

**CONTINENTAL DRIFT:  
AGRICULTURAL TRADE AND THE WIDENING GAP  
BETWEEN EUROPEAN UNION AND UNITED STATES  
ANIMAL WELFARE LAWS**

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INTRODUCTION

How much is peace of mind worth? To the European Union (E.U.), it's worth at least \$117 million a year.<sup>1</sup> Rather than accept imports of United

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1. Decision of the Arbitrators, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, *Original Complaint by the United States, Recourse to Arbitration by the*

States (U.S.) and Canadian beef produced from cattle treated with synthetic or natural growth hormones, the E.U. accepted that sizable annual penalty.<sup>2</sup> The World Trade Organization (WTO) assessed these trade reparations against the E.U. after determining that the meat products ban was unjustified for lack of sufficient scientific basis.<sup>3</sup> Over a decade later, not only has the E.U. refused to remove the trade ban, it has also banned the import and sale of poultry produced with the “pathogen reduction treatment” chemicals used to clean chickens in most U.S. industrial packaging plants.<sup>4</sup> In response, the U.S. has registered another complaint with the WTO.<sup>5</sup>

It cannot have gone unnoticed by E.U. lawmakers that, in the last three years, U.S. consumers have witnessed three of the most extensive food recalls—for beef,<sup>6</sup> peanut butter,<sup>7</sup> and eggs.<sup>8</sup> The media attention garnered by these increasingly dramatic events has led consumers to question the efficacy of the regulatory systems in place to protect the nation’s food supply.<sup>9</sup> Congress eventually responded by enacting the first expansive food

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*European Communities Under Article 22.6 of the DSU*, ¶ 79, WT/DS26/ARB (July 12, 1999) [hereinafter Decision by the Arbitrators, *E.C.—Hormones*].

2. Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter Appellate Body Report, *E.C.—Hormones*]. The E.U. has prohibited imports of hormone-treated beef products since 1988, pursuant to council directives prohibiting the use of synthetic or natural hormones to enhance growth. *Id.* ¶ 5. The U.S. and Canada complained of violations under the General Agreement on Tariffs and Trade (GATT) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) because the restriction was not based on “risk assessment” data. *Id.* ¶¶ 47, 49, 78.

3. When the E.U. delayed complying with the WTO decision, the U.S. engaged arbitrators to determine that damages had been incurred by the U.S. and Canada in the amounts of \$116.8 million and \$11.3 million, respectively, and they instituted trade restrictions on certain products from the E.U. to compensate for these losses. Decision by the Arbitrators, *E.C.—Hormones*, *supra* note 1; Decision by the Arbitrators, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, *Original Complaint by Canada, Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, ¶¶ 4, 68, WT/DS48/ARB (July 12, 1999).

4. Request for Consultations by the United States, *European Communities—Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States* ¶ 1, WT/DS389/1, G/SPS/GEN/894, G/AG/GEN/81, G/TBT/D/35, G/L/881 (Jan. 20, 2009) [hereinafter Request for Consultations, *E.C.—Poultry Meat*].

5. *Id.*

6. David Brown, *USDA Orders Largest Meat Recall in U.S. History*, WASH. POST, Feb. 18, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/17/AR2008021701530.html>.

7. Lindsey Layton, *Latest Recall One of Largest Ever*, SEATTLE TIMES, Jan. 29, 2009, [http://seattletimes.nwsourc.com/html/nationworld/2008683232\\_peanut29.html](http://seattletimes.nwsourc.com/html/nationworld/2008683232_peanut29.html).

8. Lindsey Layton, *Iowa Egg Farmers Face Questions on Salmonella Outbreak*, WASH. POST, Sept. 22, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/22/AR2010092201331.html>.

9. See, e.g., Michael J. Crumb, *Former Egg Farm Workers Say Complaints Ignored*, YAHOO! NEWS, Sept. 3, 2009, [http://news.yahoo.com/s/ap/20100903/ap\\_on\\_bi\\_ge/us\\_tainted\\_eggs\\_inspectors](http://news.yahoo.com/s/ap/20100903/ap_on_bi_ge/us_tainted_eggs_inspectors); Editorial, *Egg Recall Points up Need for Senate Action on Food Safety*, WASH. POST, Aug. 24, 2010,

safety reform legislation in seventy years.<sup>10</sup> Critically, however, this regulatory overhaul does not address most foods derived from animals (including beef and eggs).<sup>11</sup> In that respect, the FDA Food Safety Modernization Act is little more than a placebo.

In contrast, policies underlying E.U. animal-derived agriculture regulations have drifted away from American standards. Not only are the E.U.'s food safety and inspection regulations more stringent, but recently reformed animal welfare standards are likely to significantly alter its animal husbandry practices. Whereas the E.U. is reforming its egg industry by banning battery cages, hormones, and prophylactic antibiotics, and mandating "humane" conditions for the chickens, the U.S. has reacted to the discovery of salmonella-tainted eggs nationwide by exploring pasteurization and sterilization options.<sup>12</sup> This growing divergence in food safety and animal welfare policies is contributing to the production of two discrete food supplies: one designed to preserve agriculture as a viable domestic industry and one designed to feed the world.

The E.U.'s progressive food safety and animal welfare policies are not without economic consequences, however. Under these policies, animal-based food products are more expensive to produce, despite the fact that less-intensive farming methods are more economical when the costly externalities inherent in "concentrated animal feeding operation" (CAFO) food production are considered.<sup>13</sup> Unless E.U. food producers are compensated for the cost of using more humane and environmentally sound

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<http://www.washingtonpost.com/wp-dyn/content/article/2010/08/23/AR2010082304247.html>; Alison Young, *Food Safety Groups Slam USDA Egg Graders at Farms in Recall*, USA TODAY, Sept. 2, 2010, [http://www.usatoday.com/yourlife/food/safety/2010-09-02-eggregulations2\\_ST\\_N.htm](http://www.usatoday.com/yourlife/food/safety/2010-09-02-eggregulations2_ST_N.htm).

10. FDA Food Safety Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885 (2011) [hereinafter Food Safety Act].

11. 21 U.S.C. § 392 (2006) (exempting "meat and meat food products" covered under 21 U.S.C. §§ 601–695 from the Federal Food, Drug, and Cosmetics Act, 21 U.S.C. §§ 301–399a); Egg Products Inspection Act, 21 U.S.C. §§ 1031–1056 (assigning regulatory authority over eggs and egg products to the United States Department of Agriculture (USDA) and the Department of Health and Human Services (HHS)).

12. *FDA Approves Life Tech Kit that Detects Egg Salmonella Faster*, FOXBUSINESS.COM, Jan. 13, 2011, <http://www.foxbusiness.com/markets/2011/01/13/fda-approves-life-tech-kit-detects-egg-salmonella-faster/>; *Fresh Eggs from Recall Farms Being Pasteurized, Processed*, CNN.COM, Aug. 26, 2010, <http://www.cnn.com/2010/HEALTH/08/25/eggs.pasteurized.processed/?hpt=T2>; see also Elisabeth Hagen, Under Sec'y for Food Safety, U.S. Dep't of Agric., Remarks at American Farm Bureau Annual Meeting: Food Safety: A Farm to Fork Effort (Jan. 9, 2011), available at [http://www.fsis.usda.gov/News\\_&\\_Events/Speech\\_010911\\_Hagen/index.asp](http://www.fsis.usda.gov/News_&_Events/Speech_010911_Hagen/index.asp) ("My job, and the job of the 10,000 employees in FSIS, is to protect public health through science-based policies that help drive an industry—an innovative and committed industry—to produce the safest products possible.").

13. Harald Grethe, *High Animal Welfare Standards in the EU and International Trade—How to Prevent Potential "Low Animal Welfare Havens"?*, 32 FOOD POL'Y 315, 318, 326–27 (2006).

production methods, their products cannot survive direct competition from less-expensive American imports. Therefore, to preserve its higher food security and animal welfare standards, the E.U. must insulate its animal agriculture industries from this competition.<sup>14</sup>

Yet, the U.S. and E.U. are major trading partners, and signees to multi-lateral treaties drafted to encourage free trade and remove protectionist barriers.<sup>15</sup> The current U.S. presidential administration considers agricultural trade to be “the lifeblood of many American farms and ranches” because “[c]ompared to the general economy, U.S. agriculture is twice as reliant on overseas markets.”<sup>16</sup> This is why the twenty-year trade dispute over beef products (*E.C.—Hormones*) will remain a bellwether for future agricultural trade relations until U.S. agricultural practices are significantly reformed, either voluntarily or by statutory mandate.<sup>17</sup> As E.U. animal welfare and food safety regulations are implemented more broadly, animal products derived from “factory farm” U.S. corporations will be less welcome in the E.U. marketplace. Reasons for this range from the practical (economically-driven)<sup>18</sup> to theoretical (based on concern for the environment or animal welfare).<sup>19</sup>

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14. *Id.* at 316.

15. See Uruguay Round Agreements Act, Pub. L. 103-465, § 101(d), 108 Stat. 4809 (1994) (codified as amended at 19 U.S.C. § 3511 (2006)). The Uruguay Round Agreements Act implemented the following: the Agreement on Agriculture, April 15, 1994, 1867 U.N.T.S. 410 [hereinafter Agreement on Agriculture]; the Agreement on Technical Barriers to Trade, Apr. 15, 1994, 1867 U.N.T.S. 3 [hereinafter TBT agreement]; the Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, 1867 U.N.T.S. 493 [hereinafter SPS Agreement]; the Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994, Annex 1A, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement]; the Uruguay Round Agreements including the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, 1867 U.N.T.S. 187 [hereinafter GATT 1994].

