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REVIEW

'China REACH': Assessing the implications for non-Chinese companies producing and exporting new substances to China

Gareth Callagy

Nanomaterials and European Novel Food law:
The uncertain path to reasonable regulation

Julian Schenten

Access to documents: Interaction and gaps in the REACH
and Aarhus Convention systems

Vito Buonsante

Waving or drowning?
The legal impacts of the Cancun climate negotiations

Gita Parihar

A human right to a clean and healthy environment in Europe.
Dream or reality?

Jan Van de Venis

The European Court of Justice and the Justification of
Trade Restrictions for the Benefit of Animal Welfare:
A Change of Mind?

Tania Van Laer

Current Environmental Perspectives in Controlling, Handling and
Management of Used and Waste Electricals and Electronics
Equipment (WEEE) in Small Island States – A Review on Zanzibar

Aboud S. Jumbe

CONTENTS

Editorial	1
<i>elni Forum 2011</i>	
<i>"Access to Documents at European Level – key issues and practical experiences"</i>	
Articles with focus on chemicals	
'China REACH': Assessing the implications for non-Chinese companies producing and exporting new substances to China	2
<i>Gareth Callagy</i>	
Nanomaterials and European Novel Food law: The uncertain path to reasonable regulation	8
<i>Julian Schenten</i>	
Access to documents: Interaction and gaps in the REACH and Aarhus Convention systems	15
<i>Vito Buonsante</i>	
Articles with focus on other topics	
Waving or drowning? The legal impacts of the Cancun climate negotiations	21
<i>Gita Parihar</i>	
A human right to a clean and healthy environment in Europe. Dream or reality?	27
<i>Jan Van de Venis</i>	
The European Court of Justice and the Justification of Trade Restrictions for the Benefit of Animal Welfare: A Change of Mind?	36
<i>Tania Van Laer</i>	
Current Environmental Perspectives in Controlling, Handling and Management of Used and Waste Electricals and Electronics Equipment (WEEE) in Small Island States – A Review on Zanzibar	43
<i>Aboud S. Jumbe</i>	
Recent Development	
Access to Justice: Aarhus in Ireland	48
<i>Tony Lowes</i>	
Imprint	50
Authors of this issue	50
elni Membership	51

Editorial

The present issue of *elni Review* (1/2011) covers a variety of recent international environmental law issues alongside two country-specific contributions on EEE-waste regulation in Zanzibar, Tanzania and chemical substances legislation in China respectively. The key focus of the current edition of the journal, is *chemical substances regulation*.

Three articles approach this topic from different points of view:

First off, *Gareth Callegy* provides an overview of the legal impacts of the “Chinese REACH” legislation; an amendment to Chinese law which recently entered into force. By comparing the legal obligations arising from Regulation (EC) No. 1907/2006 (REACH) and the Chinese pendant, he points out inter alia the legal issues which European registrants will face when marketing chemical substances to the “Middle Kingdom.”

Subsequently, *Julian Schenten* analyses the state of affairs as regards the regulation of Nanomaterials in the food sector. Focusing on Regulation (EC) No. 258/97 on Novel Food, he identifies the weaknesses in terms of health protection and points out necessary key features which reasonable regulation of such chemical substances should have.

The third article concentrating on chemicals is by *Vito Buonsante*; it creates a bridge between the REACH Regulation and access to documents claims. In this context the author examines the interaction and gaps in the REACH and Aarhus Convention systems as well as the role of the European Chemicals Agency (ECHA).

The other contributions cover a variety of up-to-date legal issues:

Head of Legal at Friends of the Earth England, Wales and Northern Ireland, *Gita Parihar*, shows the legal impacts of the Cancun UN climate negotiations which took place in December 2010. In doing so, she develops a line of reasoning which remains relevant beyond the Bangkok Climate talks in April 2011.

Asking in his title ‘A human right to a clean and healthy environment in Europe: Dream or reality?’, *Jan Van de Venis* provides an introduction to the development of a human right to a healthy environment on a global scale. He analyses the ways in which this human rights-based approach to environmental issues evolved, what tangible benefits such a right could bring, along with where it currently stands globally and, more specifically, in Europe under the European Convention on Human Rights.

The contribution that follows, *Tania Van Laer* examines whether EU law allows Member States to justify, on the basis of animal welfare, unilateral measures that impose trade restrictions. At the same time she considers the main

principles of the free movement of goods as well as the established view of the Court of Justice.

The final article outlines the electronic waste situation in Zanzibar, Tanzania. In the absence of consumer protection provisions and specific environmental guidelines to regulate the import of these products or manage their safe disposal, the small island state is failing to implement the principles of the Basel Convention. Against this background *About S. Jumbe* presents the current activities of the Department of Environment, Zanzibar, which is now in the advanced stages of preparing a legal document which contains a set of regulations on the import, handling, and disposal of used and waste electrical and electronics equipment.

Finally, the issue covers recent developments regarding the situation of access to justice in Ireland – the only EU country in which the parliament has not ratified the 1998 UNECE Aarhus Convention.

Contributions for the next issue of the *elni Review* are very welcome. Please send them to the editors by September 2011.

Julian Schenten/Gerhard Roller

May 2011

elni Forum 2011

24th May 2011
in Brussels, Belgium

“Access to Documents at European Level – Key issues and practical experiences”

Bondine Kloostra presents key issues on access to documents regarding environmental information, including a recent decision of the ECJ (Stichting Natuur en Milieu). Vito Buonsante and Ludwig Krämer will present their practical experiences in access to documents, including the access to documents held by the European Chemicals Agency (ECHA). Eva Kruzikova will provide the point of view of the EU Commission.

This event will be held at the EU Liaison Office of the German Research Organisations (KoWi), Rue du Trône 98, 1050 Brussels, 8th Floor.

