* decision demonstrates that the WTO permits countries to restrict trade to protect the welfare of animals.⁵² As a result, countries should feel confident to pass laws to protect animals from harm even if international trade may be negatively impacted.⁵³ Further, *US—Tuna* indicates that countries' laws can distinguish between production methods as they relate to animals.⁵⁴ While the production methods for tuna did not sway the "like product" analysis,⁵⁵ the Panel found and the Appellate Body

47. *US—Tuna* Appellate Body Report, *supra* note 8, ¶¶ 341-42.

48. *See id.* (indicating that the United States unevenly protected dolphins because the Dolphin Safe label was not "calibrated" to the risks of all dolphins).

49. *Id.*

50. *See generally* Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products, 78 Fed. Reg. 40,997, 41,002 (July 9, 2013) (to be codified at 50 C.F.R. pt. 216).

51. *But see Dispute DS381: United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm (last visited Feb. 8, 2015) (revealing that Mexico formally challenged the U.S. compliance measure as inadequate for the United States to fulfill its WTO obligations, claiming that the revised label still violated WTO principles, and noting that a compliance panel met in August 2014 to hear the case).

52. *See US—Tuna* Appellate Body Report, *supra* note 8, ¶ 341 (finding that the dolphin-safe label at least partially fulfills its objective).

53. *Id.*

54. *See* 50 C.F.R. § 216.91(2)(i)-(ii) (providing guidelines for verifying and labeling dolphin-safe tuna).

55. *See US—Tuna* Panel Report, *supra* note 8, ¶¶ 7.235, 7.248-250.

affirmed that the Dolphin Safe label's distinction between tuna caught by setting on dolphins and by other fishing methods—the former being ineligible for the label and the latter being potentially eligible—was justifiable.⁵⁶ Thus, setting up different rules for tuna produced with varying methods did not violate any WTO principles.

This ruling came as good news to animal welfare advocates because it gives a preliminary imprimatur to laws regulating animal production through production methods. While *US—Tuna* involves wildlife, its reasoning may be readily applied to farm animal practices and to measures that prohibit certain practices that studies show are more harmful to animals. As a result, addressing specific animal production methods on a worldwide basis without violating WTO principles may be easier.

C. EC – SEAL PRODUCTS

While *US—Tuna* was significant, the *EC—Seal Products*⁵⁷ dispute was a watershed case in the global animal protection movement. The dispute was pivotal not because of how it addressed the measure at issue, but rather for the statement it makes about animal welfare's place in modern society and relative importance vis-à-vis free trade.⁵⁸

The Canadian commercial seal hunt is one of the largest slaughters of marine mammals in the world.⁵⁹ Animal protection organizations first started sending observers to document this event in the 1950s, and by the late 1960s, there was mounting public opposition to the annual slaughter.⁶⁰ During that time, world markets for seal products

56. *Id.* ¶¶ 7.374-378; *US—Tuna* Appellate Body Report, *supra* note 8, ¶¶ 284-97.

57. *EC—Seal Products* Appellate Body Reports, *supra* note 8.

58. *See id.* ¶ 5.289 (deciding that, in a fact-specific analysis, the inherent animal welfare concerns relating to the E.U. Seal Regime contribute to the measure's objective).

59. *About the Canadian Seal Hunt*, THE HUMANE SOC'Y OF THE UNITED STATES (Mar. 11, 2013), http://www.humanesociety.org/issues/seal_hunt/facts/about_seal_hunt.html.

60. *See, e.g., About IFAW*, INT'L FUND FOR ANIMAL WELFARE, <http://www.ifaw.org/united-states/about-ifaw> (last visited Feb. 5, 2015) (explaining that the International Fund for Animal Welfare was founded in 1969 for the purpose of ending the commercial hunting of harp seals in Canada).

began to close.⁶¹ The United States was the first country to decisively act in 1972, banning the trade in all marine mammal products, including seal products.⁶² The E.U. prohibited the import of certain seal products, such as newborn harp seals (whitecoats) and hooded seal pups (bluebacks)⁶³ in 1983;⁶⁴ many E.U. Member States, including Slovenia,⁶⁵ Croatia,⁶⁶ Italy,⁶⁷ Belgium,⁶⁸ the Netherlands,⁶⁹

61. *About the Canadian Seal Hunt*, *supra* note 59.

62. See Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, §§ 101, 107, 202, 86 Stat. 1027, 1029 (detailing the takings protocol for marine mammals and specifically mentioning that fur seals must be protected as a species).

63. See *Animal Welfare Aspects of the Killing and Skinning of Seals: Scientific Opinion of the Panel on Animal Health and Welfare*, EUR. FOOD SAFETY AUTH. J., Dec. 2007, at 1-122, available at <http://www.efsa.europa.eu/en/scdocs/doc/610.pdf> [hereinafter EFSA Scientific Opinion] (defining whitecoat pups as seal pups aged twelve days or less that have not yet started to shed their white lanugo (fetal hair)); see also *id.* 118-122 (defining bluebacks as hooded seals that have not yet molted their pelage (the blueback), which occurs when they are around sixteen months old).

64. See Council Directive 83/129/EEC, 1983 O.J. (L 091) (“[C]oncerning the importation into Member States of skins of certain seal pups and products derived therefrom”); see also Council Directive 89/370/EEC, 1989 O.J. (L 163/37) (extending Directive 83/129/EEC indefinitely); Council Directive 85/444/EEC, 1986 O.J. (L 259/70) (amending Council Directive 83/129/EEC).

65. See *Restrictions on the Import and Export of Goods*, STATE PORTAL OF THE REPUBLIC OF SLOVN., <http://e-uprava.gov.si/e-uprava/en/poslovneSituacijeStanjeUprava?dogodek.id=344> (last visited Feb. 9, 2015) (noting that as of May 1, 2004, “the rules on import and export of goods apply in the Republic of Slovenia as provided for by European regulations.”).

66. Press Release, Bernard Franolic, Animal Friends Croatia, Croatia Bans the Import of Seal Pelts (Mar. 29, 2006), available at <http://www.seashepherd.org/news-and-media/2008/11/02/croatia-bans-the-import-of-seal-pelts-848>.

67. See *Italy Temporarily Bans Imports of Canadian Seal Products*, INT’L FUND FOR ANIMAL WELFARE (Feb. 13, 2006), <http://www.ifaw.org/united-states/node/9656> (explaining that Adolfo d’Urso, the Italian Vice Minister for Trade and Industrial Affairs, announced a Ministerial Decree that temporarily banned the import of seal skins and derivatives).

68. See Request for Consultations by Canada, *European Communities—Certain Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS369/1 (Oct. 1, 2007) (describing the Belgian trade ban, which “prohibits the preparation for sale or delivery to consumers, transport for sale or delivery, possession for the purpose of sale, importation, distribution and transfer of seal products.”).

69. See *Ending Trade in Seal Products*, INT’L FUND FOR ANIMAL WELFARE, <http://www.ifaw.org/united-states/our-work/seals/ending-trade-seal-products> (last visited Feb. 9, 2015) (discussing the Netherlands “adopting national bans on the import of seal products.”).

Germany,⁷⁰ and Austria,⁷¹ later considered or passed stronger measures. Mexico and the Customs Union of Russia, Belarus, and Kazakhstan followed with similar trade bans in 2006⁷² and 2011,⁷³ respectively, bookending the E.U.'s 2009 prohibition on marketing seal products that is the subject of the dispute.⁷⁴ Most recently, Taiwan joined this growing list of countries in 2013 by prohibiting trade in marine mammal products.⁷⁵

Once E.U. Member States began taking actions to limit or ban trade in commercial seal products, the E.U. Parliament saw an opportunity to harmonize the internal E.U. market and to address its citizens' concerns about commercial seal hunting.⁷⁶ Thus in 2009, the E.U. passed a regulation that prohibited placing any seal products from any countries (including the E.U.) on the market.⁷⁷ The

70. See *German Parliament Votes Unanimously to Ban Seal Product Imports*, INT'L FUND FOR ANIMAL WELFARE (Feb. 20, 2006), <http://www.ifaw.org/international/node/26536> (discussing Germany's unanimous 2006 parliamentary vote that banned the import of seal products to send a message to the Canadian government that Germany would not play a part in Canada's annual seal hunt).

71. See *Austria Votes to Ban Seal Products!*, INT'L FUND FOR ANIMAL WELFARE, <http://www.ifaw.org/united-kingdom/node/1502> (last visited Feb. 9, 2015) (noting Austria's recent unanimous vote to ban all seal products).

72. *Mexico Bans Imports and Exports of Primates and Marine Mammals*, INT'L FUND FOR ANIMAL WELFARE (Feb. 6, 2006), <http://www.ifaw.org/africa/node/14701>.

73. See *Customs Alert*, DELOITTE 4 (July 2011), <http://bit.ly/1y6SoA1> (restricting the import of harp seal pelts in the Customs Union); see also Sheryl Fink, *Major Victory as Russia Bans Trade in Harp Seal*, INT'L FUND FOR ANIMAL WELFARE (Dec. 19, 2011), <http://www.ifaw.org/united-states/news/major-victory-russia-bans-trade-harp-seal-skins>.

74. See Council Regulation 1007/2009, 2009 O.J. (L 286/36) 38 (EC) ("The placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence. These conditions shall apply at the time or point of import for imported products."); see also Commission Regulation 737/2010, 2010 O.J. (L 216/1) (EU) (providing detailed rules for the implementation of Council Regulation 1007/2009).

75. See *HSI Commends Taiwan for Historic Ban on Trade in Marine Mammal Products*, HUMANE SOC'Y INT'L (Jan. 8, 2013), http://www.hsi.org/world/canada/news/releases/2013/01/taiwan_seal_product_ban_010813.html (noting that the ban exempts products that result from indigenous hunts).

76. See generally Council Regulation 1007/2009, *supra* note 74, art. 3.1 (limiting the conditions under which seal products may be put on the market).

77. See *id.* arts. 2(3), 3(1) (defining "placing on the market" as "introducing into the Community market, thereby making available to third parties, in exchange for payment" and allowing seal products to be placed on the market only when

regulation includes exceptions for seal products resulting from subsistence hunts traditionally conducted by Inuit and other indigenous communities (the IC exception)⁷⁸ and seal products from hunts conducted for marine resource management purposes (the MRM exception).⁷⁹

The prohibition was passed as a result of the E.U. Parliament's careful consideration of their citizens' moral concerns about the slaughter and scientific evidence concerning the characteristics of the hunt.⁸⁰ Although sealing nations have repeatedly amended their seal hunting regulations, no existing regulations can sufficiently and consistently guarantee a humane death for seals.⁸¹ As a result and as it currently exists, seal hunting is inherently inhumane for three reasons.⁸²

First, the hunts take place in remote, harsh environments far off the coast, where high ocean swells, low visibility and temperatures, and extreme weather events are common.⁸³ These environmental

they are a product of an indigenous hunt).

78. *See id.* art. 3(1).

79. *See id.* art. 3(2)(a)-(b).

80. *See* Commission Regulation 1007/2009, Trade in Seal Products, 2009 (L 286/36), ¶¶ 4-5, 11 (discussing "serious concerns by members of the public" about "the animal welfare aspects of the killing and skinning of seals" and concluding that it is not feasible to hunt seals in a humane way); *see also Report on the Proposal for Regulation of the European Parliament and of the Council Concerning Trade in Seals Products*, at 22 (Mar. 5, 2009), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=//EP//NONSGML+REPORT+A6-2009-0118+0+DOC+PDF+V0//EN> ("Commercial seal hunts are inherently inhumane because humane killing methods cannot be effectively and consistently applied in the field environments in which they operate. Moreover, seal hunts occur in remote locations, and are conducted by thousands of individuals over large, inaccessible areas, making effective monitoring of seal hunting impossible. As such only a comprehensive ban without the derogation drafted by the Commission would meet citizens' demands to see an end to the trade in seal products."); Proposed Commission Regulation 2008/0160, 2008 O.J. 2 ("The Commission received during the last years a massive number of letters and petitions on the issue expressing citizens' deep indignation and repulsion regarding the trade in seal products in such conditions"); EFSA Scientific Opinion, *supra* note 63, at 118 (listing general conclusions that promote the welfare of seals).

81. *See id.* (noting that existing regulations often are not carried out effectively and that death of seals is not adequately monitored before skinning the animal).