16. RON KIRK, OFFICE OF THE U.S. TRADE REPRESENTATIVE, THE PRESIDENT’S 2010 TRADE POLICY AGENDA 2 (2010), available at [http://www.ustr.gov/webfm\\_send/1673](http://www.ustr.gov/webfm_send/1673); Hagen, *supra* note 12 (announcing USDA projections that 2011 will be a “record year” for agriculture exports, and that agriculture “is one of the few major economic sectors running a trade surplus”).

17. See Appellate Body Report, *E.C.—Hormones*, *supra* note 2 (outlining the dispute between the E.U. and the U.S. over an E.U. prohibition of import of meat and meat products derived from hormone treated cattle).

18. Gaverick Matheny & Cheryl Leahy, *Farm-Animal Welfare, Legislation, and Trade*, 70 L. & CONTEMP. PROBS. 325, 325 (2007). The E.U. currently sustains these standards under the Common Agricultural Policy (CAP), a subsidy program for certain products or crops. If these products are exported to a third country, the farmer or producer may receive an “export refund” of the price difference between a minimum price set by the CAP and a set “world price level” (which considers the destination country). The CAP is about one-half of the entire E.U. budget. AGRIC. & RURAL DEV., EUR. COMM’N, THE COMMON AGRICULTURAL POLICY EXPLAINED 4, available at [http://ec.europa.eu/agriculture/publi/capexplained/cap\\_en.pdf](http://ec.europa.eu/agriculture/publi/capexplained/cap_en.pdf).

19. Matheny & Leahy, *supra* note 18, at 341–43.

This article posits that the E.U. will ultimately prevail in a prolonged trade conflict borne of the diametrically opposed policies, and that U.S. corporations desiring access to E.U. markets will have no choice but to initiate good faith animal welfare and food safety reforms in the absence of legislative reform. Part I depicts the developing chasm between animal agriculture regulations in the U.S. and the E.U. Part II reviews the legal scaffolding on which trade agreements are built and disputes are resolved, illustrating the contradictory twin goals of supporting sovereign authority over domestic policies and enabling unencumbered international trade. Finally, Part III analyzes relevant WTO disputes and suggests arguments the E.U. might use to preserve its animal welfare standards and human health regulations, focusing on the General Agreement on Tariffs and Trade (GATT) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). The article concludes that, irrespective of inevitable diplomatic and economic pressure from the U.S., existing trade agreements do not foreclose the use of trade bans to preserve the E.U.'s progressive reform directives.

## I. COMPARING UNITED STATES AND EUROPEAN UNION ANIMAL WELFARE AND FOOD SAFETY LAWS

### A. *The United States*

#### 1. Federal Legislation

Many Americans are unaware that the Animal Welfare Act, the primary federal animal protection statute, does not apply to animals in agriculture, or that the care of farm animals is only minimally regulated and under enforced.<sup>20</sup> In the late 1980s and early 1990s, the absence of legislative oversight—agricultural, environmental, or animal husbandry—enabled industrial agriculture corporations like Perdue, Tyson Foods, Murphy Family Farms, and Carroll's Foods to radically and rapidly transform the landscape in mostly poor, rural communities.<sup>21</sup> This ushered in a new era of

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20. 7 U.S.C. §§ 2131–2159 (2006); Matheny & Leahy, *supra* note 18, at 326, 333–35; David J. Wolfson & Mariann Sullivan, *Foxes in the Henhouse*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 205, 206 (eds. Cass Sunstein & Martha Nussbaum 2005) (noting the widespread and false “presumption that the law currently provides some basic legal protection for animals, even if there is skepticism about its effectiveness or enforcement”).

21. DAVID KIRBY, *ANIMAL FACTORY: THE LOOMING THREAT OF INDUSTRIAL PIG, DAIRY, AND POULTRY FARMS TO HUMAN HEALTH AND THE ENVIRONMENT* xiii–xviii, 24–26 (2010); CURTIS SOFFERAHN, *INDUSTRIALIZED FARMING AND ITS RELATIONSHIP TO COMMUNITY WELL-BEING: AN*

animal production methods dedicated exclusively to efficiency and the commoditization of animals used for food. The hallmark of the CAFO model is a complete disregard for traditional animal husbandry practices.<sup>22</sup>

The 1958 Humane Methods of Slaughter Act does not apply to poultry, which are over ninety-five percent of all slaughtered animals,<sup>23</sup> and the United States Department of Agriculture (USDA) has neglected to enforce humane slaughter guidelines for hogs and cattle even after a 2002 congressional resolution urged it to do so.<sup>24</sup> The 1877 “Twenty-Eight Hour Law,” which establishes minimum guidelines for animals in transport,<sup>25</sup> did not apply to trucking transportation until the USDA was pressured to alter its guidance in 2006.<sup>26</sup> The last reported prosecution under this law was in 1962.<sup>27</sup> In Congress, only members of the House of Representatives have demonstrated a genuine interest in animal welfare reform.<sup>28</sup>

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UPDATE OF THE 2000 REPORT BY LINDA LABAO (2006), available at <http://www.und.edu/org/ndrural/Lobao%20&%20Stofferahn.pdf>. Carroll’s Foods and Murphy Family Farms are now wholly-owned subsidiaries of Smithfield Foods, Inc., the world’s largest pork producer. *Our Company: A Look Back at the Smithfield Foods Industry*, SMITHFIELD, [http://www.smithfieldfoods.com/our\\_company/2000.aspx](http://www.smithfieldfoods.com/our_company/2000.aspx) (last visited Jan. 23, 2011).

22. Bernard E. Rollin, *Farm Factories: The End of Animal Husbandry*, in *THE CAFO READER* 8–10 (Daniel Imhoff ed., 2010).

23. 7 U.S.C. §§ 1901–1907. HMSA authorizes the USDA to promulgate regulations such that the animals are “rendered insensible to pain,” but only for “cattle, calves, horses, mules, sheep, swine, and other livestock.” *Id.* § 1902. A challenge to the USDA’s interpretation of HMSA in 2008 ultimately resulted in dismissal of the plaintiffs for lack of standing. *Levine v. Vilsack*, 587 F.3d 986, 992–93 (9th Cir. 2009).

24. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 10305, 61 Stat. 134, 493–94 (providing guidance for the enforcement of the Humane Methods of Slaughter Act of 1958, 7 U.S.C. §§ 1901–1907); see, e.g., *Short Supply of Inspectors Threatens Meat Safety*, MSNBC.COM, Feb. 21, 2008, <http://www.msnbc.msn.com/id/23282496> (“Industry critics say the [USDA inspector] shortages [of at least ten percent] are compounded by a change in USDA regulations in the late 1990s that gave slaughterhouses more responsibility for devising their own safety checklists and [assuming responsibility] for reporting downer cows to the USDA.”).

25. 49 U.S.C. § 80502(a) (2006).

26. Letter from W. Ron DeHaven, Admin., U.S. Dep’t of Agric., to Peter A. Brandt, Humane Soc’y of U.S. (Sept. 22, 2006).

27. § 80502(d) (providing for civil penalties for each incident, not for each animal, at no more than \$500); see *People v. So. Pac. Co.*, 25 Cal. Rptr. 2d 644 (Cal. Dist. Ct. App. 1962) (affirming prosecution under the Act’s former title, 45 U.S.C. §§ 71–74, with the same penalty as in the current parallel statute).

28. The eighty-four-member Congressional Animal Protection Caucus has sponsored bills to prohibit the use of “downed” cattle in the beef production process, and to set minimum welfare standards for farmed animals. Prevention of Farm Animal Cruelty Act, H.R. 4733, 111th Cong. § 3 (2010); Downed Animal and Food Safety Protection Act, H.R. 4356, 111th Cong. (2009).

Food safety laws for meat and poultry products have not been significantly updated in over forty years.<sup>29</sup> Instead, the federal government endorses industry-led reform. This policy is often attributed to the industrial agriculture lobby's influence in keeping regulations to a minimum<sup>30</sup> and the "revolving door" syndrome wherein agriculture industry executives and agency regulators for the USDA and the Food and Drug Administration (FDA) deftly transition from one side of the regulatory equation to the other.<sup>31</sup>

Perhaps due to media focus on the egg salmonella crisis of August, 2010, Americans are beginning to realize that laws for the protection of their food supply are also inadequate. The Obama administration's Food Safety Working Group published its conclusion in 2009 that the U.S. food regulatory system "is hamstrung by outdated laws, insufficient resources, suboptimal management structures, and poor coordination across agencies and with States and localities."<sup>32</sup> A recent Pew Commission Report recommended the formation of a central Food Safety Administration to remedy the distributed agency model that likely contributes to current enforcement problems.<sup>33</sup>

The new FDA Food Safety Modernization Act (Food Safety Act) is illustrative of this problem. Although it enhances the FDA's authority to monitor, inspect, and enforce food safety standards, that agency does not have direct authority over most animal-derived food production. Under the Federal Food, Drug, and Cosmetics Act,<sup>34</sup> the FDA regulates all food

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29. Wholesome Meat Act (Meat Inspection Acts), Pub. L. 90-201, 81 Stat. 584 (1967) (codified at 21 U.S.C. §§ 601-691 (2006)); Poultry Products Inspection Act, Pub. L. 85-172, 71 Stat. 441 (1957) (codified at 21 U.S.C. §§ 451-471 (2006)).