For more information about participation, including registration forms, please visit <http://www.elni.org/elni-events.0.html>.

The European Court of Justice and the Justification of Trade Restrictions for the Benefit of Animal Welfare: A Change of Mind?

Tania Van Laer*

1 Introduction

Animal welfare is a constantly growing concern within the European Union.¹ The protection thereof, is less easy to obtain since opinions on animal welfare differ enormously due, for instance, to cultural differences.² One harmonised regulatory framework seems impossible, yet certain common rules are necessary to avoid a negative impact of national animal welfare regulations on intra-Community trade.

This paper examines only one of many different issues due to these conflicting interests. It investigates whether EU law allows Member States to justify, on the basis of animal welfare, unilateral measures that impose trade restrictions. Since new developments – that might resolve the problem of Member States pursuing a high level of protection of animal welfare – seem to be on their way, it is necessary to highlight the issue both from the traditional point of view as well as from the possible future one.

In part two the problem with unilateral measures aiming at a high level of animal welfare will be set out more extensively, at the same time serving as a reminder for the reader of the main principles of the free movement of goods. The third part will describe the established view of the Court of Justice with regard to Art. 36 of the Treaty on the Functioning of the European Union (TFEU) and the rule of reason, followed in the fourth part by the possible changes under discussion at the moment.³

2 Identifying the problems

First of all it is clear that animals are considered as goods.⁴ Consequently, their regulation has to comply with the rules on the free movement of goods⁵ since the Court of Justice states that: ‘(...) objects which are transported over a frontier in order to give rise to commercial transactions are subject to Article [34 TFEU], irrespective of the nature of those transactions.’⁶ A similar reasoning applies for exports. Thus, animals are subjected to

with international trade and possible incompatibility with the regime of the WTO, although a likely issue as the one currently discussed may occur within this context. Only national – and not international or regional – measures with a possible restriction on intra-Community trade will be examined. Thus, the possible application of Article 34-36 TFEU on measures which only produce internal consequences will not be addressed either, although this applicability is suggested by recent case-law: Jan H. Jans and Hans H.B. Vedder, *European Environmental Law*, 3rd ed. (Groningen: Europa Law Publishing, 2008), 496, 238-239.

- Thirdly, the focus of this paper is on Articles 34-36 TFEU and in particular Article 36. So the environmental guarantee as provided for in Articles 114 and 193 TFEU will not be addressed. For more information on the environmental guarantee see: Ludwig Krämer, *EC Environmental Law*, 6th ed. (London: Sweet & Maxwell, 2007), 513 126-142; Geert Van Calster, ‘Public Environmental Law in the European Union’, in René J.G.H. Seerden, Michiel A. Heldeweg and Kurt R. Deketelaere (eds), *Public Environmental Law in the European Union and the United States – A Comparative Analysis* (The Hague: Kluwer Law International, 2002), 465-515, 486-489 [hereinafter: Van Calster, ‘Public Environmental Law’].

- Last but not least, exhaustive harmonisation and extraterritoriality will not be addressed since this would lead us too far. Nevertheless, it has to be pointed out that the issue of exhaustive harmonisation is very important in regulating certain matters of animal welfare since reliance on Article 36 TFEU or the rule of reason is only allowed in the absence of harmonisation: E.g. Case 227/82, *Van Bennekom*, [1983] ECR 388, at 35; Case C-347/89, *Freistaat Bayern v. Eurim-Pharm GmbH*, [1991] ECR I-1747, at 26; Case C-5/94, *Lomas*, [1996] ECR I-2553, at 18. For more information on these issues see: Cardwell, *The European Model of Agriculture* (Oxford: Oxford University Press, 2004), 447, 304-308; Jans and Vedder, above, 261-264; Krämer, above, 118; Nicola Notaro, ‘The new generation case law on trade and environment’, 25 *European Law Review* (2000), 467-491, 474 and 487-489; Radford, note 1 above, 150; Ludwig Rasso ‘A Cock and Bull Story? – Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions’, 20 *Journal of Environmental Law* (2008), 363-390, 370-378; Rasso, above, 375-378; Han Somsen, ‘Discretion in European Community Environmental Law: an Analysis of ECJ Case Law’, 40 *Common Market Law Review* (2003), 1413-1453, 1424-1427; Geert Van Calster, ‘Export Restrictions – A Watershed for Article 30’, 25 *European Law Review* (2000), 335-352, 337-351 [hereinafter: Van Calster, ‘A Watershed’]; Van Calster, ‘Public Environmental Law’, above, 483-484; Geert Van Calster, ‘Animal welfare, the EU and the World Trade Organization – Member states’ sovereignty between a rock and a hard place?’, in Anton Vedder (ed), *The WTO and Concerns Regarding Animals and Nature*, (Nijmegen: Wolf Legal Publishers, 2003), 61-85, 66 and 68-69 [hereinafter: Van Calster, ‘Between a rock and a hard place’].

4 Rasso, supra note 3 above, 370.

5 Rasso, supra note 3 above, 370.

6 Case C-2/90, *Walloon Waste*, [1992] ECR I-4431, at 26; Jans and Vedder, note 3 above, 234.

* With many thanks to Prof. Dr. Geert Van Calster for his support and much appreciated suggestions.

1 Take for instance a look at the different steps taken to achieve a reference to animal welfare in the current Treaty on the Functioning of the European Union and the development of different Directives and Regulations that protect animal welfare. For more information on these issues see: Mike Radford, *Animal Welfare Law in Britain – Regulation and Responsibility* (Oxford: Oxford University Press, 2001), 441, 105-106 and 146-147; David B. Wilkins, *Animal Welfare in Europe – European Legislation and Concerns* (London: Kluwer Law International, 1997), 423. Although this book is outdated, it gives an extensive overview of the big amount of legislation at Community level concerning animal welfare and its development up till 1997. For a recent though less extensive overview of the main EU legislative references with regard to animal welfare see:

http://ec.europa.eu/food/animal/welfare/references_en.htm#ref93-119 (date of access: 9 January 2010).