82. *Id.*

83. *See* Panel Reports, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 7.187, WT/DS400/R, WT/DS401/R (Nov. 25, 2013) [hereinafter EC—Seal Panel Reports].

considerations and the decreasing amount of sea ice as a result of climate change compound the difficulty in effectively stunning seals in one hit, especially given that the seals are mobile on the ice.⁸⁴ Second, because of economic and safety pressures, the hunts take place over very short periods, leading to hunters providing less care for each kill.⁸⁵ Third, seals have unique physiological characteristics, particularly in terms of lung capacity and responses to stress and pain.⁸⁶

These factors lead to (1) high wounding rates, (2) unacceptable delays between wounding, monitoring for unconsciousness, and exsanguination, (3) high “struck and lost” rates, and (4) actions that cause pain to wounded, conscious seals, such as live gaffing and dragging.⁸⁷ Diminished sea ice due to climate change further exacerbates these problems.⁸⁸ No amount of regulation can surmount these obstacles to guarantee commercially hunted seals have a humane death.⁸⁹

Shortly after the E.U. measure went into effect, Canada and Norway challenged it before the WTO, arguing that it discriminated against them and constituted an unnecessary restriction on trade in contravention of the GATT and the TBT Agreement.⁹⁰ In defending the measure, the E.U. took the bold step of attempting to justify it through recourse to the public morals section, subsection (a) of GATT Article XX.⁹¹ Specifically, the E.U. contended that the measure aimed to address its citizens’ public moral concerns about the suffering involved in the commercial seal hunt and their belief that the E.U. market should not contribute to this trade.⁹² The E.U. presented evidence demonstrating that the measure significantly

84. *See id.* ¶¶ 7.202, 7.204, 7.223 (noting the challenges inherent in adequately stunning seals during hunts).

85. *Id.* ¶ 7.245.

86. *See id.* ¶¶ 7.190-191 (explaining that seals may experience prolonged life and more suffering than other mammals when hunted because of their greater ability to withstand periods of poor oxygenation).

87. *See id.* ¶¶ 7.212-.222.

88. *See id.* ¶ 7.187, n.255.

89. *See, e.g., id.* ¶ 7.222 (“[The] circumstances and conditions of seal hunts present specific challenges to the humane killing of seals”).

90. *See, e.g., id.* ¶ 7.2.

91. *See, e.g., id.* ¶ 7.3.

92. *See, e.g., id.* ¶¶ 7.367, 7.625.

contributed to these objectives by ensuring that E.U. citizens are not confronted by these morally abhorrent products and by decreasing demand for seal products, which has helped avoid the inhumane killing of tens, if not hundreds, of thousands of seals since the E.U. implemented the measure.⁹³

Despite Canada and Norway protesting to the contrary, the Panel found that the E.U. measure fell within the ambit of public morals under Article XX(a) of GATT⁹⁴ and that the protection of public morals related to seal hunting is a legitimate objective pursuant to the TBT Agreement.⁹⁵ The Panel acknowledged that “animal welfare is an issue of ethical or moral nature” and that “animal welfare is matter of ethical responsibility for human beings in general.”⁹⁶ The explicit recognition of the importance of animal welfare by the WTO was unprecedented.

The Appellate Body ultimately agreed with the Panel and concluded that the current E.U. measure violated WTO principles because it did not apply evenly to all countries.⁹⁷ Much like *US—Tuna*, the Appellate Body did not condemn E.U.’s decision to restrict trade in response to its citizens’ concerns, but instead found that how the measure accomplished this goal was problematic.⁹⁸ Specifically, the Appellate Body determined that the exceptions to the ban as applied amounted to arbitrary or unjustifiable discrimination.⁹⁹

93. *Id.* ¶¶ 7.434-435.

94. *See id.* ¶ 7.639 (finding that the less restrictive measures proposed by the complainants were not reasonably available to the E.U. based on its animal rights concerns).

95. *See id.* ¶¶ 7.419-420.

96. *Id.* ¶ 7.409

97. EC—Seal Panel Reports, *supra* note 83, ¶¶ 7.319, 7.352; *see also* EC—Seal Products Appellate Body Reports, *supra* note 8, ¶¶ 5.338-339 (finding that the E.U. Seal Regime was applied in a discriminatory manner and was therefore inconsistent with GATT Article XX).

98. *See* EC—Seal Products Appellate Body Reports, *supra* note 8, ¶ 5.338 (“[W]e found that the European Union did not show that the manner in which the EU Seal Regime treats seal products derived from IC hunts as compared to seal products derived from ‘commercial’ hunts can be reconciled with the objective of addressing EU public moral concerns regarding seal welfare.”).

99. *See id.* ¶ 5.338; EC—Seal Products Panel Reports, *supra* note 83, ¶ 7.650 (finding that the MRM exception was not even-handed); *see also* EC—Seal Products Appellate Body Reports, *supra* note 8, ¶¶ 1.10, 2.1-10 (revealing that the E.U. only appealed a select number of the Panel’s findings).

Essentially, the Appellate Body determined that the measure *did not go far enough* in achieving its objectives.¹⁰⁰ The Appellate Body acknowledged the Panel's finding that the exceptions to the prohibition diminished the measure's effectiveness¹⁰¹ because they allowed trade in seal products with similar animal welfare concerns.¹⁰² In doing so, it implicitly provided that banning trade in seal products without exceptions would make a greater contribution to protecting E.U. public morals as to seal welfare and be consistent with the E.U.'s WTO obligations.¹⁰³ Although it may be politically difficult, the door is now open for the E.U. to improve its seal product measure by removing or scaling back the exemptions and thus better achieve its objectives. In fact, the E.U. Commission has put forward a proposal to amend its seal product trade ban by removing the MRM exception and tightening up the IC exception.¹⁰⁴

The importance of the *EC—Seal Products* case cannot be understated. If a country previously sought to protect animal welfare by outlawing a certain practice and the trade in the products produced using that practice, it would have to demonstrate either that (i) the practice caused direct harm to animal life or health or the continued survival of the species¹⁰⁵ or (ii) the practice caused harm to the environment.¹⁰⁶ After the WTO recognized that animal welfare is an ethical concern for all and that the protection of public moral concerns regarding animal welfare is a legitimate objective that can

100. See *EC—Seal Products Appellate Body Reports*, *supra* note 8, ¶¶ 5.181-182 (noting that the measure did not prevent all seal products from entering the market).

101. See *EC – Seal Products (AB)*, paras.*id.* ¶¶ 5.181-, 5.182, 5.280 (finding that the exceptions to the E.U. measure diminish its effectiveness because consumers' moral concerns extend to all seal hunting, including indigenous hunts and marine resource management hunts).

102. See *id.* ¶ 5.317 (indicating that the E.U. engaged in seal product trade with Greenland, which did not have an appreciably different seal hunting industry compared to Norway and Canada).

103. See Rob Howse, Joanna Langille & Katie Sykes, *Sealing the Deal: The WTO's Appellate Body Report in EC- Seal Products*, 18 AM. SOC'Y INT'L L., no. 12, 2014 (“[V]irtually all Greenlandic seal products are eligible for [an exception to the ban], but the vast majority of products from Canada and Norway are not”).

104. Proposed Commission Regulation Amending Regulation (EC) No. 1007/2009 on Trade in Seal Productions 2015/0028, http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/proposal.pdf.

105. See, e.g., GATT, *supra* note 15, Art. XX(b).

106. See, e.g., *id.* Art. XX(g).

justify trade restrictions, countries have a broader basis upon which to legislate.¹⁰⁷ While these disputes involve wildlife, the principles elucidated by the WTO Dispute Settlement Body can be universally applied to all animals in need of protection. Besides the commercial seal hunt, the public has ethical concerns about many other animal-related practices, such as shark finning, caging egg-laying hens, and experimentation on chimps, that can benefit from this decision. As the industrialization of animal agriculture continues, the moral dimensions of extreme confinement of farmed animals and animal transport will likely begin to concern a larger percentage of the public. Fortunately, the notion that a nation's ethical position on animal welfare can justify trade restrictions will assuage the fears of any country considering a trade-related animal welfare measure that it will face a successful WTO challenge.

In sum, the *US—Tuna* and *EC—Seal Products* disputes provide countries with solid footing to restrict trade to protect animals in the future. They also give animal advocates good reason to believe that the WTO will continue to recognize that seeking to improve animal welfare, whether to protect animal life or health or to safeguard public morals, is a legitimate objective that justifies restricting trade.

III. FREE TRADE AGREEMENTS, WILDLIFE CONSERVATION, AND ANIMAL WELFARE

The terms of FTAs may guide the future of international animal welfare measures and wildlife conservation. This section seeks to highlight how FTAs already have made substantial progress in addressing these two areas and explain how the TPP and TTIP, two expansive FTAs, are likely to take it further. First, it focuses on two existing U.S. FTAs to illustrate how these agreements could potentially make progress in wildlife conservation. From the start of the twenty-first century, the United States has lead in negotiating the most progressive environment chapters in several agreements.¹⁰⁸

107. See Adam Behsudi, *WTO 'Morals' Decision Could Escalate Animal Welfare Disputes*, POLITICO (May 22, 2014), <http://www.politico.com/story/2014/05/wto-eu-seal-product-ban-canada-norway-107004.html> (“Legal experts, however, debate whether the decision really sets a precedent for justifying trade restrictions based on [sic] animal welfare – either as genuine defense of public morals or as a way to protect domestic industries.”).

108. See Scott Wilson, Comment, *NAFTA's Legacy: An Explanation of Why the*

Environment chapters traditionally concern enforcement matters relating to national environmental laws and implementing multilateral environmental agreements, combating the trafficking of flora and fauna, and other issues. Second, this section focuses on the E.U. in light of its leadership in negotiating provisions that address farm animal welfare in the Sanitary and Phytosanitary (“SPS”) chapters and welfare of animals in testing and research sector-specific sections like those on chemicals, pharmaceutical, and cosmetics.

A. THE UNITED STATES AND FREE TRADE AGREEMENTS

1. Background

Congress grants the U.S. President the authority to negotiate FTAs with other States.¹⁰⁹ Most recently, Congress granted this authority in the Bipartisan Trade Promotion Authority Act of 2002 (“BTPAA”), contained in Title XXI of the Trade Act of 2002.¹¹⁰ This has been referred to as “fast track” because the BTPAA allows for an up or down vote on the trade agreement once the negotiating parties finalize its terms without allowing Congress to amend those terms.¹¹¹ This authority expired in January 2009 and a new “fast track” authority is necessary.¹¹²

Free Trade Area of the Americas is Good for International Environmental Law, 24 TEMP. J. SCI. TECH. & ENVTL. L. 551, 561-62 (2005) (citing the North American Agreement on Environmental Cooperation as giving NAFTA “the environmental ‘teeth’ that critics demanded and President Clinton worked for during the agreement’s negotiating process”).

109. 19 U.S.C. § 2191(d) (2002).

110. Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. § 3801(a) (2002).

111. *Id.*

112. *Federal Bill Extends President’s Authority to Negotiate Free Trade Agreements*, CALCHAMBER (Jan. 10, 2014), <http://www.calchamber.com/Headlines/Pages/01142014-Federal-Bill-Extends-Presidents-Authority-to-Negotiate-Free-Trade-Agreements.aspx>; see also Vicki Needham, *Hatch Says Trade Promotion Authority a Necessity*, THE HILL, (Jan. 20, 2015), <http://thehill.com/policy/finance/230028-hatch-says-trade-promotion-authority-a-necessity> (citing efforts by Senator Orrin Hatch, Senator Ron Wyden, and Congressman Paul Ryan to pass a bipartisan trade promotion authority bill as an alternative to the 2014 proposal by Congressman Dave Camp, Senator Max Baucus, and Senator Orrin Hatch).

BTPAA set forth certain objectives and priorities relating to the environment that the United States must meet in negotiating FTAs.¹¹³ First, the United States must ensure that trade and environment policies are mutually supportive and seek to protect and preserve the environment and enhance international means of doing so while also optimizing the use of the world's resources.¹¹⁴ Second, the United States must seek provisions that require contracting parties to ensure that they do not weaken or reduce the protections afforded in domestic environmental laws as a means of encouraging trade.¹¹⁵ Third, the United States must strengthen its trading partners' capacity to protect the environment through sustainable development.¹¹⁶

In May 2007, the Bush Administration and a Democrats-led Congress reached a Bipartisan Trade Deal¹¹⁷ ("Bipartisan Agreement") coined as the new "trade policy template."¹¹⁸ It expanded the objectives of the BTPAA relating to the environment and provided very progressive measures that were previously never seen in FTAs.¹¹⁹ However, the objectives outlined pertained only to the U.S. FTAs under negotiation at that time with Peru, Colombia, Panama, and South Korea. The Bipartisan Agreement requires commitment to seven specific MEAs,¹²⁰ subjects the environment

113. 19 U.S.C. § 3802(a)(5)

114. *Id.*

115. *Id.* § 3802(a)(7).

116. *Id.* § 3802(b)(11)(D).

117. See *The 2007 U.S. Trade Policy Template: Opportunities and Risks for Workers' Rights*, HUMAN RIGHTS WATCH 1 (June 2007), <http://www.citizen.org/documents/HRWstudyondeal.pdf>.