30. Wolfson & Sullivan, *supra* note 18, at 206. Industrial agriculture in the U.S. has also enjoyed more relaxed environmental standards. See KIRBY, *supra* note 21, at 300 (ascribing Tyson Foods' influence to the Environmental Protection Agency's (EPA) decision to grant large CAFOs amnesty from Clean Air Act rules).

31. See Sue McGrath, *Only a Matter of Time: Lessons Unlearned at the Food and Drug Administration Keep Americans at Risk*, 60 FOOD & DRUG L.J. 603, 615 (2005) (explaining how frequently FDA employees initially work for industry, then for the FDA, and then are rehired by industry in a higher ranking position); see generally Thomas O. McGarity, *Federal Regulation of Mad Cow Disease Risks*, 57 ADMIN. L. REV. 289, 390-91 (2005) (explaining the common practice of consumer advocates being hired for high ranking USDA positions).

32. FOOD SAFETY WORKING GRP., FOOD SAFETY WORKING GROUP: KEY FINDINGS (2009), available at [http://www.foodsafetyworkinggroup.gov/FSWG\\_Key\\_Findings.pdf](http://www.foodsafetyworkinggroup.gov/FSWG_Key_Findings.pdf). The Food Safety Working Group, chaired by the Secretary of Health and Human Services and the Secretary of Agriculture, was established by President Barack Obama in March 2009 to "advise him on how to upgrade the food safety [system]." *Id.*

33. PEW COMM'N ON INDUS. FARM ANIMAL PROD., PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA 71 (2008), available at <http://www.ncifap.org/bin/e/j/PCIFAPFin.pdf> [hereinafter PEW REPORT].

34. Federal Food Drug and Cosmetics Act, 21 U.S.C. § 321(s) (2006).

products *except* those specifically assigned to the USDA under the Federal Meat Inspection Act (beef, pork, sheep, and goat)<sup>35</sup> and the Poultry Products Inspection Act (poultry).<sup>36</sup> On the other hand, dairy products, seafood, and wild game (venison and bison, for example) *are* regulated by the FDA,<sup>37</sup> while shelled eggs and egg products are regulated by the USDA, the FDA, and the Department of Health and Human Services.<sup>38</sup>

The Food Safety Act is glaringly inadequate in what it does *not* do. First, it empowers the FDA to inspect and monitor only those production facilities that process non-USDA regulated foods, so the Act does not address the public health and safety issues associated with most foods derived from animals, such as beef and chicken. Yet, as the Pew Commission reported, industrial farm animal production methods create “obvious risks for both animals and humans,”<sup>39</sup> including the overuse of antimicrobials (including antibiotics), the enhanced transfer of pathogens among genetically non-diverse animals kept in close confinement, or untreated or improperly treated animal waste exposed to plant crops.<sup>40</sup>

Second, the Act only passively provides for FDA oversight of the farms where the crops are grown, by directing the agency to consider “science-based minimum standards” for safe “growing, harvesting, sorting, packing, and storage operations.”<sup>41</sup> Importantly, however, because the Act does not convey regulatory authority over farms where animals are raised for food, crop contamination from animal waste—whether it is intentionally sprayed as fertilizer or it unintentionally reaches the crops in runoff water—will remain unaddressed, usually until a critical mass of consumers have alerted authorities to the contamination. *E. coli* (O157) and the newly emerging high toxin-producing *E. coli* (STEC) O145, the lethal pathogens prompting the nationwide recalls of certain brands of spinach (2006) and lettuce (2010), are transmitted through animal or human feces.<sup>42</sup> Thus, the Food

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35. Federal Meat Inspection Act, 21 U.S.C. §§ 601–695 (2006).

36. Poultry Products Inspection Act, 21 U.S.C. §§ 451–472 (2006). The USDA also has regulatory authority over processed foods containing more than “a relatively small portion” of these meat products. Federal Meat Inspection Act, 21 U.S.C. § 601(j); Poultry Products Inspection Act, 21 U.S.C. § 453(f). Dairy products and seafood are regulated by the FDA. Federal Food, Drug, and Cosmetics Act, 21 U.S.C. §§ 301–399. Shelled egg and egg products are regulated by both agencies. Egg Products Inspection Act, 21 U.S.C. §§ 1031–1056 (2006).

37. 21 U.S.C. § 392(b).

38. *Id.* § 1031.

39. PEW REPORT, *supra* note 33, at 58.

40. *Id.* at 11, 13–15, 23–25, 85.

41. Food Safety Act, ch. 9, sec. 105, § 419(a), (c), 124 Stat. 3885, (2011).

42. *Ongoing Outbreak of Escherichia Coli Serotype O157:H7 Infections Associated with Consumption of Fresh Spinach – United States September 2006*, 55 MORBIDITY & MORTALITY WEEKLY REPORT 1045, 1045–46 (2006); *Escherichia O157:H7: General Information*, CENTER FOR

Safety Act becomes relevant only after field crop contamination occurs, in its enhanced products tracing and enforced recall regulations.

## 2. State Laws and Constitutional Amendments

State legislatures are, in many cases, federally preempted from enacting stricter food handling and safety laws,<sup>43</sup> but not farm animal welfare laws.<sup>44</sup> Voters at the state level generally support restrictions on the most high-profile CAFO practices, through statutory and state constitutional ballot initiatives. Examples of state progressive animal welfare reform include the phasing out of hog gestation crates and/or veal calf crates in Arizona, Colorado, Florida, Maine, Michigan, and Oregon.<sup>45</sup> California's 2008 "Prop 2," the most comprehensive voter initiative, mandates a 2015 end to the use of poultry battery cages, pig gestation crates, veal calf crates, and other confinement practices that prevent an animal from "lying down, standing up, and fully extending *his or her* limbs . . . [and] turning around freely."<sup>46</sup> Legislation under this proposition includes a ban of cow tail-docking and of slaughtering "downed" (non-ambulatory) cattle,<sup>47</sup> and a sunset prohibition on the sale and importation of shelled eggs produced using battery cages.<sup>48</sup>

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DISEASE CONTROL, NAT'L CENTER FOR ZOONOTIC, VECTOR-BORNE, AND ENTERIC DISEASES (July 21, 2010), [http://www.cdc.gov/nczved/divisions/dfbmd/diseases/ecoli\\_o157h7/index.html](http://www.cdc.gov/nczved/divisions/dfbmd/diseases/ecoli_o157h7/index.html); *Investigation Update: Multistate Outbreak of Human E. Coli O145 Infections Linked to Shredded Romaine Lettuce from a Single Processing Facility*, CENTER FOR DISEASE CONTROL (May 12, 2010), [http://www.cdc.gov/print.do?url=http://www.cdc.gov/ecoli/2010/ecoli\\_O145/archive/051210.html](http://www.cdc.gov/print.do?url=http://www.cdc.gov/ecoli/2010/ecoli_O145/archive/051210.html).

43. *See, e.g.*, Poultry Products Inspection Act, 21 U.S.C. § 467e (2006) ("Marking, labeling, packaging, or ingredient requirements . . . in addition to, or different than, those made under this chapter may not be imposed by any State . . ."); Federal Meat Inspection Act, 21 U.S.C. § 678 (2006) (same).

44. *See, e.g.*, Nat'l Meat Ass'n v. Brown, 599 F.3d 1093 (9th Cir. 2010) (determining that California's prohibition on slaughtering non-ambulatory cattle was not preempted by the Federal Meat Inspection Act).

45. FLA. CONST. art. X, § 21; COLO. REV. STAT. § 35-50.5-102(1) (2010); ME. REV. STAT. ANN. tit. 7, § 4020 (2009); OR. REV. STAT. § 600.150(2) (2009) (applying to swine); H.R. 5127, 95th Leg., Reg. Sess. (Mich. 2009); JAN BREWER, SEC'Y OF STATE, ARIZONA 2006 BALLOT PROPOSITION GUIDE 134 (2006), *available at* <http://www.azsos.gov/election/2006/Info/PubPamphlet/english/Prop204.pdf#page=21>.

46. CAL. HEALTH & SAFETY CODE §§ 25990–25994 (West 2010) (emphasis added).

47. CAL. PENAL CODE §§ 599f(b), 597n(a) (West 2010).

48. Assemb. B. 1437, 10 Reg. Sess. (Cal. 2009). Not all state legislation has been favorable to animals. For example, in 2009, Georgia and South Carolina enacted laws prohibiting municipalities from adopting ordinances, rules, or regulations for farms. S.C. CODE ANN. § 47-4-160(B); H.B. 529, 150th Leg., Reg. Sess. (Ga. 2009), *available at* [http://www.legis.ga.gov/legis/2009\\_10/pdf/hb529.pdf](http://www.legis.ga.gov/legis/2009_10/pdf/hb529.pdf). Also, the Oklahoma legislature codified preemption rights over similar local regulations. H.B. 2151, 2009 Leg., Reg. Sess. (Okla. 2009), *available at* [http://webserver1.lsb.state.ok.us/2009-10bills/HB/hb2151\\_enr.rtf](http://webserver1.lsb.state.ok.us/2009-10bills/HB/hb2151_enr.rtf).