2 For example: religious slaughtering of animals, hunting animals as entertainment or organising bull fights as a traditional festivity.

3 The scope of this paper is not exhaustive and limited in several ways:
- First of all, it is obvious that national measures may not only conflict with the provisions on the free movement of goods but also with other Community policies such as agriculture, transport, environment and research. The scope of this paper, however, is limited to the conflicts which arise within the trade policy of the European Union.

- Secondly, this paper limits itself to the study of the effect of national measures on intra-Community trade. This implies that it is not concerned

Articles 34-36 TFEU as is reflected in different cases concerning animal welfare.⁷

Article 34 and 35 TFEU prohibit respectively all import or export restrictions and measures having an equivalent effect. Although the wording of both articles is similar, the Court interprets them differently. In the *Dassonville* case, it defined ‘*measures having an equivalent effect*’ of Article 34 TFEU as national measures ‘*which are capable of hindering, directly or indirectly, actually or potentially intra-Community trade*’.⁸ Obviously, also measures applicable without distinction are included within the prohibition of Article 34 TFEU.⁹ Surprisingly, the Court has ruled that Article 35 TFEU only comprises measures ‘*which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a member state and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the state in question at the expense of the production or of the trade of other Member States*’.¹⁰ So measures applicable without distinction are not contrary to Article 35 of the TFEU.¹¹ For the remainder, the definition of measures having an equivalent effect remains the same.¹² With regard to animal welfare, both articles have been addressed in the past.¹³

Further, the Court has judged in the *Cassis de Dijon* case that within the European Union a principle of mutual recognition exists, so products lawfully produced and marketed in one Member State must be accepted in the other Member States.¹⁴ Also in this context problems with regard to animal welfare requirements could arise, e.g. when a Member State does not allow the import of products legally produced in another Member State, but which were not produced in accordance with its own animal welfare standards.

The same goes for animal welfare labelling requirements since these too fall within the scope of Article 34 of the TFEU.¹⁵

Therefore it is obvious that measures to the benefit of animal welfare may infringe the free movement of goods.¹⁶

Nevertheless, some infringements may be justified by recourse to Article 36 and/or to the rule of reason.¹⁷ The latter means that obstacles to the free movement of goods may be accepted, if the rules, indistinctly applicable¹⁸, are ‘*recognised as being necessary in order to satisfy mandatory requirements*’.¹⁹ The Court of Justice determines what the exact content of these mandatory requirements is and has already added the protection of the environment some time ago.²⁰

It remains unclear, however, whether animal welfare lies within the scope of Article 36 or may be seen as a mandatory requirement. If it is, then national measures imposing trade restrictions to the benefit of animal welfare may be justified on the ground of Article 36 and/or the rule of reason. If it is not, one will have to find recourse to some other grounds each time one wants to introduce trade restrictions to the benefit of animal welfare. The latter may prove difficult, perhaps impossible.

So the question to be resolved in this paper is whether or not it is possible to rely on animal welfare as grounds of justification for trade restrictions. More concretely, the question is whether or not animal welfare is recognised by Article 36 TFEU and/or as a mandatory requirement.

3 The established view of the Court of Justice

This part investigates whether it was possible before the *Andibel* case²¹ – which recognised for the first time that animal welfare may be used as a justification for trade restrictions (see chapter 4.1 below) – to argue that animal welfare falls within the scope of Article 36 of the TFEU or can be recognised as a mandatory requirement. This reasoning remains relevant since – as argued below – the *Andibel* case together with case C-100/08 referring to the *Andibel* case²² remain at the moment the only cases in which animal welfare is recognised as a mandatory requirement and one swallow does not make a summer.

Firstly the possibility of using Article 36 is addressed. In particular it is investigated whether one can rely on the exceptions of ‘*protection of health and life of humans, animals or plants*’ or ‘*public morality, public policy and*

7 E.g. Case C-1/96, *Compassion in World Farming*, [1998] ECR I-1251; Case C-219/07, *National Raad van Dierenkwekers en Liefhebbers VZW and Andibel VZW v Belgische Staat*, [2008] ECR I-4475.

8 Case 8/74, *Dassonville*, [1974] ECR 837, at 5.

9 *Jans and Vedder*, note 3 above, 234-235.

10 Case 15/79, *PB Groenveld BV v. Produktschap voor Vee en Vlees*, [1979] ECR 3409; Case 172/82, *Inter-Huiles*, [1983] ECR 555, at 12; Van Calster, ‘*A Watershed*’, note 3 above, 336; Van Calster, ‘*Public Environmental Law*’, note 3 above, 495.

11 *Jans and Vedder*, note 3 above, 239.

12 Case 53/76, *Procureur de la République Besançon v. Bouhelier and others*, [1977] ECR 197; Van Calster, ‘*A Watershed*’, note 3 above, 336.

13 E.g. Case C-169/89, *Red Grouse*, [1990] ECT I-2143 (In this case, the Dutch government issued an import restriction on the Red Grouse.); Case C-1/96, *Compassion in World Farming*, [1998] ECR I-1251 (In this case, the question rose whether the UK could legally prohibit the export of calves in order to avoid them being reared in the veal crate system.) For a full description of the case see: *Cardwell*, note 3 above, 305-308; Van Calster, ‘*Public Environmental Law*’, note 3 above, 484-485; Van Calster, ‘*Between a rock and a hard place*’, note 3 above, 66-74..