118. See Sungjoon Cho, *The Bush Administration and Democrats Reach a Bipartisan Deal on Trade Policy*, AM. SOC'Y INT'L LAW (May 31, 2007), <http://www.asil.org/print/238>.

119. See *id.* (requiring that the parties incorporate specific MEAs); Teall Crossen, *Multilateral Environmental Agreements and the Compliance Continuum*, 16 GEO. INT'L ENVTL. L. REV. 473, 499 (2004); see also JEANNE J. GRIMMETT, CONG. RESEARCH SERV., R41779, DISPUTE SETTLEMENT IN THE U.S.-SOUTH KOREA FREE TRADE AGREEMENT (KORUS FTA) 10 (2012) (differentiating the 2007 FTAs from earlier FTAs by noting that the 2007 FTAs contain "additional labor and environmental obligations, not restricting its general dispute settlement procedures to specified provisions of its labor and environmental chapters, and not limiting the remedy for non-compliance with an adverse panel report to the payment of an annual monetary assessment, such as a fine, by the defending party").

120. The seven MEAs include: the Convention on International Trade in Endangered Species (CITES), Montreal Protocol on Ozone Depleting Substances,

chapter to dispute settlement procedures, compels non-derogation from environmental obligations in the interest of trade and investment, and includes specific obligations for Peru pertaining to illegal logging and trade in violation of CITES.¹²¹

The most important new developments in the Bipartisan Agreement pertain to MEAs and dispute settlements.¹²² Previously, U.S. FTAs did not contain reference to specific MEAs but a general recognition of their importance and commitment to mutual supportiveness toward MEA objectives.¹²³ After 2007, the FTAs in question also committed the parties to comply with seven specific MEAs using binding language subject to dispute settlement. In fact the dispute settlement provisions, formerly reserved only for commercial chapters in FTAs, now applied to the environment chapters of these four agreements.

2. MEAs in the Bipartisan Agreement

The first three Bipartisan Agreement objectives concern MEAs and call for international cooperation on environmental matters among multiple parties.¹²⁴ MEAs are transboundary in nature and may be global, regional, or sub-regional in their scope.¹²⁵ MEAs have

Convention on Marine Pollution, Inter-American Tropical Tuna Convention (IATTC), Ramsar Convention on Wetlands, International Whaling Convention (IWC), and Convention on Conservation of Antarctic Marine Living Resources (CCAMLR). *Bipartisan Trade Deal*, U.S. TRADE REPRESENTATIVE 2-3 (May 2007), https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf.

121. *Id.*

122. *Id.*

123. See U.S.-Austl. Free Trade Agreement art. 19.8, U.S.-Austl., Jul. 1, 2005, https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file148_5168.pdf (“The Parties recognise that multilateral environmental agreements to which they are both party play an important role, globally and domestically, in protecting the environment and that their respective implementation of these agreements is critical to achieving the environmental objectives of these agreements. Accordingly, the Parties shall continue to seek means to enhance the mutual supportiveness of multilateral environmental agreements to which they are both party and international trade agreements to which they are both party. The Parties shall consult regularly with respect to negotiations in the WTO regarding multilateral environmental agreements.”).

124. *Id.*

125. *Id.*

addressed some of the following issues: “biodiversity and nature protection, climate change, protection of the ozone layer, desertification, management of chemicals and waste, transboundary water and air pollution, environmental governance (including impact assessments, access to information and public participation), industrial accidents, maritime and river protection, [and] environmental liability.”¹²⁶

As required under the Bipartisan Agreement, the four FTAs concluded with Peru, Colombia, Panama, and South Korea included similar language about MEAs: “Each Party *shall* adopt, maintain, and implement laws, regulations, and all other measures to fulfill its obligations under the multilateral environmental agreements listed in Annex [xx] (“covered agreements”).”¹²⁷ Inclusion of *shall*, as opposed to *may* or *should*, imposes rights and obligations on each party under these circumstances.

Further, this MEA provision and the rest of the environment chapter in these four FTAs is subject to dispute settlement.¹²⁸ It provides the framework for resolving disagreements that arise under the FTAs through formal consultations that may result in monetary payment or trade sanctions.¹²⁹ Although most MEAs already include some type of enforcement mechanism, enforcement at the national level may be weak or non-existent.¹³⁰ In particular, MEA parties do not pass domestic laws that implement the MEA obligations or do not devote necessary human and financial resources to enforce MEA obligations.¹³¹ Enforcement at the MEA level, which is carried out by an internal body charged with this task, may be a lengthy and bureaucratic process.¹³² Including binding MEA provisions in FTAs

126. See *Multilateral Environmental Agreements*, EUROPA, http://ec.europa.eu/environment/international_issues/agreements_en.htm (last visited Feb. 9, 2015).

127. United States-Panama Free Trade Promotion Agreement Implementation Act, H.R. REP. NO. 112-238, art. 17.2 (2011) (emphasis added).

128. *Id.* art. 17.11(7)-(8).

129. See *id.* arts. 17.4(1)(c), 17.4(4)(b), 17.11(7)-(8).

130. *Id.*

131. Kannan Ambalam, *Challenges of Compliance with Multilateral Environmental Agreements: The Case of the United Nations Convention to Combat Desertification in Africa*, 5 J. SUSTAINABLE DEV. STUD. 145, 153 (2014).

132. See H.R. REP. NO. 112-238, art. 17.4 (describing the review proceedings that must be available to sanction or provide remedies for violations of environmental laws).

provide for another way to address noncompliance with MEA obligations. At the same time, FTAs commitment to capacity building and funding of the implementation of environment chapter obligations, such as MEA compliance, alleviate some of the resource concerns.¹³³

3. *Dispute Settlement in the Bipartisan Agreement*

The fifth objective of the Bilateral Agreement specifically addresses dispute settlement and, unlike FTAs that were concluded before this Agreement, requires the environment chapter to be binding, subject to all remedies, procedures, and sanctions available under other chapters of the FTA.¹³⁴ To date, only U.S. FTAs have had binding environment chapters.¹³⁵ According to the text of the four FTAs covered by the Bilateral Agreement, the complaining party must first seek to address the matter under the consultations and panel procedure provisions of the environment chapter, after which it can seek redress through dispute settlement.¹³⁶ Dispute settlement is limited to state-to-state resolution of complaints; however, each of the four agreements also provide public participation opportunities whereby the public, generally a non-governmental organization (“NGO”), can file submissions claiming a party has failed to comply with the environment chapter.¹³⁷

If a party loses in the state-to-state dispute settlement procedure, they are generally “expected to remove the complained-of measure”

133. See United States-Peru Trade Promotion Agreement Annex 18.3.4 (4), U.S.-Peru, Apr. 12, 2006, Temp. State Dep't No. 09-54, <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text> [hereinafter U.S.-Peru FTA] (“The Parties are committed to work cooperatively to implement the actions required under the preceding paragraph, including through capacity-building and other joint initiatives to promote the sustainable management of Peru’s forest resources.”).

134. See *Bipartisan Trade Deal*, *supra* note 120, at 2-3.

135. U.S. State Dep't, *Free Trade Agreements and the Environment*, U.S. EMBASSY MONTEVIDEO URUGUAY (Dec. 4, 2007), <http://archives.uruguay.us.embassy.gov/usaweb/2007/07-507EN.shtml>.

136. See *Bipartisan Trade Deal*, *supra* note 120, at 2-3 (agreeing that the FTA environmental obligations will be enforced on the same basis of the commercial provisions); see also H.R. REP. NO. 112-238, art. 17.11(6)-(7) (providing a detailed breakdown of the dispute settlement process).

137. See H.R. REP. NO. 112-238, art. 17.6 (creating the Environmental Affairs Council to provide a public forum for both participation and complaints).

and remedies for non-compliance include:

[C]ompensation and the suspension of [FTA] obligations (e.g., the imposition of a tariff surcharge on the defending Party's products) and, as an alternative, payment of a fine to the prevailing Party in the dispute or, in some cases, into a fund that may be used to assist the defending Party in complying with its obligations in the case.¹³⁸

To date, no party has reached the dispute settlement stage under the environment chapter of any of the four agreements discussed.¹³⁹ This is the case because the United States favors other effective means of resolving disputes including through cooperation, diplomacy, and senior level meetings. Nonetheless, the mere application of the dispute settlement process to the environment chapter may motivate the parties to adhere to its terms.¹⁴⁰ If a party knows that it may be subjected to dispute settlement, fines, and trade bans, they are more likely to correct the alleged infringement without reaching formal dispute settlement. If voluntary compliance proves insufficient¹⁴¹ the dispute settlement mechanism can be exercised. Additionally, the public participation and consultation procedures provide an opportunity for information-sharing on the issue in question and thus allow for a certain level of transparency.

B. FTAS AND ENVIRONMENTAL PROTECTION IN PRACTICE

1. CAFTA-DR and Enforcement of Sea Turtle Protection Measures

The Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA-DR") includes the governments of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic.¹⁴² The Dominican Republic ("DR") sea turtle

138. See GRIMMETT, *supra* note 119.

139. See Ambalam, *supra* note 131, at 154 (noting that enforcement mostly takes place at the national level).

140. *Id.*

141. *EIA Issues Statement Following President Humala's Address to the Nation*, ENVTL. INVESTIGATION AGENCY (July 30, 2014), <http://eia-global.org/news-media/eia-issues-statement-following-president-humalas-address-to-the-nation>.

142. See CAFTA-DR SECRETARIAT FOR ENVTL. MATTERS, FACTUAL RECORD: CAALA 07-001 SEA TURTLES DR 7 (2011) [hereinafter FACTUAL RECORD] (describing that Humane Society International filed a submission asserting that DR was "failing to enforce its Environmental Legislation with regard to conducting

case under CAFTA-DR illustrates how the FTA public participation and consultation procedures have benefited wildlife conservation. The case concerned an allegation by Humane Society International (“HSI”) that DR failed to effectively enforce certain domestic laws intended to protect endangered sea turtles.¹⁴³

According to Article 17.7.1 of CAFTA-DR on Submissions on Enforcement Matters, “any person,”¹⁴⁴ including NGOs, may file a submission with the CAFTA-DR’s Independent Secretariat claiming that one of the parties is failing to effectively enforce its environmental laws.¹⁴⁵ Once certain submission requirements are met, the Secretariat determines whether the party must submit a response.¹⁴⁶ If so, once the party submits a response, the Secretariat decides whether it must develop a factual record and notifies the Environmental Affairs Council (“Council”) of its reasoning.¹⁴⁷ Regardless, the Council may also instruct the Secretariat to develop a factual record after being notified.¹⁴⁸ This Factual Record can be an effective tool to improving enforcement of environmental laws.

inventories of commercial and artisan establishments that possess or sell sea turtle products”); *CAFTA-DR (Dominican Republic-Central America FTA)*, U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta> (last visited Jan. 30, 2015) (noting that the CAFTA-DR “promotes stronger trade and investment ties, prosperity, and stability throughout the region and along our Southern border.”).

143. FACTUAL RECORD, *supra* note 142, at 7.

144. United States-Panama Free Trade Promotion Agreement Implementation Act, H.R. REP. NO. 112-238, art. 17.7.1 (2011).

145. *Id.*

146. *Id.* art. 17.7.4

147. *Id.* art. 17.5.1 (detailing that the Environmental Affairs Council consists of “cabinet-level or equivalent representatives of the Parties, or their designees” and each party designates “an office in its appropriate ministry that shall serve as a contact point for carrying out the work of the Council”).

148. *Id.* art. 17.8.

The timeline of the CAFTA-DR Dominican Republic Sea Turtle Submission proceeded as follows:

Date	Action
April 4, 2007	HSI submitted a letter to the DR expressing concern with enforcement of laws prohibiting the killing of sea turtles and the sale of sea turtle products.
May 9, 2007	When DR did not respond to the letter, HSI made a Submission to the CAFTA-DR Secretariat for Environmental Matters (“SEM”) regarding enforcement issues.
October 1, 2007	After SEM determined the original submission did not sufficiently address questions of private domestic remedies sought by HSI, HSI revised the Submission.
December 5, 2007	The SEM determined that HSI’s Submission merited a response from the DR.
February 13, 2008	The DR, through its Secretary of State for the Environment and Natural Resources, responded to HSI’s Submission.
August 2008	The Council, by vote from the United States, instructed the SEM to prepare a Factual Record.
January 2010	The SEM prepared a General Plan for preparing a Factual Record and shared it with Council members, the Contact Points for each of the governments from the region, civil society, private sector, academic institutions, and other interested public entities.
August 31, 2010	SEM presented the Draft Factual Record to the Council and requested that the Council submit comments by October 15, 2010.
January 2011	Final Factual Record ¹⁴⁹ was made publicly available.