*B. The European Union*<sup>49</sup>

Broader protections and considerations for farm animal welfare in Europe were recognized as early as 1976 in Western European agreements.<sup>50</sup> A confluence of events in the 1990s sparked renewed interest in reform. First, Europeans experienced a series of food-related crises, including discoveries of livestock with Bovine Spongiform Encephalopathy (colloquially, “mad cow disease”) and lethal amounts of dioxin in Belgian milk.<sup>51</sup> During that period, two young Londoners held the European media’s attention for months as they defended themselves *pro se* against McDonald’s Corporation. McDonald’s sued the activists for distributing pamphlets condemning McDonald’s business practices, particularly those that abused animals.<sup>52</sup> These and other events generated support for the 1998 E.U. Council Directive to establish minimum care standards for animals “bred or kept for the production of food, wool, skin or fur” or farming, a directive that also covered amphibians and animals in aquaculture.<sup>53</sup>

The 1998 Directive was followed by individual directives setting minimum care standards for calves, chickens, pigs, and laying hens, which created sunset provisions for the use of veal calf crates, battery cages, and gestation crates.<sup>54</sup> Animal welfare laws were again amended in 2007 and 2008 to consider such animal needs as a twenty-four-hour day (with transitions from light to dark), humane climate and noise levels, and the

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49. Although the WTO refers to the European Union as “the E.C.” for “European Communities,” this article uses the interchangeable and more widely-used “E.U.” convention. To avoid confusion, this article refers to “E.U. law” although the technically correct term would be “E.C. law.” Christine Fretten & Vaughne Miller, *The European Union: A Guide to Terminology, Procedures and Sources*, 3–4, SN/IA/3689, H.C. LIBR. (July 21, 2005) (Standard Note) (U.K.). E.U. law is mainly directives and regulations. *Id.* Directives are binding on member states, directing their legislating bodies to adopt laws or regulations conforming to the directive. *Id.* E.U. regulations are binding on every citizen of every E.U. member, irrespective of contrary state law. *Id.*

50. European Convention for the Protection of Animals Kept for Farming Purposes, E.U., Oct. 9, 1976, E.T.S. No. 87, available at <http://conventions.coe.int/treaty/en/Treaties/Word/087.doc>; Wolfson & Sullivan, *supra* note 18, at 221.

51. Bernd M.J. van der Meulen & Annelies A. Freriks, ‘Beastly Bureaucracy’ *Animal Traceability, Identification and Labeling in EU Law*, 2 J. FOOD L. & POL’Y 317, 319, 319 n.2 (2006).

52. Wolfson & Sullivan, *supra* note 18, at 219.

53. Council Directive 98/58/EC, art. 2, 1998 O.J. (L 221) 23 (EC).

54. Council Directive 1999/74/EC, art. 3–4.1, 1999 O.J. (L 203) (EC). In addition to setting nesting, feeding, and perching parameters, the directive also requires that lighting in the henhouse follow a twenty-four-hour day and that it minimize loud and sudden noises. *Id.* at Annex, ¶¶ 2–3. Laying hen establishments must also be registered with the member state and egg packages must be coded with the method used to produce the eggs: “Free range,” “Barn,” or “Cages.” Commission Directive 2002/4/EC, annex 2.1, 2002 O.J. (L 30) 46 (EC).

ability to satisfy natural dietary, mobility, and behavioral preferences.<sup>55</sup> Finally, the member states affirmed their commitment to “pay full regard to the welfare requirements of animals” as “sentient beings” in the Treaty of Lisbon, the 2008 amendment to the Treaty on the Functioning of the European Union.<sup>56</sup> This expressed textual commitment to animal welfare was added to the list of “Provisions having General Application,” underscoring its importance.<sup>57</sup> In addition, member states may initiate more immediate or expansive protections.<sup>58</sup> Germany,<sup>59</sup> Austria,<sup>60</sup> Sweden,<sup>61</sup> and the United Kingdom<sup>62</sup> are among those to have adopted enhanced living standards for farm animals and restrictions on the sale of factory-farmed products.

Complementing revised animal welfare directives are E.U. council regulations addressing health, hygiene, and inspection rules for food raised and produced in member states and imported from outside E.U. borders,<sup>63</sup> and inspection and handling standards for imported live animals.<sup>64</sup> Amendments to regulations on the transportation of animals also broaden protections and create an extensive, transparent record-keeping system.<sup>65</sup> A 2006 Commission Decision mandated the setting of minimum inspection

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55. Council Directive 2008/119/EC, annex 3, 5, 11–13, 2008 O.J. (L 10) 7 (EC); Council Directive 2007/43/EC, art 1.1, 2007 O.J. (L 182) 7 (EC); Council Directive 2008/120/EC, annex 1, 2009 O.J. (L 47) 11 (EC).

56. Consolidated Version of the Treaty on the Functioning of the European Union art. 1, 13, May, 5, 2008, 2008 O.J. (C115) 50 [hereinafter TFEU].

57. Rasso Ludwig & Roderic O’Gorman, *A Cock and Bull Story?—Problems with the Protection of Animal Welfare in E.U. Law and Some Proposed Solutions*, 20 J. ENVTL. L. 363, 364–65 (2008). It could be suggested that this amendment could be instrumental in persuading the WTO that E.U. animal welfare standards are not veiled protectionism. *Id.* at 380 (arguing that an amendment would “lay down a well-defined principle of Community law which [would be] binding on all Community institutions”).

58. Council Directive 98/58/EC, art. 10, 1998 O.J. (L 221) 23.

59. Animal Welfare Act, 25 May 1998, BGBL. I [Federal Gazette] at 1105 (Ger.), available at <http://www.bfr.bund.de/cd/1614>.

60. Federal Act on the Protection of Animals [TschG] No. 18/2004 (Austria), available at [http://www.ris.bka.gv.at/Dokumente/Erw/ERV\\_2004\\_1\\_118/ERV\\_2004\\_1\\_118.pdf](http://www.ris.bka.gv.at/Dokumente/Erw/ERV_2004_1_118/ERV_2004_1_118.pdf) (English translation).

61. Swedish Animal Welfare Act, ([SFS] 1988:534) (Swed.) (amended by SFS 2009:303 (2010)); Animal Welfare Ordinance, ([SFS] 1988:539) (Swed.) (amended by SFS 2008:1051 (2009)), available at <http://www.sweden.gov.se/content/1/c6/09/03/10/f07ee736.pdf> (English translation).

62. Animal Welfare Act, (2006) c. 45, §§ 1–5, 9, (Eng.), available at <http://www.legislation.gov.uk/ukpga/2006/45/contents>.

63. Regulation (EC) No. 853/2004, of the European Parliament and of the Council of 29 April 2004, 2004 O.J. (L 226) 22; Regulation (EC) No. 854/2004 of the European Parliament and of the Council of 29 Apr. 2004, art. 4, 11, 12, 2004 O.J. (L 155) 206.

64. Council Directive 2004/68/EC, art. 6, 2004 O.J. (L 226) 131.

65. Council Regulation (EC) 1/2005 of 22 Dec. 2004, art. 34, 2005 O.J. (L 3) 1, 15 (amending Directives 64/432/EEC & Regulation (EC) No. 1255/97).

and documentation requirements for animal “production sites” covered by the council directives for calves, pigs, and laying hens.<sup>66</sup>

Taking these laws *in toto*, E.U. agriculture policy is markedly more progressive than U.S. policy.<sup>67</sup> Importantly, this article does not suggest that the *practice* of farming in the E.U. is appreciably different—yet. What is critical in international trade dispute resolution is the adoption of the standards and good faith efforts to enforce them.

## II. TRADE AGREEMENT PROVISIONS CONTROLLING TRADE IN ANIMAL AGRICULTURE PRODUCTS BETWEEN THE UNITED STATES AND THE EUROPEAN UNION

### *A. The General Agreement on Tariffs and Trade 1994 (GATT)*

The original GATT, signed by twenty-three countries in 1947, created both a textual framework and organizational entity for establishing “reciprocal and mutually advantageous arrangements” to reduce trade barriers and eliminate “discriminatory treatment in international commerce.”<sup>68</sup> In 1994, GATT was amended to preserve the textual agreement, but replace the physical entity with a new body, the World Trade Organization (WTO).<sup>69</sup> The 153 member states appoint ambassadors to serve on the WTO General Council and various committees, including the Dispute Settlement Body discussed below.<sup>70</sup>

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66. Commission Decision 2006/778/EC, art. 1, 3–7, 2006 O.J. (L 314) 39 (EC).

67. Some multi-national corporations rely on the disparity representing consumer sentiment. For example, in the E.U., McDonald’s Corporation has committed to acquiring all of its eggs from cage-free sources by 2011, but in the U.S., it will commit to no quota. Leora Broydo Vestel, *McDonald’s Board Opposes Cage-Free Eggs for U.S.*, N.Y. TIMES, GREEN BLOG (Apr. 13, 2010, 3:49 PM), <http://green.blogs.nytimes.com/2010/04/13/mcdonalds-parries-on-cage-free-eggs>. In a true “chicken and egg” explanation for the disparity, a McDonald’s spokeswoman blamed “the high consumer demand for cage-free eggs in Europe and a more robust cage-free egg production infrastructure there.” *Id.*

68. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11 (1947), 55 U.N.T.S. 194 [hereinafter GATT 1947].

69. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, 108 Stat. 4809 (1994), 1867 U.N.T.S. 187, available at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](http://www.wto.org/english/docs_e/legal_e/04-wto.pdf); Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, annex 1C, 108 Stat. 4809, 1867 U.N.T.S. 154, available at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](http://www.wto.org/english/docs_e/legal_e/04-wto.pdf).