14 Case 120/78, *Rewe-Zentral AG*, [1979] ECR 649; *Jans and Vedder*, note 3 above, 234-235.

15 *Jans and Vedder*, note 3 above, 237.

16 *Radford*, note 1 above, 149.

17 Restrictions to selling arrangements are always justified, but since this seems not very relevant for animal welfare it will not be investigated in this paper. For more information see: *Jans and Vedder*, note 3 above, 237-238.

18 E.g. Case 113/80, *Commission v. Ireland*, [1981] ECR 1625, at 10; Case 6/81, *Industrie Diensten Groep v. J.A. Beele Handelsmaatschappij BV*, [1982] ECR 707 at 7; Case 207/83, *Commission v. United Kingdom*, [1985] ECR 1201, at 19-20; Van Calster, ‘*Public Environmental Law*’, note 3 above, 490.

19 Case 120/78, *Rewe-Zentral AG*, [1979] ECR 649, at 8; *Jans and Vedder*, note 3 above, 245-246.

20 Case 302/86, *Danish Bottles*, [1988] ECR 4607, at 9; *Jans and Vedder*, note 3 above, 245-246; *Krämer*, note 3 above, 105.

21 Case C-219/07, *National Raad van Dierenkwekers en Liefhebbers VZW and Andibel VZW v Belgische Staat*, [2008] ECR I-4475.

22 Case C-100/08, *Commission v. Belgium*, not yet published in ECR.

public security', since these are the only two that may be used with regard to animal welfare.

Secondly, whether animal welfare could be seen as a mandatory requirement since it obviously is an important issue in the European Union is examined.

3.1 Article 36 of the TFEU

3.1.1 Protection of health and life of humans, animals or plants

First of all a difference has to be made between situations whereby animal welfare might be protected together with the health and life of animals and those in which this is not the case. Clearly the former situations do not pose any problems since a Member State is able to enact national measures on the basis of the exception provided for in Article 36 of the TFEU. Therefore, it is important to stress that from now on animal welfare will be interpreted in the most strict sense possible, i.e. animals as sentient beings, since the following reasoning is only relevant for measures that aim exclusively at the protection of animal welfare.

Some authors²³ state that animal welfare does not fall within the scope of the exception 'protection of health and life of animals' whereas others²⁴ believe that it does. This author states that neither is right or wrong, since for both points of view there are valid arguments, none of which are all-convincing and the Court of Justice not yet ruling explicitly on the matter.

Firstly, the Court has held on several occasions that the exception of Article 36 has to be interpreted strictly²⁵ and requires a real threat for the health and life of animals²⁶ in order to rely on it successfully.

However, in the Danish bees case, the Court interpreted Article 36 less narrowly since it stated: "[...] *measures to preserve an indigenous animal population with distinct characteristics contribute to the maintenance of biodiversity by ensuring the survival of the population concerned. By so doing, they are aimed at protecting the life of these animals and are capable of being justified under Article 36 [...]*".²⁷ Clearly the Court took a more lenient approach towards the exception²⁸, especially since it did not require that the protected population was threatened with extinction.²⁹ This is however the only case known

by the author where this has occurred, so one has to be careful in drawing conclusions.

Concerning the 'real threat' requirement, it can be argued that, since animals are sentient beings³⁰, their "mental" wellbeing is also part of their health. Thus, protecting animal welfare means protecting their health. At the same time the author realises that it is very unlikely that such an argument will succeed before the Court of Justice.

Secondly, it can be argued that animal welfare, as inserted in EU law by the Protocol on Animal Welfare, goes much further than what is meant by 'the protection of health and life of animals'.³¹

Last but not least, there are two cases in which the Court seems to allow some space to argue that animal welfare falls within the scope of 'health and life of animals'. The first one is the Holdijk case, regarding which the Court states '(...) *Such an interpretation would be incompatible with the Community's concern for the health and protection of animals, as evinced inter alia, by article 36 of the Treaty (...)*'.³² It could be argued that the 'protection of animals' relates to animal welfare and not to the health and life of animals, which means that animal welfare is embraced by Article 36 of the TFEU. The second one is the Lomas case in which the Court ruled: '*Article 36 of the Treaty allows the maintenance of restrictions on the free movement of goods, justified on grounds of the protection of the health and life of animals, which constitutes a fundamental requirement recognized by Community law. However, recourse to Article 36 is no longer possible where Community directives provide for harmonization (...)*'.³³ This case concerned an export prohibition in order to protect live animals from getting slaughtered without being stunned properly, so to protect animal welfare. It could be argued that one can deduct from the Courts argumentation that if there would not have been harmonization, the export prohibition would have been justified on the ground of 'the protection of the health and life of animals'.

Although both cases provide some space to argue that animal welfare falls within the scope of 'health and life of animals', it is obvious that the Court in these cases did not judge explicitly on the interpretation of the exceptions provided by Article 36. Therefore, the reasoning above remains speculative only.

As expounded above, it is not clear at all whether the exception for the protection of health and life of humans,

23 Radford, note 1 above, 150; Van Calster, 'A Watershed', note 3 above, 348; Van Calster, 'Between a rock and a hard place', note 3 above, 73-74.

24 Notaro, note 3 above, 472; Rasso, note 3 above, 370; Andreas R. Ziegler, Trade and Environmental Law in the European Community (Oxford: Clarendon Press, 1996), 308, 66.

25 E.g. Case 46/76, W.J.G. Bauhuis v. The Netherlands State, [1977] ECR 5, at 12; Case 72/83, Campus Oil Limited and others v Minister for Industry and Energy and others, [1984] ECR 2727, 37; Case C-367/89, Criminal proceedings against Aimé Richardt and Les Accessoires Scientifiques SNC., [1991] ECR I-4621, at 20; Jans and Vedder, note 3 above, 242; Krämer, note 3 above, 104; Radford, note 1 above, 150.