149. See generally FACTUAL RECORD, *supra* note 142.

a. NGO Submission to the CAFTA-DR Secretariat for Environmental Matters

On April 2007, HSI sent a letter to the DR explaining that it was concerned about the enforcement of various domestic measures intended to protect endangered sea turtles, but the DR did not respond.¹⁵⁰ On May 9, 2007, HSI presented its Submission to the SEM asserting that the DR failed to effectively enforce its environmental laws, specifically General Environmental Law (Law 64-00) and Decree No. 752-01 that prohibited the killing of endangered sea turtles and the sale of products from endangered turtles captured and killed after July 31 of 2001.¹⁵¹

Article 140 of the General Law of Environment and Natural Resources (Law No. 64-00) states that:

[I]t is prohibited to hunt, fish, capture, mistreat, kill, traffic, import, export, sell, manufacture or produce traditional handicrafts, as well as exhibit and illegally possess . . . species of flora and fauna that are found to be threatened or endangered by [DR] or any other country in accordance with international treaties signed by [DR].¹⁵²

Decree No. 752-01 places a ten-year ban on “the capture, killing, collection of eggs and sale of products derived from green, hawksbill, loggerhead and leatherback turtles.”¹⁵³ Additionally, Article 3 of the Decree “requires that the Office of the Undersecretary of State for Marine and Coastal Resources and the Main Directorate of Wildlife and Biodiversity compile inventories of products sold or used in artisan or commercial establishments that are made from protected sea turtles.”¹⁵⁴

Evidence gathered by HSI and other sources, including TRAFFIC,¹⁵⁵ a wildlife trade monitoring network, demonstrated that the DR failed to complete an inventory of sea turtle products for sale

150. *Id.* at 22.

151. *Id.* at 21-22.

152. *Id.* at 21.

153. *Id.* at 21-22.

154. *Id.* at 22.

155. *See generally* ADRIAN REUTER & CRAWFORD ALLAN, TRAFFIC, TOURISTS, TURTLES AND TRINKETS: A LOOK AT THE TRADE IN MARINE TURTLE PRODUCTS IN THE DOMINICAN REPUBLIC AND COLOMBIA 3 (2006), available at http://awsassets.panda.org/downloads/tourists__turtles_and_trinkets.pdf.

when determining which products were made before these laws came into effect.¹⁵⁶ HSI argued that, without the inventory, enforcing the domestic laws was impossible and undermined the DR's ability to determine if any turtle products are imported illegally, in violation of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES").¹⁵⁷

b. SEM's Factual Record on DR's Compliance with Environmental Legislation

In January 2011, almost four years after HSI made its initial complaint, the SEM finalized and made public the Factual Record on the matter.¹⁵⁸ According to the SEM, the Factual Record "seeks to present factual information on the trade of sea turtles, especially the Hawksbill Turtle (*Eretmochelys imbricate*), in the DR as well as on how these species should be protected in light of the mandates stipulated in the Dominican Environmental Legislation cited by the Submission" and "presents technical, scientific and legal perspectives related to the arguments presented in [HSI's Submission]."¹⁵⁹

More importantly, the Factual Record documents voluntary measures that the DR has undertaken to address enforcement issues of the sea turtle laws as result of the Submission procedure. For example, in 2008, DR published the 2008-2015 Action Plan for

156. HSI's submission was summarized by a CAFTA-DR Secretariat for Environmental Matters determination from December 5, 2007, as follows:

The Submitter, supported by reports from a Non-Governmental Organization as well as direct reports from contacts in the Dominican Republic, also affirms that many ornamental products made from endangered sea turtles are sold openly in street markets, souvenir stores, jewelry markets and stores visited by tourists throughout the country. The Submitter asserts that the turtle shells are used to produce a wide variety of articles such as purses, jewelry boxes, bracelets, earrings, rings, hair clips and bands, combs, photo frames, serving plates, silverware, bowls, letter openers and cigarette boxes as well as young, stuffed turtles. In addition, the Submitter affirms that by not completing the inventory of products made from sea turtles, as required by internal legislation, the Dominican Republic is not effectively enforcing its sea turtle protection laws, which prohibit the sale of products made from endangered sea turtles that were captured and killed in the country after July 31 of 2001.

FACTUAL RECORD, *supra* note 142, at 21.

157. REUTER & ALLAN, *supra* note 155, at 12.

158. *See generally* FACTUAL RECORD, *supra* note 142 (stating publication date as January 2011).

159. *Id.* at 11.

Compliance with the Legal Framework and the Effective Protection (“Action Plan”) that provided that inventorying of sea turtle products was a priority.¹⁶⁰ Lastly, the Factual Record documents “international cooperation efforts” between DR, civil society, and various U.S. government agencies that enabled DR “to carry out training, seizure, monitoring, awareness-raising[,] and other actions.”¹⁶¹

*c. Advantages of Pursuing a Factual Record under FTA
Environmental Provisions*

Resolving this issue through CAFTA-DR was advantageous for HSI and civil society seeking to ensure enforcement of domestic wildlife conservation laws through this FTA.¹⁶² First, the DR did not appropriately address the inventory issue prior to HSI’s submission to the SEM. DR did not respond to HSI’s initial letter describing its concerns about endangered turtle conservation and only responded after the SEM Submission.¹⁶³ In addition, HSI found that “there have not been any court actions or administrative proceedings requesting the DR to enforce Law No. 64-00 or Decree No. 752-01 to provide greater protections for endangered sea turtles.”¹⁶⁴ This indicated that no other entity had pursued a legal domestic action on the DR’s enforcement of sea turtle legislation and that alternative means of redress were necessary.

Second, HSI’s case demonstrated that it may be unreasonable to expect NGOs to fight resource-intensive legal battles domestically that seek to address environmental problems of enormous scope. For example, the Commission for Environmental Cooperation created by the North American Agreement for Environmental Cooperation,¹⁶⁵ concluded that, “it may be impractical and unrealistic for individuals and non-governmental entities with limited resources to seek redress

160. *Id.* at 71.

161. *Id.* at 72.

162. *See id.* at 7 (emphasizing that such record could foster civil society participation).

163. *Id.* at 22.

164. *Id.*

165. *About the CEC, COMM’N FOR ENVTL. COOPERATION*, http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=310&BL_ExpandID=878 (last visited Feb. 6, 2015) (providing that the North American Agreement for Environmental Cooperation mechanism was created by Canada, Mexico, and the United States as part of NAFTA).

through private remedies for a transnational problem of great scope and complexity.”¹⁶⁶ Domestic private remedies can be very costly to pursue and redress available under domestic law often falls short or is simply inappropriate. Thus, HSI argued that, “CAFTA-DR provides the most favorable opportunity to draw attention to the failure of the [DR] to effectively enforce its sea turtle protection laws.”¹⁶⁷ In fact, both the DR’s Action Plan and various cooperation efforts that resulted from the Submission support this claim.¹⁶⁸

Third, although HSI was limited to non-binding remedies under CAFTA-DR in the form of the Factual Record in this case, the Factual Record offered multiple benefits. The SEM developed a detailed report on the technical, scientific, and legal issues related to DR’s sea turtle population and its inventory of sea turtle products for sale; this spared the DR the cost of compiling this data itself.¹⁶⁹ Additionally, developing the Factual Record gave DR the political capital to develop its 2008-2015 Action Plan and engage with various entities on capacity building to improve enforcement of its environmental legislation.¹⁷⁰ It must be noted, however, that a Factual Record is meaningless if it is not developed within a reasonable timeline, especially when dealing with endangered species where time is of the essence. In the sea turtle case, it took almost four years to complete the Factual Record.¹⁷¹ Generally, a one-year timeline is considered more reasonable and effective.

2. CAFTA-DR and Additional Benefits for Wildlife and Conservation

a. Environmental Trade Capacity Building under CAFTA-DR

Apart from providing a process to address insufficient enforcement of environmental laws, CAFTA-DR also includes provisions on trade capacity building, another powerful tool to improve enforcement and benefit wildlife conservation.¹⁷² The

166. FACTUAL RECORD, *supra* note 142, at 23 (internal quotes omitted).

167. *Id.* at 22.

168. *Id.*

169. *Id.* at 7-8.

170. *Id.* at 32.

171. *Id.* at 21.

172. U.S.-CAFTA-DR Environmental Cooperation Agreement, U.S. DEP’T OF STATE pmbl. (Feb. 1, 2005), <http://www.state.gov/e/oes/eqt/trade/caftacooperation/142688.htm>.

CAFTA-DR Environmental Cooperation Agreement (“ECA”) calls on the parties “to cooperate to protect, improve and conserve the environment, including natural resources” and seeks “to establish a framework for such cooperation among the Parties.”¹⁷³ In Article V of the ECA entitled Work Program and Priority Cooperation Areas, it also states:

The work program developed by the Commission shall reflect national priorities for cooperative activities and shall be agreed upon by the Parties. The work program may include long-, medium-, and short-term activities related to: . . . (c) fostering partnerships to address current or emerging conservation and management issues, including personnel training and *capacity building*.¹⁷⁴

In the United States, implementing these provisions and the CAFTA-DR environment chapter as a whole requires cooperation between the U.S. Trade Representative’s (“USTR”) office, the U.S. Department of State, and the U.S. Agency for International Development. Other agencies may also be involved depending on the agreement, such as the U.S. Fish and Wildlife Service. The FTA parties prepare a work plan for environmental trade capacity building and environmental cooperation that becomes the guide for on-the-ground work. Programs are typically implemented by a hybrid of government personnel and the public and private sector. These programs are critical to FTA’s success and require specific funding allocation that the U.S. Congress must appropriate for this purpose.¹⁷⁵

b. Examples of Effective Trade Capacity Building under CAFTA-DR

In terms of public sector participation, civil society may impact wildlife conservation efforts through trade capacity building in multiple ways. For example, HSI has been involved in CAFTA-DR capacity building efforts since 2005. Funded by the U.S. State Department, HSI’s Latin America office has executed a variety of programs throughout the CAFTA-DR region. It has carried out

173. *Id.* art. II (“The Parties recognize the importance of both bilateral and regional cooperation to achieve this objective.”).

174. *Id.* art. v(1)(c) (emphasis added).

175. State, Foreign Operations, and Related Programs Appropriations Bill of 2015, H.R. REP. NO. 113-113, at 35 (2014).

trainings for CITES enforcement personnel.¹⁷⁶ HSI also completed public outreach against wildlife trafficking, including billboards and radio advertisements. It conducted a Central American Rescue Center Sustainability Study, assessing the status of each wildlife rescue center intended to handle confiscated and otherwise rescued animals.¹⁷⁷ Using this knowledge, HSI later helped a variety of centers to standardize their protocols, such as those related to biosafety and emergency care, and improve infrastructure, such as building some centers from the ground up.¹⁷⁸ Finally, HSI also developed and ran an animal handling workshop for border patrol, police, and customs officials.¹⁷⁹ These efforts would not be possible without the capacity building provisions found in the CAFTA-DR ECA and without U.S. Congress allocating the funding for this effort.

3. U.S.-Peru Trade Promotion Agreement

CAFTA-DR laid the groundwork for even stronger environmental obligations in FTAs that followed. As previously mentioned, trade deals concluded at the time of the Bipartisan Agreement—with the countries of Peru, Colombia, Panama and South Korea—were required to incorporate a variety of new provisions not present in CAFTA-DR. These include a specific list of MEAs, non-derogation

176. *CITES Law Enforcement Training: Guatemala & El Salvador*, CAFTA-DR ENVTL. COOP., http://www.caftadr-environment.org/top_menu/countries/Regional/B_re_activitiy_snapshot_CITES_Law-Enforcement_Training.html (last visited Feb. 9, 2015).

177. Marta M. Prado, *Combating Illegal Wildlife Trafficking in Central America*, HUMANE SOC'Y INT'L (Sept. 24, 2009), http://csis.org/files/attachments/090924_prado_presentation.pdf.

178. *See Costa Rica to Shut Down its Zoos—But It's not Going to be Easy*, TAKEPART, <http://www.takepart.com/article/2013/08/07/costa-rica-zoo-shutdown> (last visited Apr. 8, 2015) (discussing the efforts of HSI Latin America to improve the infrastructure and protocol of rescue centers as the population of rescue center in the aftermath of Costa Rica closing two of its zoos); *Supporting Wildlife Rescue Centers CAFTA-DR*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/documents/organization/121781.pdf> (last visited on Apr. 8, 2015) (listing some of HSI's efforts: “[c]ollaborating with the CAFTA-DR governments and local NGO partners to develop strategies for rescue center sustainability” and “training rescue center staff and volunteers on the provisions of [CITES]”).