70. *Understanding the WTO: The Organization*, WORLD TRADE ORG., July 23, 2008, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm).

### 1. GATT Articles I and III

For purposes of this discussion, Articles I and III of the GATT are particularly relevant. Article I awards all members “most-favored nation” (MFN) status. Under Article I, Section 1, one MFN must treat the exports from all MFNs equally if they are “like products.”<sup>71</sup> As an example, the E.U. might violate this section if it were to assign an import quota to strawberries from the U.S., but no quota to strawberries from Mexico. Article III prohibits MFNs from treating products from other MFNs less favorably than domestically-developed “like products,”<sup>72</sup> whether the treatment involves trade bans, quotas, tariffs, taxes, or other restrictions on the sale of the imported products.<sup>73</sup> As will be discussed, the primary analysis for a complaint invoking Articles I or III turns on whether the two sets of products are “like” each other. This analysis is especially complex in agricultural trade disputes.

### 2. GATT Article XX Exceptions

Article XX offers exceptions to the requirements in other GATT articles, including Articles I and III.<sup>74</sup> If a WTO judicial body provisionally finds that a country’s trade measure violates Article III, it might conclude, for example, that the measure qualifies for an exception under Article XX,<sup>75</sup> so long as the trade measure: (1) does not unjustifiably or arbitrarily discriminate against the complainant member; and (2) is not disguised

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71. GATT 1947, *supra* note 68, at art. I (“[A]ny advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”).

72. *Id.* at art. III (“The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.”).

73. *Id.* (“The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.”).

74. A trade ban may be defended using one or more of these exceptions, because it may serve multiple purposes. For example a ban on certain alcoholic beverages may address human health and public morality concerns. Steve Charnovitz, *The Moral Exception in Trade Policy*, 28 VA. J. INT’L L. 689, 692, 694 (1998).

75. Article XX is interpreted and applied as broadly as other sections of GATT. GATT 1947, *supra* note 68, at art. XX.

protectionism.<sup>76</sup> These two requirements are the GATT “chapeau,” which tests trade barriers for good faith.<sup>77</sup>

This article focuses on four Article XX exceptions for trade measures which might otherwise violate GATT: (1) when the measure is “necessary to protect public morals;”<sup>78</sup> (2) when it is “necessary to protect human, animal or plant life or health;”<sup>79</sup> (3) when it is “necessary to secure compliance with laws or regulations which are not inconsistent with” GATT;<sup>80</sup> and (4) when it is one “relating to the conservation of exhaustible natural resources[,] if such measures are made effective in conjunction with restrictions on domestic production or consumption.”<sup>81</sup> In analyzing whether an exception applies, the WTO judicial body generally follows an analysis that first evaluates the importance of the interest or value the member nation seeks to protect or conserve. It then balances the interest or value with the measure’s impact on trade. Finally, it considers the viability of less-restrictive alternative measures (which potentially impact whether the measure is “necessary”).<sup>82</sup> Additionally, it may also consider whether the measure is likely to satisfy the stated goal.<sup>83</sup>

### *B. The SPS Agreement*

The SPS Agreement is an extension of GATT’s Article XX(b) exception permitting trade barriers that are “necessary to protect human, animal or plant life or health,” setting the guidelines for a MFN’s sanitary (food safety) and phytosanitary (animal health) regulations. To illustrate, when a member initiates a trade measure alleging public health reasons (such as the E.U.’s trade ban on meats produced using growth hormones) the measure must be proportional to the level of risk, and it must be based on “international standards, guidelines or recommendations, where they exist.”<sup>84</sup> Only when a member has “scientific justification” may it institute trade measures based on higher sanitary or phytosanitary standards than

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76. *Id.*

77. Ilona Cheyne, *Proportionality, Proximity and Environmental Labelling in WTO Law*, J. INT’L ECON. L. 927, 949 (2009); Robert Galantucci, *Compassionate Consumerism Within the GATT Regime: Can Belgium’s Ban on Seal Product Imports Be Justified by Article XX?*, 39 CAL. W. INT’L L.J. 281, 300 (2009).

78. GATT 1947, *supra* note 68, at art. XX(a).

79. *Id.* at art. XX(b).

80. *Id.* at art. XX(d).

81. *Id.* at art. XX(g).

82. Cheyne, *supra* note 77, at 948.

83. Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 145, WT/DS332/AB/R (Dec. 3, 2007) [hereinafter Appellate Body Report, *Brazil—Tyres*].

84. SPS Agreement, *supra* note 15, at art. 3.1.

those recognized by international organizations such as the Codex Alimentarius Commission (Codex), the World Organization for Animal Health (OIE), and the International Plant Protection Convention (IPPC).<sup>85</sup>

Herein lays the SPS Agreement's fatal internal contradiction: its acknowledgment that a WTO member is a sovereign state with the inherent right to protect the safety of its citizens, versus the quest to "harmonize the sanitary and phytosanitary measures on as wide a basis as possible."<sup>86</sup> Because the WTO's mission includes resolving differences in national food quality and safety standards to facilitate international trade, the pursuit of these standards carries with it the danger of accommodating the lowest common denominator.

### *C. Other Trade Agreements Regulating Agricultural Trade*

Although beyond the scope of this article, the Agreement on Technical Barriers to Trade (TBT Agreement) and the Agreement on Agriculture are occasionally invoked in agricultural trade disputes. The TBT Agreement addresses technical product and manufacturing specifications that affect international trade, and it encourages members to adopt international standards. The Agreement on Agriculture attempts to establish long-term goals and commitments for resolving issues of domestic subsidies, access to export markets, and food safety or plant or animal health.<sup>87</sup>

### *D. The Dispute Settlement Process*

Under the WTO regime, trade disputes among members are addressed by the Dispute Settlement Body (DSB). The dispute resolution process begins when one member files a complaint against another member, alleging violation of one or more WTO agreements. Because mediation is preferred to judicial resolution, the first stage is typically a mandatory sixty-day consultation period during which the WTO director general may mediate negotiations. If no resolution is reached, the complaining party requests DSB approval to form a Dispute Panel to hear the dispute. The parties to the dispute choose three panelists of unbiased experts in the dispute's subject matter; this panel hears the parties' arguments, optionally considering input from third parties asserting a formal interest in the action.

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85. *Id.* at arts. 3.3, 3.4.

86. *Id.* at art. 3.1.

87. Agreement on Agriculture, *supra* note 15, at pmb1.

The panel renders its decision in the form of a report generally no less than six months from the beginning of the proceedings.<sup>88</sup>

Either side may appeal any legal interpretation or determination in the panel report to a DSB Appellate Board. The Appellate Board hears the legal arguments, reviews the panel's decision, and renders its own report. If the defending party in the dispute is found to have violated WTO trade agreements, it is expected to accept and implement the DSB decision.<sup>89</sup> On the exceptional occasion when a member refuses, the complaining member may request that the DSB authorize sanctions against the offending nation in an amount calculated to compensate the complaining member for the defending member's trade violations.<sup>90</sup>

The DSB adopts the panel or appellate body report within sixty days, making the decision binding on all members—unless the members *unanimously* reject it. Because every member of the DSB has a vote in this process, all post-1994 GATT decisions have been adopted by this method of “reverse consensus.”<sup>91</sup> This makes DSB decisions binding on a *de facto* basis, should a similar dispute arise later between other members. Thus, the DSB has considerable authority over international economic, political, and social affairs.<sup>92</sup>

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88. *Understanding the WTO: Settling Disputes, a Unique Contribution*, WTO, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/displ\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm) (last visited Nov. 14, 2010) [hereinafter *Understanding the WTO*]. Panel and Appellate Body reports are publicly available, but the proceedings may be kept confidential. *Id.*

89. *Id.* The Appellate Body is composed of seven WTO representatives serving four-year terms. *Id.* Three members hear the appeal. *Id.*

90. One such exceptional case is *E.C.—Hormones*, wherein the E.U. has delayed and resisted terminating its trade ban on certain meat products. Sebastiaan Princen, *EC Compliance with WTO Law: The Interplay of Law and Politics*, 15 EUR. J. INT'L L. 555, 570 (2004) (“[D]omestic support for the import ban within the EC was simply too strong for the WTO rulings to have a decisive effect.”).

91. *Understanding the WTO*, *supra* note 88.

92. See Shoab A. Ghias, *International Judicial Lawmaking: A Theoretical and Political Analysis of the WTO Appellate Body*, 24 BERKELEY J. INT'L L. 534, 541–50 (2006) (suggesting that the DSB extended its original jurisdiction to political and social issues); John H. Knox, *The Judicial Resolution of Conflicts Between Trade and the Environment*, 28 HARV. ENVTL. L. REV. 1, 3–4 (2004) (advocating the appellate body as the most likely candidate to resolve trade conflicts invoking environmental protection policies); Princen, *supra* note 90, at 561–62 (attributing the E.U.'s cancellation of a scheduled import ban on fur produced animal trapping methods prohibited in the E.U. to the GATT *Tuna–Dolphin* decision).