26 Jans and Vedder, note 3 above, 242.

27 Case C-67/97, Danish bees, [1998] ECR I-8033, at 33.

28 Van Calster, 'Between a rock and a hard place', note 3 above, 80-81.

29 Case C-67/97, Danish bees, [1998] ECR I-8033, at 34; Jans and Vedder, note 3 above, 244.

30 As is confirmed by the Preamble of the Amsterdam Protocol on Animal Welfare. (Treaty of Amsterdam of 10 November 1997 amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Protocol annexed to the Treaty of the European Community - Protocol on protection and welfare of animals, OJ 1997 C340/110.)

31 Van Calster, 'A Watershed', note 3 above, 348; Van Calster, 'Between a rock and a hard place', note 3 above, 73.

32 Joined cases 141 to 143/81, G. Holdijk et al., [1982] ECR 1299, at 13.

33 Case 5/94, Lomas, [1996] ECR I-2553, at 18.

animals or plants comprises animal welfare or not. A ruling of the Court on the matter is desirable.

3.1.2 Public morality, public policy and public security

The exception of public morality, public policy and public security seems of little help in justifying trade restrictions based on animal welfare grounds.

Firstly it is clear that public security can never include animal welfare, unless perhaps – in a very unlikely scenario – people resort to violence when demonstrating against certain cruel practices towards animals to such an extent that the Member State has no other satisfying means of tackling the problem but to resort to trade restrictions. In any case, this exception has never been used with regard to animal welfare.

Further, the exception of public policy, standing on its own, has only been accepted once within the framework of the free movement of goods in an exceptional case regarding the protection of the right to mint coinage.³⁴

When the court has the possibility to use a different exception provided for by Article 36 of the TFEU, it prefers to use this one or combines the use of the public policy justification with it.³⁵ Obviously, it is unlikely that animal welfare will be able to trigger the exception of public policy since it is interpreted so strictly.

Finally, in the *Compassion* case the Court judged on the invocation of the public morality exception within the context of animal welfare. It stated that '(...) by drawing attention to the views and reactions of a section of national public opinion which believes that the system put in place by the Directive does not adequately protect animal health (...) in reality, public policy and public morality are not being invoked as a separate justification but are an aspect of the justification relating to the protection of animal health (...)'.³⁶ Thus, already in this case it was made clear that recourse to the exception of public morality is subject to strict conditions since it is not sufficient to rely on 'views and reactions of a section of national public opinion'.

In an attempt to explain this rather odd judgement of the Court, it was stated that reliance on the public morality exception in this case in order to justify export restrictions would have been possible if the government would have held 'the official position that the exports were morally unacceptable'.³⁷ So, in order to justify trade restrictions based on the public morality exception, one

has to consider the interests of a whole Member State and not just a part.³⁸

However, this explanation seems no longer tenable since the Court has ruled in a recent judgment³⁹ with regard to GMO's in similar wordings and with reference to the *Compassion* case, 'that public morality is not really being invoked as a separate justification, but as an aspect of the justification relating to protection of human health and the environment'⁴⁰ although in this case the government tried to defend its internal measures. In this case the government adopted the view that the introduction of GMO's was morally unacceptable. Thus, according to the reasoning described above, it should have been possible to justify the restriction on the basis of the public morality exception. The Court of Justice, however, rejected the arguments for the same reasons as in *Compassion* although they concerned the Member State as a whole.⁴¹

Nevertheless, the Court clarified some issues. With regard to the religious and ethical arguments of Poland it stated that 'it must be held that that Member State has failed to establish that the contested national provisions were in fact adopted on the basis of such considerations'.⁴² So if a Member State wants to rely on the public morality exception, it has to prove that measures were taken on the basis of religious or ethical arguments.

Although it seems *prima facie* easy to argue that trade restrictions on the basis of animal welfare are taken for ethical reasons, one has to be careful with such a conclusion especially seen the judgment of the Court in the *Compassion* case.

So the exception of public morality, public policy and public security does not contribute much to the justification of trade restrictions on the basis of animal welfare. Only public morality has got some potential, but obviously the Court does not like to judge on the basis of this exception and very strict conditions have to be fulfilled.

3.2 The rule of reason

As mentioned above, mandatory requirements can also be relied upon to justify trade restrictions. Since the list of mandatory requirements is not exhaustive and can be subject to change⁴³, it is possible to argue that animal welfare constitutes a mandatory requirement. In this part the possibilities for such an argument will be discussed without taking into account the judgment of the Court in the *Andibel* case and the insertion in the Treaty on the Functioning of the European Union of an article that

34 Case 7/78, *Regina v. Ernest George Thompson et alii*, [1978] ECR 2247.

35 European Commission Directorate C, Regulatory Policy, of DG Enterprise and Industry, Commission Staff Working Document - Free Movement of Goods - Guide to the application of Treaty provisions governing Free Movement of Goods (Articles 28-30 EC), 12 May 2009, http://ec.europa.eu/enterprise/policies/single-market_goods/files/goods/docs/art2830/new_guide_en.pdf (date of access: 9 January 2010), 63, 38.

36 Case C-1/96, *Compassion in World Farming*, [1998] ECR I-1251, at 66.

37 Van Calster, 'A Watershed', note 3 above, 346-347.

38 Van Calster, 'A Watershed', note 3 above, 346-347.

39 Case C-165/08, *Commission v. Republic of Poland*, not yet published in ECR.

40 Case C-165/08, *Commission v. Republic of Poland*, not yet published in ECR, at 55.

41 Case C-165/08, *Commission v. Republic of Poland*, not yet published in ECR, at 52-55.

42 Case C-165/08, *Commission v. Republic of Poland*, not yet published in ECR, at 57.

43 Van Calster, 'Public Environmental Law', note 3 above, 482-483; Ziegler, note 24 above, 68-69.

concerns animal welfare. The effects of these two new developments will be discussed separately in part four.