179. Mike Skuja, *Wildlife Hotspots: Animal Handling Along the Guatemalan Border*, HUMANE SOC'Y INT'L (Feb. 17, 2011), http://www.hsi.org/news/news/2011/02/wildlife_hotspots_021711.html.

obligation for environmental laws, and binding dispute settlement for environmental obligations that include sanctions.¹⁸⁰ The PTPA, which came into force on February 1, 2009,¹⁸¹ was also unique in that in addition to the Bipartisan Agreement provisions, it included “special provisions committing Parties to biodiversity conservation, including non-consumptive use, and a forest governance annex that recognizes the link between illegal logging and illegal wildlife trade.”¹⁸²

a. Biodiversity Conservation and Non-Consumptive Use

Article 18.11 of the PTPA addresses matters of biological diversity.¹⁸³ The article states that “the Parties remain committed to promoting and encouraging the conservation and sustainable use of biological diversity and all its components and levels, including plants, animals, and habitat.”¹⁸⁴ It provides, in part, that “[t]he Parties also recognize the importance of public participation and consultations, as provided by domestic law, on matters concerning the conservation and sustainable use of biological diversity.”¹⁸⁵ The parties must also commit to cooperate on these matters, such as through the ECA.¹⁸⁶

Commonly FTA references to promotion of “sustainable use” of biological diversity imply “consumptive use,” and with respect to wildlife this generally means the animal is killed “as in hunting, fishing and trapping.”¹⁸⁷ However, PTPA made an important step to

180. *Bipartisan Trade Deal*, *supra* note 120, at 2-3.

181. *United States – Peru Trade Promotion Agreement: Strengthening Forest Sector Governance in Peru*, U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/sites/default/files/2013-Progress-under-the-Forest-Annex.pdf> (last visited Feb. 9, 2015) [hereinafter *USTR Forest Annex*].

182. Patricia Forkan, *International Trade: One Way Forward for Humans, Animals, and the Environment*, in OPPORTUNITIES AND OBLIGATIONS: NEW PERSPECTIVES ON GLOBAL AND U.S. TRADE 323 (2009).

183. U.S.-Peru FTA art. 18, U.S.-Peru, Apr. 12, 2006, Temp. State Dep’t No. 09-54, <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>.

184. *Id.* art. 18.11(2).

185. *Id.* art. 18.11(4).

186. *Id.* art. 18.11(5).

187. *Pro and Con: Consumptive and Nonconsumptive Uses of Wildlife*, COUNCIL FOR ENVIRONMENTAL EDUCATION, http://www.fws.gov/uploadedFiles/Region_1/NWRS/Zone_2/Inland_Northwest_Complex/Turnbull/Documents/EE/Endangered_Species/Pro%20and%20Con%20Consumptive%20and%20Nonco

offer greater protection for wildlife by defining sustainable use as “non-consumptive or consumptive use in a sustainable manner.”¹⁸⁸ Non-consumptive use implies any non-hunting or non-extractive use of wildlife that may include wildlife photography, bird watching, and whale watching, among others.

The U.S.-Peru Environmental Cooperation 2011-2014 Work Program (“Work Program”), executed by the Environmental Cooperation Commission (“ECC”) established under Article III of the U.S.-Peru ECA¹⁸⁹ specifically cites to this article and states that one of the joint cooperation goals is to “[p]rovide assistance to strengthen trade consistent with PTPA Article 18.11.”¹⁹⁰

b. Forest Sector Governance Annex

The Environment Chapter of the PTPA includes what some have described as a “groundbreaking”¹⁹¹ Annex on Forest Sector Governance (“Forest Annex”). Although it focuses primarily on illegal logging, the Forest Annex also calls on the parties to combat illegal wildlife trade and to protect CITES-listed species. These commitments have resulted in several important changes to Peru’s wildlife laws and ways it implements CITES.

PTPA provides, in relevant part, that each Party must “combat trade associated with . . . illegal trade in wildlife.”¹⁹² It also explicitly acknowledges that illegal trade in wildlife “undermine[s] trade in products from legally harvested sources, reduce[s] the economic value of natural resources, and weaken[s] efforts to promote conservation and sustainable management of resources.”¹⁹³ To assist in implementing these provisions of the Forest Annex, Peru enacted the Forestry and Wildlife Law¹⁹⁴ along with draft implementing

nsumptive%20Uses%20of%20Wildlife.pdf (last visited on Apr. 8, 2015).

188. *Id.* art. 18.11(1) (emphasis added).

189. Peru Environment Cooperation Agreement art. 3, July 26, 2006, <http://www.ustr.gov/sites/default/files/Peru%20Environmental%20Cooperation%20Agreement.pdf>.

190. *United States-Peru Environmental Cooperation 2011-2014 Work Program*, U.S. DEPT. OF STATE, <http://www.state.gov/documents/organization/169165.pdf> (last visited Feb. 8, 2015).

191. U.S.-Peru FTA, *supra* note 183, Introduction.

192. *Id.* ANNEX 18.3.4(1).

193. *Id.*

194. Ley Forestal y de Fauna Silvestre [Forestry and Wildlife Law], Ley No.

regulations.¹⁹⁵ The new law was an important outcome of the PTPA and reflected progress on many key issues, but it also raised some concerns among wildlife groups.

First, the law recognized the value of wildlife for human beings and the ecosystem.¹⁹⁶ Second, to manage wildlife effectively, it required that each party implement a number of plans, such as construction of necessary facilities, conservation plans for reintroduction and repopulation, population evaluations, and threatened species lists.¹⁹⁷ Third, it provided for wildlife conservation centers, which include public or private facilities for captive wildlife for their protection, conservation, rehabilitation, repopulation, or reintroduction back into the wild.¹⁹⁸ Finally, the law designated the National Forest and Wildlife Service (“SERFOR”)¹⁹⁹ as the body responsible for forest and wildlife national policy, including wildlife conservation centers.²⁰⁰ This is critical because CITES requires that the CITES Management Authority entity manage rescue centers²⁰¹ and SERFOR is within Peru’s CITES Managing Authority.

Some wildlife NGOs have expressed concerns with the law. The law emphasizes “sustainable use” of wildlife resources, as opposed to non-consumptive use.²⁰² Its definition of “wildlife”²⁰³ excludes

29763 (2011) (Peru) (recognizing the importance of wildlife and that its protection requires productive and participatory conservation oriented at sustainable maintenance).

195. *USTR Forest Annex*, *supra* note 181, at 2.

196. Forestry and Wildlife Law, Ley No. 29763, art. 85 (Peru) (prohibiting the use of wildlife resources without obtaining authorization).

197. *Id.* art. 86.

198. *Id.* art. 96.

199. SERVICIO NACIONAL FORESTAL Y DE FAUNA SILVESTRE [NAT’L FOREST & WILDLIFE SERV.], <http://dgffs.minag.gob.pe> (last visited Feb. 7, 2015).

200. Ley Forestal y de Fauna Silvestre, Ley No. 29763 (2011) (Peru) (creating the National Forest and Wildlife Service as the specialized technical body with a legal personality under public law which is responsible for enacting regulations and establishing the necessary procedures for forest and wildlife issues).

201. Convention on International Trade in Endangered Species of Wild Fauna and Flora art. VIII (4)(b), Mar. 3, 1973, T.I.A.S. No. 8249, 993 U.N.T.S. 243 [hereinafter CITES].

202. Forestry and Wildlife Law, Ley No. 29763 (Peru) (establishing sustainable use of forest and wildlife as a primary objective of the law).

203. *Id.* art. 6 (defining wildlife as “non-domesticated species, native or exotic, including their genetic diversity, which live freely in the national territory, as well as domestic species, which due to abandonment and other causes, have assimilated

certain non-amphibious and aquatic amphibious species.²⁰⁴ Additionally, according to the law, SERFOR manages wildlife conservation centers, but regional authorities manage rescue centers. This contradicts the requirement of CITES Article VIII(5) that a “Management Authority,” in this case SERFOR rather than regional authorities, must oversee rescue centers.²⁰⁵ Finally, the law’s proposed implementing regulations include language regarding placement of confiscated wildlife with breeding centers that focus on breeding animals as opposed to rehabilitation and long-term care in the case of rescue centers.²⁰⁶

Another important wildlife-related provision of the Forest Annex commits parties to “work within the framework of CITES to protect CITES-listed species” and to act in a manner that is consistent with its CITES obligations.²⁰⁷ CITES is one of the most critical wildlife MEAs, and including this provision in the PTPA encouraged several positive developments in Peru. For example, to meet these obligations, Peru assigned the Ministry of Environment as the CITES Scientific Authority and the Ministry of Agriculture as the CITES Management Authority.²⁰⁸ Peru also received Category I status based on the CITES National Legislation Project, which denotes that Peru’s CITES implementing legislation largely satisfies CITES requirements.²⁰⁹ Moreover, the PTPA Work Program included several ECC objectives pertaining to CITES, such as “a training plan for CITES authorities”²¹⁰ and “[t]echnical support”²¹¹ for MEAs.

into the wildlife, excluding amphibious species which are born in marine and inland water, which are governed by their own laws. The scope of the law also includes wildlife species, whether alive or dead along with eggs and any parts or derivatives thereof, that are held in captivity”).

204. *Id.*

205. CITES, *supra* note 201, art. VIII (5).

206. Humane Society International comments on Forestry and Wild Fauna Law N° 29763 submitted to Peru’s Ministry of Agriculture (MINAGRI) (Feb. 28, 2014) Mara Burr, U.S. Trade Representative, and Ernesto Guevara (Apr. 2010).

207. *Id.* ¶ 15 (“[N]othing in this Annex shall limit the authority of either Party to take action consistent with its legislation implementing CITES.”).

208. *USTR Forest Annex*, *supra* note 181, at 1.

209. *Id.*

210. *United States-Peru Environmental Cooperation 2011-2014 Work Program*, *supra* note 190, at 5 (describing Activity 1.7 of Theme 1).

211. *Id.* at 6 (quoting Activity 2.3 in Theme 2).

c. U.S.-Peru Environmental Cooperation 2011-2014 Work Program

To guide the progress on PTPA environmental cooperation, the ECC, established under Article III of the ECA, devised multiple work programs for the years 2009-2010 and 2011-2014.²¹² The Work Program included themes and objectives to achieve long-term goals that include effectively implementing the PTPA Environment Chapter, improving the protection and conservation of the environment, increasing transparency and public participation, and promoting a culture of environmental protection and compliance with environmental laws.²¹³ The ECC regularly reports on the progress of parties in achieving these objectives.²¹⁴

d. Criticism of PTPA Enforcement

Without effectively enforcing these provisions, even the most protective FTA is insufficient. The PTPA has made substantial progress in advancing environmental and wildlife conservation, but recent accounts suggest that Peru is facing issues with enforcing the environmental obligations. For example, in 2014, the Environmental Investigation Agency reported that Peru's new law, Law 30230, included "measures that roll back environmental standards in a misguided effort to attract greater investment in Peru."²¹⁵ Peru's law is alleged to contradict Article 18.3 of PTPA, which prohibits parties from waiving or derogating from protections afforded in domestic environmental laws to encourage trade or investment.²¹⁶ If FTA parties do not comply with the terms of the agreement, they must face consequences or the terms are meaningless. If the allegations prove true, the United States's response under the terms of PTPA could set an important precedent for FTA environment chapters.

212. *United States-Peru Environmental Cooperation 2011-2014 Work Program*, *supra* note 190.

213. *Id.*

214. *Id.*

215. *EIA Issues Statement Following President Humala's Address to the Nation*, *supra* note 141.

216. U.S.-Peru FTA, *supra* note 183, art. 18.3(2) ("The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in their respective environmental laws.").

4. *Trans-Pacific Partnership and Transatlantic Trade and Investment Partnership Agreements*

Having discussed CAFTA-DR and PTPA and the ways in which they benefit wildlife conservation, this sub-section examines two of the most recent and far-reaching FTAs that aim to go even further in achieving environmental and animal welfare. The first is the TPP, negotiations for which began in 2004 and are nearing completion as of 2015.²¹⁷ TPP “is the first major twenty-first-century trade negotiation encompassing not only tariffs and quotas but also new areas like regulatory cooperation, competition policy, environment and labor, and trade in digital goods and services.”²¹⁸ There are currently twelve TPP countries from along the Pacific Ocean and “represent [forty] percent of global GDP, [twenty-six] percent of global trade, and [forty] percent of U.S. trade.”²¹⁹ The second is the TTIP, which the United States and twenty-eight E.U. Member States has been negotiating since 2013 and is ongoing as of 2015. The United States and the E.U. account “for nearly [thirty] percent of global merchandise trade, about [forty] percent of world trade in services, and nearly half of global GDP.”²²⁰ TTIP aims to remove non-tariff barriers and enhance regulatory cooperation in the environment and labor, among other areas. Considering that the text of both agreements will only be publicly available after the negotiations are officially complete, this section discusses whether the TPP and TTIP may include environment and animal welfare provisions that go far beyond previous FTAs.

217. Peter S. Rashish, *Bridging the Pacific: The Americas' New Economic Frontier?*, ATLANTIC COUNCIL 1 (July 2014), http://www.atlanticcouncil.org/images/files/Bridging_the_Pacific_report.pdf.