## III. A DOUBLE-PRONGED STRATEGY FOR FUTURE TRADE DISPUTES

A. *Emerging Conflicts*

As discussed in Part I, the E.U. amended its animal welfare and food safety directives in the late 2000s, while U.S. animal welfare regulations have remained relatively static for several decades and the only significant advancement in food safety legislation in seventy years exempts most animal-derived foods. This regulatory disparity sets the stage for more trade disputes in which the E.U. will ban or limit importation of animal products produced under domestically prohibited farming or food handling practices.

One instance of this trend is the E.U. ban on imports of poultry treated with pathogen reduction treatment chemicals (PRTs), used “to reduce the amount of microbes on the meat” during the packaging process.<sup>93</sup> The U.S. asserts that the ban “effectively prohibit[s] the shipment of virtually all” U.S. poultry and has consequently challenged this ban before the DSB. The U.S. complaint, submitted in 2009, alleges that the ban violates GATT, SPS, and other agreements. Specifically, the complaint argues that scientific evidence supports the U.S.’s conclusion that PRTs are *not unsafe* for human consumption. As of this writing, more than a year after the DSB agreed to hear the dispute, it had still not chosen the panelists.<sup>94</sup>

Considering its aggressive trade policy objectives, the U.S., logically, will prepare for additional trade disputes involving U.S. farming and food-handling practices not conforming to E.U. standards.<sup>95</sup> As 2007 and 2008 E.U. directives revising animal welfare standards for chickens, pigs, and calves become widely implemented across the member states, increasing financial consequences will inevitably lead to trade restrictions designed to protect the commercial viability of E.U. products from low-priced CAFO-

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93. Request for Consultations, *E.C.—Poultry Meat*, *supra* note 4 (identifying the substances as “chlorine dioxide, acidified sodium chlorite, trisodium phosphate, and peroxyacids”). Only cold-water processed poultry may be marketed as poultry products in the E.U. *Id.* (citing Regulation (EC) No. 853/2004, of the European Parliament and of the Council of 29 Apr. 2004, art. 3, 6, 2004 O.J. (L.139)); Council Regulation (EC) No. 1234/2007, 2007 O.J. (L.299) Annex XIV, B.II ¶ 1–4.

94. Australia, China, Korea, and Norway reserved their third-party rights; subsequently, Guatemala, New Zealand, and Chinese Taipei reserved their third-party rights. *Dispute Settlement: European Communities—Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States*, WTO, [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds389\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds389_e.htm) (last updated Feb. 24, 2010).

95. The FDA’s recent request that the livestock, hog, and poultry industries voluntarily decrease the amount of preventive antibiotics they use as growth enhancers may be a preemptive attempt to show a good faith effort of reform. Nathan Phelps, *FDA Targets Antibiotic Usage in Livestock*, DES MOINES REG., Aug. 10, 2010, at A07, available at <http://www.greenbaypressgazette.com/article/20100810/GPG03/8100485/1247>.

raised imports. Additionally, as the global food system becomes increasingly multi-layered and complex, food safety issues will take on national security importance.<sup>96</sup> This suggests that enhanced E.U. food labeling and tracking information requirements for both live animals and animal products will likely also be a source of trade conflict.

This article submits that when the E.U. implements a trade ban pursuant to domestic animal welfare or food safety law, it should prepare to defend these trade measures with a dual-pronged strategy, relying on both its animal welfare and public health policy directives. The two issues are synergistically interconnected because the CAFO model promotes the gravest food-related public health and safety threats *and* intrinsically sweeping inhumane treatment of animals.<sup>97</sup> Finally, when appropriate, the E.U. could expand its argument to include environmental policies and initiatives. The approach of a multi-pronged defense to a challenge before the WTO increases the E.U.'s options for passing DSB scrutiny.

*B. Animal Welfare and Public Health Defenses:  
Strengths and Limitations*

1. GATT Analysis

In order for the E.U. to defend a trade ban on products produced by farming methods not conforming to E.U. standards, it should first position domestically produced products as dissimilar to the banned imports to avoid violating GATT Article III. In other words, the E.U. should dispute that it is treating “like products” unequally or discriminatorily because products derived from animals under distinctly different animal husbandry standards and phytosanitary conditions are sufficiently dissimilar from CAFO-derived products. The animal products should be characterized as dissimilar regarding their (1) production methods; (2) marketability to discerning consumers; and (3) human health effects. Because past dispute panel and appellate board decisions reveal no reliably consistent method of analysis, the most strategic argument will use every available angle.<sup>98</sup> Moreover, the

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96. Eric Schlosser, Op-Ed., *Unsafe at Any Meal*, N.Y. TIMES, July 24, 2010, <http://www.nytimes.com/2010/07/25/opinion/25schlosser.html>.

97. PEW REPORT, *supra* note 33, at 31–39.

98. Historically, “like products” in Article III:4 applied only to the products’ final form, not to how they were produced. Prior to the 1994 GATT amendments, the analysis turned on whether the distinction between products served any regulatory purpose. Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT’s-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1424–25 (1994).

E.U. should emphasize the DSB's commitment to reviewing each "like products" dispute on a case-by-case basis.<sup>99</sup>

Modern DSB decisions, such as *Japan—Alcohol*, suggest that the analysis will consider, *inter alia*: "(1) the properties, nature and quality of the products; (2) the end-uses of the products; [and] (3) consumers' tastes and habits."<sup>100</sup> Regarding the first factor, the E.U. could argue that humane husbandry practices yield a higher quality meat product, and offer physical evidence to this effect. The DSB may not be receptive to this position, as it has previously determined that, even if two products have different physical characteristics, they may still be "like" each other under Article III:4 if they are "directly competitive or substitutable products."<sup>101</sup> To illustrate, a 1991 GATT panel determined that a U.S. ban on tuna caught using methods contrary to the U.S. Marine Mammal Protection Act violated Article III:4 because the ban specified the manner in which the tuna was caught (by net or by fishing line), not the physical qualities of the tuna products themselves.<sup>102</sup>

To the second consideration, the "end uses" of the animal products in question will be the same: human consumption. However, the DSB has recognized that a product's properties and end-uses may be distinguished by their marketability and consumers' tastes and preferences in selecting the product.<sup>103</sup> Therefore, the E.U. should emphasize how consumers in both the U.S. and E.U. value foods produced under allegedly humane standards (bearing labels such as "grass-fed cattle" or "free-range chickens"), or under organic guidelines. The evidence should demonstrate that consumers view these as "premium" products, and that they will pay more for them.<sup>104</sup>

99. Catherine Jean Archibald, *Forbidden by the WTO? Discrimination Against a Product When Its Creation Causes Harm to the Environment or Animal Welfare*, 48 NAT. RESOURCES J. 15, 25 (2008).

100. Reinhard Quick & Christian Lau, *Environmentally Motivated Tax Distinctions and WTO Law*, 6 J. INT'L ECON. L. 419, 428 (2003) (citing Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, 20, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996)).

101. Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, 20, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996) [hereinafter Appellate Body Report, *Japan—Alcohol*].

102. Panel Report, *United States—Restriction on the Imports of Tuna*, DS21/R (Sept. 3, 1991), GATT B.I.S.D. 395/155 at 48 (1991) [hereinafter Panel Report, *Tuna-Dolphin*]; Steve Charnovitz, *Green Roots, Bad Pruning: GATT Rules and Their Application to Environmental Trade Measures*, 7 TUL. ENVTL. L. J. 299, 319–20 (1994). This report was never adopted by the General Council because the dispute between Mexico and the U.S. was settled outside the WTO process.

103. Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 101–102, WT/DS135/AB/R (March 12, 2001) [hereinafter Appellate Body Report, *E.C.—Asbestos*]; Appellate Body Report, *Japan—Alcohol*, *supra* note 101, at 20.

104. Working Party Report, *Border Tax Adjustments*, BISD 18S/97 (adopted Dec. 2, 1970); Peter Stevenson, *The World Trade Organisation Rules: A Legal Analysis of their Adverse Impact on Animal Welfare*, 9 ANIMAL L. 107, 117 (2002) ("[C]onsumers may have a view about the likeness of two products that is very different from that of the . . . producers' . . . [to] the extent to which consumers are

Evidence of strong E.U. domestic consumer distaste or dislike for inhumane production methods should also be introduced.<sup>105</sup>

Consumer preferences or perceptions are particularly relevant when they are motivated by ethical considerations. Thus, the E.U. should submit evidence that its consumers would not find CAFO-produced products interchangeable with “humane” products, irrespective of whether they could distinguish the products’ physical properties. It should be documented that widespread consumer support for animal welfare reform contributed to the most recent animal welfare policy initiatives and regulations.<sup>106</sup>

Most importantly, the E.U. should emphasize the health risks associated with products produced using certain banned methods (such as use of growth hormones or PRTs in the packaging process). *E.C.—Asbestos* underscores the importance of assessing a product’s health risks in the “physical properties” analysis.<sup>107</sup> When France banned the domestic production or use of fibers containing asbestos, Canada challenged the ban as a violation of GATT Article III, claiming that fibers with and without asbestos were “like products.”<sup>108</sup> In the alternative, Canada suggested that a less-restrictive trade measure would involve a “controlled use” of fibers containing asbestos.<sup>109</sup> The appellate body disagreed on both counts, finding that the health concerns created a higher standard of review for any suggested alternatives.<sup>110</sup>

In another dispute demonstrating this lesson, Mexico’s import tax on soft drinks sweetened with ingredients other than cane sugar was declared a trade violation because sodas and syrups using high fructose corn syrup (HFCS) were “like” beverages made with cane sugar. The appellate body reasoned that the beverages had “virtually identical physical properties,

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willing to choose one product instead of another to perform the same function is highly relevant in assessing . . . likeness.”) (quoting Appellate Body Report, *E.C.—Asbestos*, *supra* note 103, ¶ 92).