As will be shown below, animal welfare has the same potential as environmental protection to become a mandatory requirement.⁴⁴

First, it is clear that animal welfare – just like the protection of the environment – not being explicitly mentioned in Article 36 of the TFEU is ‘worthy of protection under the Rule of Reason, since Member States’ perception of priorities has changed since the conception of [Article 36 TFEU].⁴⁵ That this perception has changed and that animal welfare has become an important issue within the EU can be proved by reference to the acceptance of the Protocol on Animal Welfare⁴⁶ and the enacting of numerous legal instruments at EU level in order to improve animal welfare⁴⁷.

The former recognises in its preamble that animals are sentient beings and declares: ‘In formulating and implementing the Community’s agriculture, transport, internal market and research policies, the Community and the Member States shall pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.’ Although the statement is made in a Protocol and not integrated in the text of the Treaty itself, it has the same legal standing as the text of the Treaty.⁴⁸

This seems a very strong basis for arguing that animal welfare is a mandatory requirement, but one has to be careful. The Court has ruled in the Jippes case⁴⁹ that the Protocol according ‘to its very wording’ does not lay down a general principle of animal welfare⁵⁰ because ‘[a]lthough it provides that full regard must be had to the welfare requirements of animals in the formulation and

implementation of the Community’s policy, it limits that obligation to four specific spheres of Community activity and provides that the legislative or administrative provisions and customs of the Member States must be respected as regards, in particular, religious rites, cultural traditions and regional heritage’.⁵¹ According to the Court the Protocol only ‘seeks to reinforce the obligation to take the health and protection of animals into consideration’.⁵² Thus, it is evident that the Court does not contribute too much weight to this development. This does not mean that one can not use the Protocol when arguing that animal welfare constitutes a mandatory requirement. The author only suggests that one has to be prudent because of the ruling of the Court in the Jippes case. Moreover, some authors even state that the Protocol hampers the development of animal welfare as a mandatory requirement due to its specific reference to taking culture and so on into account.⁵³

Concerning secondary legislation, the same degree of prudence is recommended since the Court stated in the Jippes case that the references made to animal welfare in secondary legislation ‘contain no indication that the need to ensure animal welfare is to be regarded as a general principle of Community law’.⁵⁴

Secondly, the Court has already held on a number of occasions that animal welfare or the ‘health and protection of animals’ as the Court calls it, constitutes a public interest within the EU. However, these statements were never made with regard to the rule of reason. In some cases it concerned the validity of EU legislation⁵⁵, whereas in others it related to the justification of national measures. But in the latter cases, the Court referred to Article 36 of the TFEU and not to the rule of reason.⁵⁶ Thus, no conclusions can be drawn with regard to the rule of reason.

Nevertheless, if one observes the development of environmental protection as a mandatory requirement, a similar development can be observed. First environmental protection was recognised as a mandatory re-

44 Van Calster, ‘A Watershed’, note 3 above, 348; Van Calster, ‘Between a rock and a hard place’, note 3 above, 73-74; Wilkins, note 1 above, 129-130.

45 Van Calster, ‘A Watershed’, note 3 above, 348; Van Calster, ‘Between a rock and a hard place’, note 3 above, 73-74.

46 Treaty of Amsterdam of 10 November 1997 amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Protocol annexed to the Treaty of the European Community - Protocol on protection and welfare of animals, OJ 1997 C340/110.

47 For an overview of the main EU legislative references with regards to animal welfare see: http://ec.europa.eu/food/animal/welfare/references_en.htm#ref93-119 (date of access: 9 January 2010).

48 Article 311 TEC; Radford, note 1 above, 106.

49 Case C-189/01, H. Jippes, Afdeling Groningen van de Nederlandse Vereniging tot Bescherming van Dieren en Afdeling Assen en omstreken van de Nederlandse Vereniging tot Bescherming van Dieren t Minister van Landbouw, Natuurbeheer en Visserij, [2001] ECR I-5689. For an extensive review of this case see: Radford, note 1 above, 403-405; Rasso, note 3 above, 366-370; Van Calster, ‘Between a rock and a hard place’, note 3 above, 76-78.

50 This principle states that ‘save in so far as may be necessary, animals are not to be exposed to pain or suffering and (...) their health and welfare [should] not (...) be impaired’. (Case C-189/01, H. Jippes, Afdeling Groningen van de Nederlandse Vereniging tot Bescherming van Dieren en Afdeling Assen en omstreken van de Nederlandse Vereniging tot Bescherming van Dieren t Minister van Landbouw, Natuurbeheer en Visserij, [2001] ECR I-5689, at 48.)

51 Case C-189/01, H. Jippes, Afdeling Groningen van de Nederlandse Vereniging tot Bescherming van Dieren en Afdeling Assen en omstreken van de Nederlandse Vereniging tot Bescherming van Dieren t Minister van Landbouw, Natuurbeheer en Visserij, [2001] ECR I-5689, at 73.

52 Case C-189/01, H. Jippes, Afdeling Groningen van de Nederlandse Vereniging tot Bescherming van Dieren en Afdeling Assen en omstreken van de Nederlandse Vereniging tot Bescherming van Dieren t Minister van Landbouw, Natuurbeheer en Visserij, [2001] ECR I-5689, at 84.