218. *Id.* (internal quotes omitted).

219. *Id.* at 3.

220. *What You Need to Know About TTIP*, EUROPEAN AM. CHAMBER OF COMMERCE, <http://www.eaccny.com/international-business-resources/what-you-need-to-know-about-ttip/> (last visited Feb. 7, 2015).

a. Trans-Pacific Partnership

i. TPP Background

As of 2015, negotiating parties to TPP include Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, and the United States.²²¹ Other countries, such as China, South Korea, and Thailand, have sought to join negotiations.²²² Because the TPP is a “docking agreement,” other parties are able to join the negotiations.²²³ These countries cover an area of not only great economic importance, but also environmental significance. For example, TPP countries cover areas such as Australia’s Great Barrier Reef, which is “the world’s largest coral reef system” and “home to more than 11,000 species” and Peru’s Amazon Rainforest, which is “one of the most biologically diverse areas on Earth.”²²⁴

Unfortunately, the natural environment and rich biodiversity of the Pacific Rim are vulnerable to both illegal and unsustainable commercial exploitation and other threats.²²⁵ The Asia-Pacific region alone is home to roughly one third of the world’s threatened species.²²⁶ TPP parties are either source or demand countries for illegally trafficked wildlife, many of which are endangered or likely to become endangered, and often “do not have sufficient rules or fail to adequately enforce their laws against the trade.”²²⁷ TPP countries also “make up more than one third of the global fisheries catch, and more than one tenth of the world aquaculture production.”²²⁸ Given this vulnerability and the importance of conservation efforts in the

221. Rashish, *supra* note 217, at 3.

222. David Pilling & Shawn Donnan, *Trans-Pacific Partnership: Ocean’s Twelve*, FIN. TIMES (Sept. 22, 2014), <http://www.ft.com/intl/cms/s/0/8c253c5c-2056-11e3-b8c6-00144feab7de.html#axzz3QKcYXf5j>.

223. *The Trans-Pacific Partnership Agreement: What It Could Mean for the Environment*, SIERRA CLUB, http://action.sierraclub.org/site/DocServer/TPP_Fact_Sheet_Final4-Leave_Behind.pdf?docID=14001 (last visited Feb. 7, 2015).

224. *Id.*

225. *Id.*

226. *Id.*

227. Letter from Members of Congress to Michael Froman, Ambassador, U.S. Trade Representative (Feb. 20, 2014), *available at* <http://blumenauer.house.gov/images/stories/2014/02-20-14%20Blumenauer-DeFazio-Levin%20TPP%20Environment%20Letter%20-%20Final.pdf>.

228. *Id.*

regions covered by the TPP, the negotiating parties and civil society agree that the TPP must serve to bolster environmental protection and support biodiversity without encouraging environmental deregulation in the interest of trade.

ii. TPP Environment Chapter

The United States has articulated that the TPP has the potential to positively impact the environment and has played a significant role in leading the discussion of this issue. In its Interim Environmental Review, the USTR articulated that the TPP could “reinforc[e] efforts to effectively enforce environmental laws and enhance the conservation of natural resources, accelerat[e] economic growth and development through trade and investment which could make environmental protection a higher priority, and disseminat[e] environmentally beneficial technologies and services.”²²⁹ In addition, it “provides a context for enhancing bilateral and regional cooperation activities to address environmental issues of concern.”²³⁰

The USTR also published a Green Paper on conservation and the TPP in December 2011²³¹ that outlined U.S. objectives for the environment chapter, focusing on non-marine wildlife species, marine and oceans governance, and illegal logging and associated trade.²³² This proposed framework includes an obligation to: (1) maintain laws and regulations that bar trade in illegally harvested products, including wildlife, across TPP borders and (2) emphasize information sharing among law enforcement personnel, provisions that provide for mechanisms to ensure cooperation between TPP regulatory and law enforcement entities, and enhanced collaboration

229. U.S. TRADE REPRESENTATIVE, INTERIM ENVIRONMENTAL REVIEW: TRANS-PACIFIC PARTNERSHIP AGREEMENT ii (2013), available at <http://www.ustr.gov/sites/default/files/TPP%20Interim%20Review%20-%20final%20for%20posting%20-%2008.22.13.pdf>; OFFICE OF THE US TRADE REPRESENTATIVE, INTERIM ENVIRONMENTAL REVIEW: TRANS-PACIFIC PARTNERSHIP AGREEMENT (AUG 2013), <http://www.ustr.gov/sites/default/files/TPP%20Interim%20Review%20-%20final%20for%20posting%20-%2008.22.13.pdf>.

230. *Id.*

231. USTR *Green Paper on Conservation and the Trans-Pacific Partnership*, U.S. DEP'T OF STATE (Dec. 6, 2011), available at <http://iipdigital.usembassy.gov/st/english/texttrans/2011/12/20111206135136su0.133343.html?distid=ucs#axzz3QKv5z6pS>.

232. *Id.*

with NGOs, private sector, scientists, and local communities to address illegal trade.²³³ With respect to wildlife, the Green Paper calls for the full implementation of CITES and, as for marine fisheries, it calls for strong measures on subsidies and Illegal, Unregulated, and Unreported (“IUU”) fishing.²³⁴ Finally, the United States has stood firm in asserting that the environment chapter must be fully enforceable through a dispute settlement mechanism.²³⁵

For the majority of the TPP countries, their previous FTAs did not include an environment chapter and the environment goals advanced by the United States represented an ambitious leap forward. A draft of the environment chapter was leaked in January 2014.²³⁶ Although the document is now outdated, it provides important insights into the negotiations and reveals that at one point in the negotiations the TPP parties did not fully support the United States’ proposed provisions.²³⁷ For example, all parties opposed the language requiring them to “adopt, maintain, and implement” measures to fulfill specific MEAs, including CITES, most likely because the parties felt they could not fully comply with this obligation and feared the consequences of failing to comply with the chapter.²³⁸ Moreover, the parties could not agree to the application of the enforceable dispute settlement procedures, such as trade sanctions, to the environment chapter.²³⁹ Four of the twelve countries did not support the draft provision concerning conservation measures for

233. *Id.*

234. *Id.*

235. Letter from Members of Congress to Michael Froman, *supra* note 227.

236. *Secret Trans-Pacific Partnership Agreement (TPP) - Environment Consolidated Text*, WIKILEAKS (Jan. 15, 2014), <https://wikileaks.org/tpp-enviro/>.

237. The leaked document is dated November 24, 2013. *Id.*

238. *Secret Trans-Pacific Partnership Agreement (TPP) – Environment Chair Report*, WIKILEAKS (Jan. 15, 2014), <https://wikileaks.org/tpp2/static/pdf/tpp-treaty-environment-chapter.pdf> (noting that the MEAs include CITES, Montreal Protocol and the International Convention for the Prevention of Pollution from Ships).

239. *Id.* at SS.12.

sharks, marine turtles, seabirds, and marine mammals.²⁴⁰ Nine countries could not agree with the draft language that required TPP parties to take measures to prohibit trade in wild flora and fauna taken or traded in contravention of a foreign law.²⁴¹ Of course only the final text will reveal what the parties ultimately agreed to include in TPP.

The leak also gave important insight into the chapter's language, which several environmental and wildlife groups found to be substantially lacking because the Bipartisan Agreement list of MEAs was not included, the dispute settlement provision did not allow for sanctions, and the leak appeared to permit continued subsidies for fishing vessels and other activities that deplete fishing stocks, among other setbacks.²⁴² The United States responded that it would continue to push for robust provisions²⁴³ and, if successful, TPP could provide

240. Malaysia, New Zealand, Australia, and Japan did not agree to the following text as it was drafted:

The Parties acknowledge their role as major consumers, producers and traders of fisheries products and the importance of the marine fisheries sector to their development and to the livelihoods of their fishing communities, including artisanal or small-scale fisheries. The Parties also acknowledge that the fate of marine capture fisheries is an urgent resource problem facing the international community. Accordingly, the Parties recognize the importance of taking measures aimed at the conservation and the sustainable management of fisheries.

Id. at SS.16.

241. *Id.* at SS.17. Australia, Brunei, Chile, Japan, Mexico, Malaysia, Peru, Singapore, and Vietnam could not agree to the text as drafted.

242. Press Release, Natural Res. Def. Council, Green Groups: Leaked Trans-Pacific Partnership Environment Chapter Unacceptable (Jan. 15, 2014), available at <http://www.nrdc.org/media/2014/140115.asp>; see also *Analysis of Leaked Environment Chapter Consolidated Text*, SIERRA CLUB (Jan. 15, 2014), http://action.sierraclub.org/site/DocServer/TPP_Enviro_Analysis.pdf?docID=1482.

243. Michael Froman, *Remarks at the U.S. Department of State 'Our Ocean' Conference* (June 17, 2014), available at <https://ustr.gov/about-us/policy-offices/press-office/speeches/transcripts/2014/June/Remarks-by-USTR-Froman-at-Department-of-State-Our-Ocean-Conference> (“[W]e’ve seen TPP as a potential model for other trade agreements to take on environmental sustainability issues, particularly illegal logging, illegal wildlife trade and illegal fishing.”). Michael Froman also stated that:

[The United States is] seeking, in TPP, ground-breaking commitments to protect our oceans – commitments never seen before in a trade agreement. We’re working to advance sustainable fisheries management, including management systems that are based on internationally recognized best practices and the best scientific information available and to combat illegal, unreported, and unregulated (IUU) fishing, or ‘pirate fishing.’

Id.

an avenue for strong environmental and wildlife conservation protections. CAFTA-DR and PTPA have demonstrated the value of environment chapters in trade agreements, and TPP stands to push the envelope even further if the parties include strong enforceable provisions.

iii. TPP SPS Chapter and Animal Welfare

TPP is most likely to increase trade, or at a minimum increase trade opportunities, in agricultural products like meat, eggs, and milk, because it reduces or eliminates tariffs and other trade barriers. The SPS chapter in FTAs addresses issues that might arise in the trade of these products, specifically concerning food safety or diseases, which are carried by plants or animals.²⁴⁴ There has been no indication from any of the TPP parties that animal welfare issues – such as housing, transport, and slaughter - will be covered under the SPS chapter or any other section of the agreement. This is concerning because as trade in agricultural products increases, there is an increased potential for harmful U.S. industry practices, such as routine tail docking and extreme confinement systems for breeding sows, laying hens, and veal calves that are exported to the Asia-Pacific region. However, as will be discussed below, the U.S.-E.U. trade deal currently under negotiation has an opportunity to include animal welfare provisions and set a standard for future FTAs to follow.

b. Transatlantic Trade and Investment Partnership

i. TTIP Background

The TTIP parties describe TTIP as “an ambitious and comprehensive trade agreement that significantly expands trade and investment between the United States and the E.U., increases economic growth, jobs, and international competitiveness, and

244. *Introduction to the SPS Agreement*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/sps_e/sps_agreement_cbt_e/c1s4p1_e.htm (last visited Feb. 5, 2015) (requiring animals and animal products to come from disease-free areas, compelling inspections for microbiological contaminants, mandating a specific fumigation treatment for products, and setting maximum allowable levels of pesticide residues in food).

addresses global issues of common concern.”²⁴⁵ Apart from eliminating tariffs and other duties and charges, TTIP also aims to eliminate or reduce non-tariff barriers to trade and unnecessary regulatory differences, such as differences in technical regulations, standards, and approval procedures.²⁴⁶ With respect to animals, the TTIP could have a very broad impact on animal protection, especially in the wildlife provisions in the environment chapter, animal welfare in chapters relevant to agriculture, and welfare for animals used in research and testing in the sector-specific sections concerning chemicals, pharmaceuticals, and cosmetics. However, two areas of TTIP referred to as regulatory coherence and Investor-State-Dispute-Settlement (“ISDS”) may present barriers to advances in wildlife protection and animal welfare.

ii. TTIP Environment Chapter

If TTIP’s environment chapter includes the highest standards in its provisions and allocates the necessary resources to implement the chapter, it will demonstrate United States and E.U. global leadership on wildlife protection and conservation. The United States articulated its goal for the environment chapter by providing that it “seek[s] to obtain . . . appropriate commitments by the E.U. to protect the environment, including conserving natural resources, and to effectively enforce environmental laws, and seek opportunities to address environmental issues of mutual interest.”²⁴⁷ The E.U. asserted that the chapter’s overarching goal must be “to ensure that trade and economic activity can expand without undermining the pursuit of social, and environmental policies.”²⁴⁸ First, both the United States and the E.U. have placed increased political emphasis

245. *U.S. Objectives, U.S. Benefits In the Transatlantic Trade and Investment Partnership: A Detailed View*, U.S. TRADE REPRESENTATIVE (March X, 2014), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/March/US-Objectives-US-Benefits-In-the-TTIP-a-Detailed-View> [hereinafter *USTR TTIP Detailed View*].