105. Sikina Jinnah, Note, *Emissions Trading Under the Kyoto Protocol: NAFTA and WTO Concerns*, 15 GEO. INT’L ENVTL. L. REV. 709, 731 (2003) (explaining the Appellate Body’s decision in *E.C.—Asbestos* that “the ‘physical properties’ of the products must be analyzed in light of the effect that difference in such properties may have on the marketability of the products”).

106. Archibald, *supra* note 99, at 25.

107. Appellate Body Report, *E.C.—Asbestos*, *supra* note 103, ¶¶ 101–02. Earlier decisions also support the importance of the “public health” angle. See Farber & Hudec, *supra* note 98, at 1424–25 (discussing the U.S.’s position in a pre-WTO case that it was warranted to distinguish among malt beverage products based on the health effects and the alcohol content, in Report of the Panel, *United States—Measures Affecting Alcoholic and Malt Beverages*, ¶ 5.74 (Mar. 16, 1992), GATT BISD (39th Supp.) at 206 (1993)).

108. Appellate Body Report, *E.C.—Asbestos*, *supra* note 103, ¶ 16.

109. *Id.* ¶ 17.

110. *Id.* ¶ 118, 174–75.

end-uses and . . . [were] equally preferred by consumers.”<sup>111</sup> Rather than exploring the health effects of HFCS, Mexico unsuccessfully claimed an exception under GATT Article XX(d), discussed *infra*, that the tariff was necessary to ensure U.S. compliance with the North American Free Trade Agreement (NAFTA).<sup>112</sup> A more compelling position might have been one that highlighted the effects of HFCS on Mexico’s dramatically rising childhood obesity rate, its problems providing access to safe drinking water, and its status as the number one importer of Coca-Cola products.<sup>113</sup>

## 2. “Chapeau” Analysis

If the E.U. fails Article III’s “like products” test, it could prevail under an Article XX exception. Exceptions, however, must first pass the “chapeau” good faith requirement that the challenged trade ban or restriction is not an arbitrary or unjustifiable discrimination, or a disguised trade restriction. The appellate body’s decision in *U.S.—Shrimp* is illustrative. The U.S. had banned imported shrimp caught with nets that inadvertently trapped endangered turtles protected under the Endangered Species Act. The appellate body discerned that this ban failed the chapeau because the U.S. had unilaterally instituted the ban without first making a good faith effort to negotiate international compliance with the U.S. law.<sup>114</sup>

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111. Panel Report, *Mexico-Tax Measures on Soft Drinks and Other Beverages*, ¶ 4.8 WT/DS308/R (Oct. 7, 2005).

112. Mexico claimed that the tax was necessary to secure the U.S.’s compliance with NAFTA, a non-WTO treaty. Finding that NAFTA was not the type of law covered under XX(d), and that the measure was not necessary to enforce the U.S.’s obligations under the treaty, the exception was denied. Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶¶ 82–84, WT/DS308/AB/R (Mar. 6, 2006) [hereinafter Appellate Body Report, *Mexico—Corn Syrup*].

113. *WTO Rules Mexico Tax on High-Fructose Corn Syrup Illegal*, ALLBUSINESS (Aug. 31, 2005), <http://www.allbusiness.com/north-america/mexico/515985-1.html>; *Distribution: Water Trucks in Mexico, SAFE DRINKING WATER IS ESSENTIAL* (2008), <http://www.drinking-water.org/html/en/Distribution/Water-Trucks-in-Mexico.html>.

114. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 171, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter Appellate Body Report, *U.S.—Shrimp I*]. In *U.S.—Shrimp I*, the U.S. argued for an exception under Article XX(g), relating to the conservation of endangered migratory sea turtles being caught and killed in commercial fishing nets. *Id.* ¶¶ 125–28. The U.S. met the exception provisionally, because the endangered turtles were “exhaustible natural resources,” and the rules were sufficiently related to their conservation. *Id.* ¶ 25. However, the U.S. had not consulted with all affected member countries or attempted to negotiate a regulatory program to everyone’s satisfaction. *Id.* ¶ 156. (“[A] balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members.”) The U.S. then attempted good faith negotiations with the complaining countries. *Id.* ¶ 129–34. In a perhaps predictable outcome, no compromise or resolution was reached, and the subsequently issued “Shrimp Recourse Report” suggested that even good faith requirements have their limits. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*.

Chapeau analysis asks: (1) whether the trade measure recognizes and accounts for problems that dissimilarly situated countries might encounter in attempting to comply with the measure; (2) whether the country attempted to negotiate an agreement with all interested parties before instituting a trade measure; and (3) whether the measure is discriminatory in its enforcement.<sup>115</sup>

To comply with the first requirement, an E.U. trade ban must be based on *comparable results*, not specific guidelines designed to achieve these results. For example, the E.U. may not require that exporting countries adhere to specific physical measurements for pig housing, but it may require that pigs be raised in quarters with enough room to turn around and roll over.

As to the second requirement, before adopting a trade restriction, the E.U. must attempt to negotiate an equitable agreement to achieve its animal welfare or food safety goals. In a sense, this is an echo of the WTO's mission to encourage international standards, not disparate, nation-specific guidelines. Establishing international farm animal welfare standards is an inherently problematic goal, considering variable economic pressures and incongruous religious and ethical value systems. There are no such current comprehensive animal welfare standards, although the OIE has begun the process by establishing standards for transporting and slaughtering animals.<sup>116</sup>

The OIE—which represents 176 countries, including the U.S. and the E.U.—tracks, researches, and publishes information regarding the prevention of and best practices for managing animal diseases,<sup>117</sup> and recommends standard practices for ensuring the safety of animal-derived foods.<sup>118</sup> The WTO has a non-binding agreement with the OIE to consult

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*Recourse to Article 21.5 by Malaysia*, WT/DS58/RW (June 15, 2001). The shrimping restrictions were upheld under exception XX(g). Appellate Body Report, *U.S.—Shrimp I*, *supra*, ¶ 153.

115. Appellate Body Report, *U.S.—Shrimp I*, *supra* note 114, ¶¶ 161–69.

116. *The OIE's Objectives and Achievements in Animal Welfare*, WORLD ORGANISATION FOR ANIMAL HEALTH (last updated Jan. 21, 2011), <http://www.oie.int/animal-welfare/key-themes>.

117. *About Us*, WORLD ORGANISATION FOR ANIMAL HEALTH, [http://www.oie.int/eng/OIE/PM/en\\_PM.htm?e1d1](http://www.oie.int/eng/OIE/PM/en_PM.htm?e1d1) (last updated Sep. 13, 2010). The acronym is derived from its previous name, the Office International des Epizooties, established in 1924. *Short History of the OIE*, WORLD ORGANISATION FOR ANIMAL HEALTH (Feb. 10, 2009), [http://www.oie.int/eng/oie/en\\_histoire.htm](http://www.oie.int/eng/oie/en_histoire.htm).

118. *Objectives*, WORLD ORGANISATION FOR ANIMAL HEALTH, [http://www.oie.int/eng/OIE/en\\_objectifs.htm](http://www.oie.int/eng/OIE/en_objectifs.htm) (last updated Oct. 11, 2010). The OIE also works with another WTO reference organization, the Codex Alimentarius Commission, established by the Food and Agricultural Organization of the United Nations and the World Health Organization “to protect the health of consumers and ensure fair practices in food trade.” *FAQs—General Questions*, CODEX

with the organization on SPS Agreement issues, such as the *E.C.—Hormones* dispute.<sup>119</sup> Unfortunately, the OIE is not the ideal candidate to create animal welfare standards, because its mandate is human-centric: to protect the food supply from diseased or otherwise unhealthy animals; to protect humans from diseases transmissible to and from animals; and to curtail the spread of animal disease via international trade.<sup>120</sup> Its focus on animal welfare is necessarily founded on “a science-based approach,” drawing on “the close relationship between animal health and animal welfare.”<sup>121</sup>

Thus, an animal welfare proposal will require only that adopted standards further human safety goals and be based on scientific data. However, not all inhumane modern agricultural practices satisfy these criteria, just as not all practices that create public health risks are strictly inhumane. For example, the common practices of “de-beaking” poultry birds and “tail-cropping” hogs or cattle, without anesthesia, invoke no direct health concerns but are unquestionably painful to these animals.<sup>122</sup> Conversely, the prevalent use of sub-therapeutic antibiotics or hormones certainly raises human health concerns, but is not in itself inhumane.<sup>123</sup> Until broad international consensus supports the creation of a third-party organization capable of establishing meaningful animal welfare standards, the E.U. should defend its own guidelines irrespective of recommendations from the OIE or another similar organization.<sup>124</sup>

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ALIMENTARIUS COMM'N, [http://www.codexalimentarius.net/web/faq\\_gen.jsp#G1](http://www.codexalimentarius.net/web/faq_gen.jsp#G1) (last visited Nov. 15, 2010).

119. *Agreement Between the World Trade Organization and the Office International Des Epizooties*, WORLD ORGANISATION FOR ANIMAL HEALTH (May 4, 1998), <http://www.oie.int/about-us/key-texts/cooperation-agreements/agreement-with-the-world-trade-organization-wto/>. The SPS Agreement specifically designates that, in order “[t]o harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations where they exist[.]” SPS Agreement, *supra* note 15, at art. 3.1. Nothing in the WTO-OIE agreement or the SPS Agreement gives OIE standards or recommendations anything more than persuasive effect on WTO proceedings or member nations.