53 Van Calster, ‘Between a rock and a hard place’, note 3 above, 78.

54 Case C-189/01, H. Jippes, Afdeling Groningen van de Nederlandse Vereniging tot Bescherming van Dieren en Afdeling Assen en omstreken van de Nederlandse Vereniging tot Bescherming van Dieren t Minister van Landbouw, Natuurbeheer en Visserij, [2001] ECR I-5689, 76.

55 Case 131/86, United Kingdom v. Council of the European Communities, [1988] ECR 905, at 17; Joined cases C-37/06 and C-58/06, Viame Agrar Handels GmbH and Zuchtvieh-Kontor GmbH (ZVK) v. Hauptzollamt Hamburg-Jonas, [2008] ECR I-69, at 22-23.

56 Joined cases 141 to 143/81, G. Holdijk et al., [1982] ECR 1299, at 13; Case 5/94, Lomas, [1996] ECR I-2553, at 18; Case C-1/96, Compassion in World Farming, [1998] ECR I-1251, at 47.

quirement in relation to EU legislation⁵⁷ and afterwards as part of the rule of reason, capable of justifying national measures.⁵⁸

Obviously, there are a lot of good arguments that could form a basis for accepting animal welfare as a mandatory requirement. On one hand, one could refer to the acceptance of the Protocol on Animal Welfare and the enacting of numerous legal instruments at EU level in order to improve animal welfare. On the other hand, one could refer to rulings of the Court of Justice itself in which it recognises that the 'health and protection of animals' constitutes a public interest within the EU. However, the first category of arguments has been weakened by the rulings of the Court of Justice and the second are based on assimilation. Thus, a ruling of the Court clarifying the issue at stake was more than welcome.

4 A change of mind within the Court of Justice?

This last part examines two changes that may have an enormous effect on the debate in terms of the possibility of justifying national trade restrictions on the basis of animal welfare. First, the *Andibel* case will be reviewed and to conclude Article 13 TFEU which inserts the text of the Protocol on Animal Welfare in the Treaty on the Functioning of the European Union.

4.1 *The Andibel case*⁵⁹

The *Andibel* case deserves separate examination since it is the first time that the Court of Justice recognises that the justification of national trade restrictions is possible on the basis of animal welfare.

In this case two non-profit organisations claimed that the Belgian animal welfare law, which inserted stricter trade restrictions for certain mammal species than the ones enacted by the relevant regulation⁶⁰, was contrary to Article 34 and 36 of the TFEU read separately or in conjunction with this regulation.

Firstly, the Court found that the law did not violate the regulation since its preamble foresaw the possibility of taking stricter measures. Moreover, it was also justifiable under Article 193 of the TFEU to introduce more stringent measures since the regulation is based on Article 192 of the TFEU.⁶¹

Secondly, the Court ruled that Articles 34 and 36 of the TFEU '*do not preclude national legislation, such as that at issue (...) if the protection of or compliance with the interests and requirements referred to in paragraphs 27*

to 29 of this judgment cannot be secured just as effectively by measures which obstruct intra-Community trade to a lesser extent'.⁶²

In these paragraphs the national measures are justified with reference to the protection of animal welfare as a '*legitimate objective in the public interest, the importance of which was reflected (...) by the adoption (...) of the Protocol on the protection and welfare of animals (...) Moreover, the Court has held on a number of occasions that the interests of the Community include the health and protection of animals (...)*'.⁶³ It is clear that this means that animal welfare may be seen as a mandatory requirement⁶⁴ and is based on similar arguments as the ones set out above. However, paragraph 28 refers to the protection of the health and life of animals of Article 36 of the TFEU and the fact that the Court has held that the protection thereof constitutes a fundamental requirement recognised by Community law. According to this paragraph the Court seems to accept that animal welfare is embraced by Article 36 of the TFEU.

Since the Court accepts all of these arguments, it remains unclear what the current status of animal welfare is. Case C-100/08 confirming the *Andibel* judgment brings no relief either since it refers both to paragraph 27 and 28.⁶⁵ Therefore and because only two judgements exist on the matter, the reasoning set out above remains important for future cases. Nevertheless, it is likely that animal welfare as a mandatory requirement will be confirmed in future judgments since the development is similar as the one of environmental protection in the past – as explained above – and the Court may be influenced by Article 13 of the TFEU – as will be discussed below.

Further, the reasoning with regards to Article 36 of the TFEU remains extremely important since it is possible to justify distinctively applicable national trade restrictions under this article but not under the rule of reason.⁶⁶ So it is in the interest of the Member State concerned to convince the Court that animal welfare is embraced by Article 36 since it provides a wider discretion. However, this distinction between Article 36 of the TFEU and the rule of reason seems to be disappearing since some authors read in certain Court judgments the application of the

57 Case 240/83, *Procureur de la République v. Association de Défense des Brûleurs d'Huiles Usagées (ADBHU)*, [1985] ECR 531, at 13.

58 Case 302/86, *Danish Bottles*, [1988] ECR 4607, at 8-9; Ziegler, note 24 above, 68-69.

59 Case C-219/07, *National Raad van Dierenkwekers en Liefhebbers VZW and Andibel VZW v Belgische Staat*, [2008] ECR I-4475.

60 Council Regulation No 338/97 of 9 December 1996 on the Protection of Species of Wild Fauna and Flora by regulating Trade Therein, OJ 1997 L61/1.

61 Case C-219/07, *National Raad van Dierenkwekers en Liefhebbers VZW and Andibel VZW v Belgische Staat*, [2008] ECR I-4475, at 14-15.

62 Case C-219/07, *National Raad van Dierenkwekers en Liefhebbers VZW and Andibel VZW v Belgische Staat*, [2008] ECR I-4475, at 42.