246. *Id.*; see also *About TTIP*, EUROPA, <http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/> (last updated Jan. 22, 2015).

247. *USTR TTIP Detailed View*, *supra* note 245.

248. *Trade and Sustainable Development: Initial EU Position Paper*, EUROPA 2, http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151626.pdf (last visited Feb. 6, 2015).

on combating wildlife trafficking.²⁴⁹ Illegal wildlife trade threatens the survival of many species and, because it can be lucrative, is often linked to global security threats as criminal syndicates become involved. Moreover, illegal wildlife trade including timber and fish is estimated to be worth nineteen billion dollars or more per year,²⁵⁰ ranking it among other top criminal activities including trafficking in narcotics, weapons, and human beings. Consequently, protecting wildlife from illegal trade should be a key priority for E.U. negotiators and the TTIP's environment chapter must articulate the commitment of both parties to combat wildlife trafficking.

Second, TTIP must include strong conservation and management provisions to ensure marine species conservation and the survival of marine turtles, sharks, and marine mammals, such as whales and polar bears, through adequate conservation and management measures. All species of marine turtles are classified as endangered because of poaching, over-exploitation, habitat destruction, and climate change. According to a study by the International Union for the Conservation of Nature, twenty-five percent of sharks and rays

249. On February 2014, the United States finalized its National Strategy for Combating Wildlife Trafficking, drafted with the help of an Advisory Council featuring representatives from the private sector, non-profit sector, conservation sphere, academia, law enforcement, and the legal field. *Advisory Council on Wildlife Trafficking Members*, U.S. FISH & WILDLIFE SER., <http://www.fws.gov/international/advisory-council-wildlife-trafficking/bios.html> (last visited Apr. 8, 2015). U.S. Fish and Wildlife Service, International Affairs, Federal Advisory Council on Wildlife Trafficking, Web. 9 April 2014, <http://www.fws.gov/international/advisory-council-wildlife-trafficking/bios.html>. Together they devised a national strategy focusing on three priorities: (1) strengthen enforcement; (2) reduce demand for illegally traded wildlife; and (3) expand international cooperation and commitment. *National Strategy for Combating Wildlife Trafficking*, WHITE HOUSE (Feb. 11, 2014), <http://www.whitehouse.gov/sites/default/files/docs/nationalstrategywildlifetrafficking.pdf>. S. National Strategy for Combatting Wildlife Trafficking, February 2014, Web. 9 April 2014, <http://www.whitehouse.gov/sites/default/files/docs/nationalstrategywildlifetrafficking.pdf>. The E.U. is also updating its Action Plan on Wildlife Trafficking in response to the rising poaching rates and illegal trade in wild animals. *E.U. Consultation on Wildlife Trafficking*, EUROPA (Feb. 7, 2014), http://ec.europa.eu/unitedkingdom/press/frontpage/2014/14_10_en.htm. European Commission, EU Consultation on Wildlife Trafficking, 2 February 2014, Web. 9 April 2014, http://ec.europa.eu/unitedkingdom/press/frontpage/2014/14_10_en.htm.

250. John Kerry, Eric Holder & Sally Jewell, *Opinion: End Illegal Wildlife Trafficking on World Wildlife Day*, DIPNOTE (Mar. 3, 2014), <http://blogs.state.gov/stories/2014/03/03/opinion-end-illegal-wildlife-trafficking-world-wildlife-day>.

are at the risk of extinction.²⁵¹ Whales continue to be killed in large numbers despite a commercial whaling moratorium since 1986.²⁵² Lastly, there are only 20,000 to 25,000 polar bears left in the wild and their numbers in some populations are steadily declining due to habitat loss caused by climate change and overutilization of international commercial trade.²⁵³

Third, TTIP must include strong trade-based measures against IUU fishing, such as a ban on products from States found to be undermining fishery conservation, and a commitment to implement stronger enforcement measures of penalties for engaging in IUU fishing. The global illegal catching of fish amounts to an estimated ten billion to twenty-three billion dollars annually.²⁵⁴ Illegal fishing compromises sustainable fisheries and thus TTIP must drive higher international standards on this issue. Both the E.U. and the United States have already taken steps to address illegal fishing, but more must be done.²⁵⁵

251. James A. Foley, *IUCN Group Says 25% of All Sharks and Rays Threatened with Extinction*, NATURE WORLD NEWS (Jan. 21, 2014), <http://www.natureworldnews.com/articles/5727/20140121/iucn-group-25-sharks-rays-threatened-extinction.htm>.

252. *Commercial Whaling*, INT'L WHALING COMM'N, <https://iwc.int/commercial> (last visited Feb. 7, 2015).

253. *On the Precipice: Why International Commercial Trade in Polar Bears Should Be Eliminated*, NATURAL RES. DEF. COUNCIL (2012), <http://www.nrdc.org/wildlife/cites/polar-bear/files/polar-bear-OV.pdf>.

254. *IUU Fishing- Frequently Asked Questions*, NOAA FISHERIES, <http://www.nmfs.noaa.gov/ia/iuu/faqs.html> (last visited Feb 7, 2015).

255. The E.U. is the world's largest importer of fish and fishery products with imports estimated at forty-seven billion dollars for 2012, which is approximately thirty-six percent of global fish imports. FOOD & AGRIC. ORG. OF THE UNITED NATIONS, THE STATE OF WORLD FISHERIES AND AQUACULTURE 50 (2014), available at <http://www.fao.org/3/d1eaa9a1-5a71-4e42-86c0-f2111f07de16/i3720e.pdf> [hereinafter FAO REPORT 2014]. The E.U. has taken significant steps to combat IUU fishing. For example, in 2008, the E.U. passed Council Regulation (EC) No 1005/200 ("IUU Regulation") to prevent, deter and eliminate IUU fishing and implemented it in 2010. The IUU Regulation aims to "ensure that any individual or business wishing to import fish and fish products into the E.U. can only do so if the country under whose flag the fish was caught can show that it has in place, and enforces, laws and regulations to conserve and manage its marine resources." FOOD & AGRIC. ORG. OF THE UNITED NATIONS, THE STATE OF WORLD FISHERIES AND AQUACULTURE 94 (2010), available at <http://www.fao.org/docrep/013/i1820e/i1820e.pdf> [hereinafter FAO REPORT 2010]. As the world's second largest importer of fish and fishery products with imports estimated at 17.5 billion dollars for 2012 (approximately 13.6 percent of global fish imports), the United

The TTIP environment chapter must also be subject to dispute settlement mechanisms, as has been the practice for U.S. FTAs in the past. E.U. environment provisions, on the other hand, have not been binding.²⁵⁶ Therefore, it will be up to the United States to ensure that it negotiates a chapter with strong dispute settlement provisions and for the E.U. to agree to these terms.

iii. TTIP SPS Chapter and Animal Welfare

Animal protection groups are advocating for the TTIP to incorporate robust provisions on farm animal welfare, and the wave of favorable actions in trade of wildlife, such as the WTO seals decision, may pave the way for progress in this area as public opinion increasingly shifts toward humane treatment of animals raised for food.²⁵⁷ Farm animal welfare standards observed in the E.U. during the production of agricultural products—such as in housing, transport, and slaughter—are currently much higher than in the United States.²⁵⁸ For example, the E.U. bans and restricts the most extreme confinement systems, including sow stalls,²⁵⁹ battery cages,²⁶⁰ and veal crates.²⁶¹ By contrast, at the federal level, the

States has also taken serious steps to combat IUU fishing. FAO REPORT 2014, *supra* note 255. Similar to the E.U. IUU Regulation, the United States has passed the U.S. High Seas Driftnet Fishing Moratorium Protection Act. Driftnet Act Amendments of 1990, 16 U.S.C. § 1826 (2006). The Act, later amended by the Magnuson-Stevens Reauthorization Act, “requires NOAA to identify countries that have fishing vessels engaged in IUU fishing activities” and “[o]nce a nation has been identified, [the United States] consult[s] with the nation to encourage appropriate corrective action.” FAO REPORT 2010, *supra* note 255.

256. *Trade and Sustainable Development: Initial EU Position Paper*, *supra* note 248, at 4.

257. See HUMANE SOCIETY INTERNATIONAL, TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP BRIEFING ON: FARM ANIMALS AND ANIMAL WELFARE 1 (June 2014).

258. *Animal Welfare Main Community Legislative References*, EUROPA, http://ec.europa.eu/food/animal/welfare/index_en.htm (last visited Feb. 5, 2015) (highlighting that animal welfare has been incorporated in all major treaties affecting the functioning of the E.U., including the 1992 Maastricht Treaty, the 1997 Amsterdam Treaty, and more recently, the Lisbon Treaty of 2009); see also *The EU and Animal Welfare: Policy Objectives*, EUROPA, art. 13, http://ec.europa.eu/food/animal/welfare/policy/index_en.htm (last visited Feb. 5, 2015) (“[T]he Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals”).

259. Council Directive 2008/120/EC, 2008 O.J. (L 47/5) 5.

260. Council Directive 1999/74/EC, *supra* note 3.

United States has only one regulation that protects animals at the time of slaughter²⁶² and another that limits the amount of time that animals may spend in transit to twenty-eight hours, whereas the E.U. limits it to eight hours.²⁶³ Only a few U.S. states have extreme confinement bans.²⁶⁴

Beyond imposing bans and restrictions, the E.U. has also negotiated animal welfare provisions into its trade agreements, such as the FTAs with Chile²⁶⁵ and South Korea.²⁶⁶ The SPS Chapter of the E.U.-Chile FTA acknowledges that developing animal welfare standards is important, especially given the relationship with veterinary matters, and states that, “it is appropriate to include [animal welfare] in this Agreement and to examine animal welfare standards taking into account the development in the competent international standards organizations.”²⁶⁷ The SPS chapter of the E.U.-Korea FTA “aims to enhance cooperation between the Parties

261. Council Directive 2008/119/EC, *supra* note 3.

262. Humane Slaughter Act, 7 U.S.C. § 1901 (2006) (requiring livestock be rendered unconscious in a humane manner prior to slaughter). Significantly, the U.S. Department of Agriculture has interpreted the Human Slaughter Act as not applying to birds (including poultry), which accounts for approximately ninety-five percent of all land animals raised for food in the United States. Wayne Pacelle, *This isn't 'Chicken Little' Talk about USDA's Poultry Slaughter Rules*, A HUMANE NATION (Apr. 10, 2014), <http://blog.humanesociety.org/wayne/2014/04/this-isnt-chicken-little-talk-about-usdas-poultry-slaughter-rules.html>

263. Twenty-Eight Hour Law of 1873, 49 U.S.C. § 80502 (1994) (stating that transporters may not confine animals in a vehicle or vessel for more than twenty-eight consecutive hours without unloading for feeding, water, and rest); *see also* Council Regulation 1/2005, 2005 O.J. (L 3) 1 (requiring similar confinement restrictions after eight hours of transport).

264. *EU and US Farm Animal Welfare Legislation*, HUMANE SOC'Y INT'L (July 10, 2014), *available at* http://www.hsi.org/assets/pdfs/ttip_briefing_eu_vs_us.pdf (noting that Florida, Arizona, Oregon, Colorado, California, Maine, Michigan, Ohio, and Rhode Island no longer allow or are phasing out use of gestation crates; Arizona, Colorado, California, Kentucky, Maine, Michigan, Ohio, and Rhode Island ban the use of veal crates; Michigan, Oregon, and Washington restrict the use of battery cages; only California bans the sale of eggs from battery cage facilities; and California, Ohio, Rhode Island, and New Jersey ban tail docking of cattle).

265. Agreement Establishing an Association Between the European Community and its Member States, of the One Part, and the Republic of Chile, of the Other Part, 2002 O.J. 3 [hereinafter E.U.-Chile FTA].

266. *Countries and Regions: South Korea*, EUROPA, <http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-korea/> (last updated Sept. 2014).

267. E.U.-Chile FTA, *supra* note 265.

on animal welfare issues, taking into consideration various factors such as livestock industry conditions of the Parties.”²⁶⁸ The E.U. draft proposal for the TTIP SPS chapter was leaked on July 2014²⁶⁹ and revealed that the E.U. aims to include an article²⁷⁰ on animal welfare within the chapter, although only the final text will reveal the ultimate outcome.

The initial U.S. position has been that animal welfare is not an issue that the SPS chapter should address because it is not a food safety issue, especially given the arguments from the agricultural industry that food can be safe for consumers whether or not an animal is raised in extreme confinement.²⁷¹ However, there are scientific studies indicating that animal health and welfare are linked because poor welfare conditions can render animals more susceptible to disease.²⁷² E.U. and U.S. diverging regulations on animal welfare are concerning because it means that E.U. farmers and their products are held to one standard of animal treatment, while products imported from the United States may be held to a lower standard.²⁷³ One alternative is that animal welfare may be addressed in other parts of TTIP beyond the SPS chapter, such as the chapter on agricultural market access or the TBT chapter. Support for this lies in

268. E.U.-South Korea Free Trade Agreement, art. 5.1, E.U.-South Korea, Sept. 16, 2010, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2011:127:FULL&from=EN> [hereinafter E.U.-South Korea FTA].

269. TTIP Textual Proposal- Sanitary and Phytosanitary Measures (SPS), http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153026.pdf (last visited Apr. 8, 2015).

270. *Id.* Article 11 of the proposal draft calls on the parties to recognize animal sentience; undertake to exchange information, expertise and experiences in animal welfare; strengthen research collaboration in this area; collaborate in international for a in the aim of promoting development of good animal welfare practices; and appoint a working group on implementation of these provisions if necessary. Note for the Attention of the Trade Policy Committee, *TTIP – Sanitary and Phytosanitary Issues – Draft SPS Chapter*, art. 11, DS 1292/14 (June 27, 2014), available at http://www.iatp.org/files/2014.07_TTIP_SPS_Chapter_0.pdf [hereinafter EU-U.S. TTIP Negotiations].

271. A position expressed by USTR representatives during public TTIP stakeholder rounds, as documented by this article’s author, Maria Kalinina.

272. *Broiler Stocking Density and Welfare*, 6 POULTRY PERSPECTIVES, no. 1, 2005, at 2, available at http://extension.udel.edu/factsheet/wp-content/uploads/2012/09/Stocking-Density_Litter-Quality-and-Poultry-Welfare-2005.pdf.

273. *EU and US Farm Animal Welfare Legislation*, *supra* note 264.

the fact that WTO has recognized public morals as a legitimate objective pursuant to the WTO TBT Agreement.

iv. TTIP and Animal Testing and Research

Millions of animals are used in laboratory research and product testing throughout the world.²⁷⁴ Many methods used are outdated and can be replaced with cutting-edge non-animal techniques. TTIP offers an opportunity to address two specific issues in this field: (1) the use of animals in product testing, including testing of pharmaceuticals, cosmetics, plant protection products, biocides and chemicals and (2) the protection of animals used in laboratories.²⁷⁵ Animal protection groups advocate for the parties to incorporate rigorous application of the ‘3Rs’ (Replacement, Reduction and Refinement of animal use) into the TTIP to improve welfare standards and reduce test data requirements, which could ensure that parties use alternatives to animal testing whenever possible.²⁷⁶

In addressing the use of animals in product testing, the E.U. has made great progress in passing regulation that substantially reduces animal testing by banning animal testing for cosmetics, introducing non-animal methods for vaccine batch testing, and reducing use of animals involved in chemical safety assessments as part of the “REACH” regulation.²⁷⁷ The United States has made similar progress

274. *About Animal Testing*, HUMAN SOC’Y INT’L, http://www.hsi.org/campaigns/end_animal_testing/qa/about.html (last visited Feb. 7, 2015).

275. EMILY MCIVOR, TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP BRIEFING ON: ANIMAL TESTING (2014).

276. *Id.*

277. On pesticides, Regulations 528/2012, 283/2013, and 284/2013 reduce testing on animals by up to fifty percent in some cases. *European Union Legislation on Plant Protection Products and Biocidal Products*, EUROPA, http://exporthelp.europa.eu/update/requirements/ehir_eu14_03v001/eu/auxi/eu_che_mkt_leg_ppp_bp.pdf (last visited Feb. 7, 2015); see Council Regulation 1223/2009, 2009 O.J. (L 342/59) (EC) (banning animal testing for cosmetics within the E.U.). On vaccine batch testing, E.U. vaccine regulators have pioneered a novel safety assessment strategy called “consistency approach” which may replace in vivo tests. See *The Vaccines Consistency Approach Project*, EUROPA, http://ec.europa.eu/enterprise/epaa/platform-regulation/vaccines/vaccines-consistency_en.htm (last visited Feb. 7, 2015). On chemicals, the “REACH” Regulations 1907/2006 has numerous measures to minimize new animal testing, but some animal testing requirements remain and are redundant. Council Regulation 1907/2006, 2007 O.J. (L 136/3) (EC). Finally, on pharmaceuticals, progress toward minimization of animal testing has been achieved via International

with some matters, such as pesticides, but lags behind the E.U. with other matters, such as not permitting cosmetic testing on animals.²⁷⁸ As for animals used in research, E.U.'s Directive 2010/63/EU on the protection of animals used for scientific purposes is the first of its kind, extending legal protections to a larger range of species and requiring application of the 3Rs.²⁷⁹

TTIP parties can build on animal testing language in existing FTAs to show leadership in promoting advanced non-animal techniques in safety-testing and research.²⁸⁰ For example, the E.U.-South Korea FTA already includes text in an annex on chemicals that confirms the shared objective of the parties to “promot[e] alternative methods for assessment of hazards of substances and reduc[e] animal testing.”²⁸¹ TTIP provides an additional opportunity for the parties to improve exchanges of regulatory data on pharmaceuticals, cooperate to advance approaches that do not require testing each batch of vaccines on animals, establish a process for timely updates of toxicological risk assessments, and facilitate exchange of data and cost information between chemical companies, among other areas.²⁸²

c. TTIP, Regulatory Cooperation, and ISDS

The United States and E.U. plan to include a horizontal regulatory cooperation chapter in the TTIP that would apply across the entire

Conference on Harmonization. Yasuo Ohno, *ICH Guidelines—Implementation of the 3Rs (Retirement, Reduction, and Replacement): Incorporating Best Scientific Practices into the Regulatory Process*, 43 *ILAR J.* 595, 596-97 (2002), http://www.humanesociety.org/issues/cosmetic_testing/qa/questions_answers.html (last visited Apr. 8, 2015)

278. *Fact Sheet: Cosmetic Testing*, HUMANE SOCIETY, http://www.humane-society.org/issues/cosmetic_testing/qa/questions_answers.html

279. Council Directive 2010/63/EU, *supra* note 3.

280. Troy Seidle, Dir., Research & Toxicology Dept., Humane Soc’y Int’l, *Enhancing Alignment in Assessment Approaches for Chemical and Product Safety 7* (Oct. 1, 2014) (available upon request) (advocating for a “process for the timely updating of toxicological assessment to optimize science-based decision making and regulatory alignment” in different industry sectors, such as vaccines, chemicals, and pharmaceuticals).

281. E.U.-South Korea FTA, *supra* note 268, Annex 2-E, ¶ 2(d).

282. Seidle, *supra* note 280, at 7.

agreement. The E.U.'s Chief Negotiator, Ignacio Garcia Bercero, has articulated two goals for this chapter:

The first is increasing cooperation between United States and E.U. regulators in order to avoid unnecessary conflicts in their regulations and help set a global standard for the development of regulations . . . The second common goal is that stakeholders have an important input in the regulatory process, "taking into account the legal and institutional framework of each side."²⁸³

The United States, in part, has suggested that regulatory cooperation in the TTIP adopt certain elements that are similar to the U.S. notice-and-comment process²⁸⁴ and cost-benefit analysis.²⁸⁵ However, many civil society groups have described the U.S. notice-and-comment process and cost-benefit analysis as severely broken because they delay the passage of critical consumer protections, primarily serve the interests of big industry, and can leave regulations open to legal challenge.²⁸⁶ The European Commission initially "rejected that proposal as politically unfeasible in the E.U., but the negotiators' comments seemed to signal that the two sides may be pursuing a potential compromise."²⁸⁷

The greatest concern for regulatory cooperation in TTIP is that it would mean "procedures could easily facilitate a roll-back of protection provided by existing legislation, and that they would likely impede the development of new legislation and the implementation of what currently exists."²⁸⁸ It is unclear how U.S.

283. *EU TTIP Negotiator Sees Advances on Sectoral, Horizontal Regulatory Goals*, INSIDE U.S. TRADE (May 29, 2014).

284. "Long Way to Go" on Regulatory Cooperation Talks in TTIP—EU Official, BORDERLEX ¶ 6 (Feb. 17, 2015), <http://www.borderlex.eu/long-way-go-regulatory-cooperation-talks-ttip-eu-official/> (describing the notice and comment process as a system in which "regulators are legally obliged to take into account comments filed by the public").

285. *De Gucht Proposal for TTIP Regulatory Effort Contrasts with Froman's*, INSIDE U.S. TRADE (Oct. 29, 2013).

286. Letter from Civil Society Groups to Michael Froman, Ambassador, U.S. Trade Representative, and Karl De Gucht, Comm'r for Trade, European Comm'n (May 12, 2014), available at http://sensible safeguards.org/assets/documents/regco-sign-on-letter_questions_final.pdf [hereinafter May 12, 2014 Letter to Michael Froman and Karl De Gucht].

287. *EU TTIP Negotiator Sees Advances on Sectoral, Horizontal Regulatory Goals*, *supra* note 283.

288. May 12, 2014 Letter to Michael Froman and Karl De Gucht, *supra* note

and E.U. regulators will develop higher standards on wildlife protections, animal welfare, and animal testing and research, if the regulatory coherence process favors big business and their interests, which are represented by lobbyists whose purpose is to limit such regulation.

Lastly, the Investor-State Dispute Settlement is another contentious section of TTIP because it has previously served corporate interests in challenging regulations that protected consumer health.²⁸⁹ ISDS has been included in multiple FTAs and bilateral investment treaties and it “grants foreign corporations the right to go before private trade tribunals and directly challenge government policies and actions that corporations allege reduce the value of their investments.”²⁹⁰ It has been used in five hundred cases against ninety-five governments, often challenging environmental regulations and policies.²⁹¹ If the government loses, it must use taxpayer resources to reimburse corporations. One of the most famous cases involved Philip Morris which involved the company bringing an ISDS challenge against Uruguay and Australia and claiming that their plain packaging rules, which would eliminate branding from cigarette packs as a public health measure, undermined their investments.²⁹² ISDS poses a potential threat to U.S. and E.U. laws and regulations that seek to protect wildlife and increase welfare for farm animals and animals in product testing and research.

286.

289. Christiane Gerstetter & Nils Meyer-Ohlendorf, *Investor-State Dispute Settlement under TTIP – A Risk for Environmental Regulation?* ECOLOGIC INST. 4 (Dec. 31, 2013), <http://www.ecologic.eu/sites/files/publication/2014/investor-state-dispute-settlement-under-ttip-hbs.pdf>.

290. Letter from Civil Society Groups to Michael Froman, Ambassador, U.S. Trade Representative, and Karl De Gucht, Comm’r for Trade, European Comm’n (Dec. 16, 2013), available at http://action.sierraclub.org/site/DocServer/TTIP_Investment_Letter_Final.pdf?docID=14701.

291. *Id.*

292. *Id.*; see Philip Morris Asia Ltd v. Australia, PCA Case No. 2012-12, Notice of Claim (Perm. Ct. Arb. 2012), <http://www.italaw.com/cases/851>; Matthew C. Porterfield & Christopher R. Byrnes, *Philip Morris v. Uruguay: Will Investor-State Arbitration Send Restrictions on Tobacco Marketing Up in Smoke?*, INVEST. TREATY NEWS (July 12, 2011), <http://www.iisd.org/itn/2011/07/12/philip-morris-v-uruguay-will-investor-state-arbitration-send-restrictions-on-tobacco-marketing-up-in-smoke/>.

IV. CONCLUSION

The most recent WTO decisions involving animals demonstrate that the WTO is committed to the notion that animal welfare may justify barriers to trade. Although the *US-Tuna* and *EC-Seal Products* disputes concern attempts to protect wildlife, the Dispute Settlement Body's analysis is applicable in other animal-related contexts, such as industrialized agriculture and scientific research. As society's abhorrence of the systematic mistreatment of animals in industry rises to the level of a public moral concern, citizens will increasingly pressure their governments to ensure that animals are treated humanely by these industries. Countries should feel more confident in taking trade-restrictive measures to protect animals so long as such measures are designed and applied even-handedly.

With respect to global bilateral and multilateral trade, FTAs are changing the way that governments and civil society think about wildlife conservation and animal welfare. Trading partners are imposing strict requirements upon one another regarding enforcement of domestic and international environmental protections, as well as efforts to combat illegal trade and habitat loss. In addition, binding environment chapters with dispute mechanisms give teeth to these critical conservation provisions for the first time. Animal advocates are hopeful that this groundswell of enthusiasm for the protection of wild animals will inspire negotiators to include meaningful protections for animals beyond the environment provisions. Given the E.U.'s progressive actions on behalf of farm animal welfare and animal testing and research, such hope may be rewarded in the TTIP negotiations. The recent successes in addressing the increased harms to animals wrought by growing international trade indicates that there is no better time than now for animal advocates to push for greater protections in trade.