63 Case C-219/07, *National Raad van Dierenkwekers en Liefhebbers VZW and Andibel VZW v Belgische Staat*, [2008] ECR I-4475, at 27.

64 European Commission Directorate C, Regulatory Policy, of DG Enterprise and Industry, Commission Staff Working Document - Free Movement of Goods - Guide to the application of Treaty provisions governing Free Movement of Goods (Articles 28-30 EC), 12 May 2009, http://ec.europa.eu/enterprise/policies/single-market-goods/files/goods/docs/art2830/new_guide_en.pdf (date of access: 9 January 2010), 44; Stephen Weatherill, 'Free Movement of Goods', 58 *International & Comparative Law Quarterly* (2009), 985-993, 988-989.

65 Case C-100/08, *Commission v. Belgium*, not yet published in ECR, at 91-92.

66 Case 113/80, *Commission v. Ireland*, [1981] ECR 1625, at 10; Case 6/81, *Industrie Diensten Groep v. J.A. Beele Handelsmaatschappij BV*, [1982] ECR 707, at 7; Case 207/83, *Commission v. United Kingdom*, [1985] ECR 1201, at 19-20; Jans and Vedder, note 3 above, 247-249; Van Calster, 'Public Environmental Law', note 3 above, 490.

rule of reason on distinctively applicable measures.⁶⁷ It remains to be seen how this will evolve.

Obviously, the *Andibel* ruling and case C-100/08 give Member States some certainty about the possibility of justifying trade restrictions on the basis of animal welfare. Nonetheless, future judgments are necessary to provide *full* legal certainty.

4.2 *The impact of incorporating an article on animal welfare in the Treaty on the Functioning of the European Union*

Whether the insertion of a new Article 13 of the TFEU⁶⁸, which addresses animal welfare, will have a great impact on the case-law of the Court of Justice remains to be seen.

First, it contains more or less the same text as the Protocol on Animal Welfare. The only changes are that the animal as a sentient being is now recognised in the text itself⁶⁹ and some new policies are added where animal welfare has to be taken into account.⁷⁰ Second – as stated above – the formal status of a Protocol is the same as that of a Treaty Article. So legally, the status has not changed by the insertion of the Protocol in the Treaty.

Although the status formally has not changed, it is obvious that there is a stronger emphasis on animal welfare and that it is more urgent to take it into account.⁷¹ Animal welfare now figures between other provisions having general application such as environmental protection and sexual equality. Moreover, since Article 7 of the TFEU⁷² makes clear that there is no hierarchy between these different integration principles⁷³, the EU as well as the Member States are obliged to take animal welfare into account on an equal basis as those other principles within the scope of the policies enumerated in Article 13 of the TFEU. Obviously, this is an enormous argument for the Member States to rely on when justifying trade restrictions on the basis of animal welfare. Moreover, this new development might show a trend towards an obligation of

Member States to take national measures since they may be sued for non-compliance with Article 13 of the TFEU. Further, it is clear that this article recognises the importance of animal welfare at EU level, which will encourage the Court in confirming its *Andibel* judgment at least to the extent that animal welfare is a mandatory requirement.

Finally, it is possible that the Court has to change its judgment in *Jippes*. Since animal welfare has a similar value as, for example, sexual equality, it is not easy to maintain that animal welfare is not a well-defined general principle of Community law. Nevertheless, it is clear that the Court chiefly took the wording of the Protocol on Animal Welfare as its basis for denying the existence of a general principle of animal welfare. Since the wording has remained more or less the same, it is doubtful whether the Court will change its mind.⁷⁴

5 Conclusion

Animal welfare as a basis for the justification of unilateral trade restrictions seems accepted by the Court of Justice. Nevertheless, it is unclear whether animal welfare is accepted as being embraced under Article 36 of the TFEU or as a mandatory requirement. Although nowadays it might be better to argue that it is embraced by Article 36 of the TFEU, this might change in the near future. This latter may prove very important since it is more likely that the Court will confirm its *Andibel* judgment to the extent that it recognises animal welfare as a mandatory requirement than as falling within the scope of Article 36 of the TFEU. This is because the recognition of animal welfare as a mandatory requirement seems to be developing in a similar manner as the recognition of environmental protection in the past and it may be stimulated by the insertion of Article 13 of the TFEU. It remains to be seen whether the Court will permanently change its mind and whether it will have to recognise a general principle of animal welfare as a consequence of the new Article 13 of the TFEU in contradiction of its earlier judgment in *Jippes*.

67 Case C-2/90, *Walloon Waste*, [1992] ECR I-4431; Case C-203/96, *Dusseldorp*, [1998] ECR I-4075; Case C-389/96, *Aher-Waggon*, [1998] ECR I-4473; Case C-67/97, *Danish bees*, [1998] ECR I-8033; Case C-379/98, *PreussenElektra*, [2001] ECR I-2099; *Jans and Vedder*, note 3 above, 247-250; *Krämer*, note 3 above, 113; *Nolaro*, note 3 above, 475-479 and 489-491.

68 Article 13 TFEU is inserted by the Treaty of Lisbon. Article 2, 21 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, OJ 2007 C306/49. The Treaty of Lisbon only entered into force on 1 December 2009. Treaty of Lisbon – Taking Europe into the 21st Century, http://europa.eu/lisbon_treaty/index_en.htm (date of access: 9 January 2010).

69 Under the Protocol on Animal Welfare this was only recognised in the preamble.

70 Fisheries, technological developments and space policies.

71 *Rasso*, note 3 above, 379-380.

72 The union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.'

73 *Hans Vedder*, *The Treaty of Lisbon and European Environmental Policy*, 2 December 2008, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1310190 (date of access: 4 January 2010), 3.

74 *Rasso*, note 3 above, 380-381.

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