120. *Objectives*, *supra* note 118.

121. *Id.*

122. PEW REPORT, *supra* note 33, at 33–35; *see also American Veterinary Medicine Assoc. Policy: Tail Docking of Cattle*, AVMA, [http://www.avma.org/issues/policy/animal\\_welfare/tail\\_docking\\_cattle.asp](http://www.avma.org/issues/policy/animal_welfare/tail_docking_cattle.asp) (last visited Jan. 13, 2011) (opposing the practice due to lack of scientific evidence supporting its necessity and the observing that “it can lead to distress during fly seasons”).

123. PEW REPORT, *supra* note 33, at 6.

124. If created by the right third-party organization, one with no conflicts of interest or vulnerability to industry influences, animal welfare standards for agriculture could be instrumental in defending an import ban based on animal husbandry regulations. The organization should be a WTO reference organization, so that the DSB will consider its input in resolving trade disputes involving questions of animal welfare.

Returning to the final step in a typical chapeau analysis, the country instituting a trade measure cannot create or enforce the ban in a manner suggesting discriminatory motives against specific exporting members. Until now, this article has assumed for purposes of discussion that E.U. animal welfare and food safety laws are generally enforced. To temporarily suspend this illusion, it bears mention that some E.U. states have lagged in adopting higher animal welfare standards. A 2008 undercover investigation in five countries with major pork markets revealed that although conditions for pigs are somewhat improved vis-à-vis pigs in the U.S., illegal practices are still conducted on a large scale.<sup>125</sup> It is also reported that unnamed corporations have applied to build CAFO facilities in England.<sup>126</sup>

Nor is the problem confined to Western Europe. Prior to accession, former Soviet countries were attractive venues for Smithfield Foods, the world's leading pork producer. Smithfield sought to expand in countries with lax environmental standards and loosely organized governments,<sup>127</sup> and it now owns a vast majority of the Polish and Romanian pork markets.<sup>128</sup> It is critical that the E.U. assist these new member states in conforming, not give them extra time to conform. General tolerance to reform resistance will expose an E.U. trade ban to the valid assertion that the ban is veiled protectionism for E.U. farmers. As an example, the Appellate Body Report in *E.C.—Hormones* observed that some E.U. states were still using growth hormones, a fact that it found persuasive in its determination that protectionism was at the root of the trade ban, not human health concerns.<sup>129</sup>

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125. Martin Hikman, *Revealed: The Cruelty of UK's Pork Suppliers*, INDEP. (Dec. 5, 2008), <http://www.independent.co.uk/life-style/food-and-drink/news/revealed-the-cruelty-of-uks-pork-suppliers-1052532.html>.

126. Steve Boggan, *The Toxic Truth About Mega-Farms: Chemical Fumes, Distressed Animals and Poisoned Locals Driven from Their Homes and Worse*, MAIL ONLINE (July 5, 2010, 9:54 AM), <http://www.dailymail.co.uk/news/article-1292011/The-truth-mega-farms-Chemical-fumes-distressed-animals-poisoned-locals.html>.

127. Doreen Carvajal & Stephen Castle, *A U.S. Hog Giant Transforms Eastern Europe*, N.Y. TIMES, May 6, 2009, <http://www.nytimes.com/2009/05/06/business/global/06smithfield.html>.

128. *Id.* Joe Luter III, the CEO of Smithfield, calls Poland "the Iowa of Europe." Dale Miller, *Straight Talk from Smithfield's Joe Luter*, NAT'L HOG FARMER (May 1, 2000, 12:00 PM), [http://nationalhogfarmer.com/mag/farming\\_straight\\_talk\\_smithfields/](http://nationalhogfarmer.com/mag/farming_straight_talk_smithfields/). "In 1999 Smithfield began by buying a slaughtering plant called Animex, Poland's largest. By 2003 it controlled the vast share of the Polish pork market and was bringing in \$338 million dollars [sic] annually from the country." *Factory Farming's Stealth Attack on Eastern Europe*, DAILY TABLE (May 12, 2009), <http://www.sustainabletable.org/2009/05/factory-farmings-stealth-attack-on-eastern-europe/>. Polish dominance of the hog products market prompted the Czech Republic to levy a tariff on Polish pork imports. *Czech Republic—Additional Duty on Imports of Pig-Meat from Poland*, WTO, [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds289\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds289_e.htm) (last updated Feb. 24, 2010).

129. Appellate Body Report, *E.C.—Hormones*, *supra* note 2, ¶ 245.

### 3. Exceptions Analysis

#### a. Necessary to Protect Public Morals<sup>130</sup>

The DSB has recognized that protecting public morals is among a country's "most important values or interests."<sup>131</sup> Nevertheless, identifying "public morals" is exigent because it is difficult to measure objectively or with scientific data.<sup>132</sup> Moreover, the history of negotiating sheds little light on "what morality and whose morality is covered," aside from the possibility that an acceptable morality issue might involve alcohol.<sup>133</sup> If an E.U. animal welfare law is designed to preserve societal decorum or to discourage corruption of moral character, then the parallels to these disputes are clearer.<sup>134</sup> On the other hand, if an animal welfare law exists to protect sentient animals from unnecessary cruelty for the animals' *own* sakes, then a trade ban in furtherance of this law would be dissimilar to public morality laws advanced in previous disputes.

A trade ban relying on this exception will be analyzed as to whether it actually concerns "public morals," and next, whether it is "necessary" to protect these morals (if less restrictive trade measures are available).<sup>135</sup> Thus, such a ban should be positioned as necessary to protect E.U. citizens from the "moral taint"<sup>136</sup> caused by marketing products produced under practices that E.U. citizens "believe to be cruel."<sup>137</sup> The E.U. should assert that an import ban on non-conforming products would aid its citizens in advancing and protecting the moral imperative that supported enacting these regulations in the first place, particularly in light of typical industry resistance to such regulations.<sup>138</sup>

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130. GATT 1947, *supra* note 68, at art. XX(a).

131. Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (Dec. 21, 2009) [hereinafter Appellate Body Report, *China—Audiovisuals*].

132. Galantucci, *supra* note 77, at 287.

133. Charnovitz, *supra* note 74, at 704–05.

134. Galantucci, *supra* note 77, at 291 (noting the "strong indication that the GATT drafters intended to define 'public morals' in accordance with a country's prevailing cultural norms").

135. Appellate Body Report, *China—Audiovisuals*, *supra* note 131, ¶ 245.

136. Charnovitz, *supra* note 74, at 695.

137. Galantucci, *supra* note 77, at 294 (discussing a trade ban under the morals exception as an exercise within the country's liberty); Stevenson, *supra* note 104, at 126 (arguing that a trade ban under this exception would not be an assertion of extra-territoriality to influence agricultural practices in other countries, but an expression of sovereign authority to limit support for these practices domestically).

138. Appellate Body Report, *China—Audiovisuals*, *supra* note 131, ¶ 246 (striking China's "public morals" argument as more likely an exercise in government censorship); Galantucci, *supra* note 77, at 290 (recognizing that "[i]mport and export policies have historically shown concern for the

The E.U. has a loftier challenge in showing that less restrictive alternatives that the U.S. might suggest are not “reasonably available” because a ban is de facto the most restrictive measure. An alternative measure is not “reasonably available” if it is only “theoretical in nature,” creates an undue burden (such as “prohibitive costs or substantial technical difficulties”),<sup>139</sup> or if the member cannot implement or adopt it.<sup>140</sup> The U.S. could suggest alternative measures such as a tariff (wherein the proceeds are used to improve animals’ conditions elsewhere in the E.U.) or mandated labeling, which would allow informed consumers to exercise their morality in the marketplace. Here, the E.U.’s challenge would be to portray alternative measures as detrimental to public morality, whereas the U.S. would assert that the morality argument is merely a pre-textual excuse for protectionism of domestically produced products. The U.S. asserted this same argument in the most recent “public morals” dispute, *China—Audiovisuals*. In this dispute, the U.S. successfully challenged China’s trade restrictions on imports of certain reading materials and home entertainment audio and video materials.<sup>141</sup> This dispute suggests that a public morals exception, on its own, is unlikely to support a broad trade ban.

b. Necessary to Protect Human or Animal Life or Health<sup>142</sup>

There are two ways a trade ban could be defended using this exception: farm animal health and human health. The *animal health* argument would require the DSB to consider first whether one country may erect a trade measure aimed at protecting the life or health of an animal in another country. It will next consider whether the measure actually serves that goal. Finally, the DSB will inquire as to whether the measure is “necessary” to meet that goal. Although there is precedent for arguing that this exception is not limited by geography,<sup>143</sup> and the DSB has considered animal health

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humane treatment of animals, although the interests of free trade have consistently won out”); Stevenson, *supra* note 104, at 126.

139. Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 308, WT/DS285/AB/R, (Apr. 7, 2005).

140. *Id.* The alternative measure suggested by the U.S. in *China—Audiovisuals*, a system by which government employees could screen imports for nonconforming content, was “reasonably available” because China could not demonstrate that the burden rose to the level of “undue.” *China—Audiovisuals*, *supra* note 131, ¶ 328.

141. Appellate Body Report, *China—Audiovisuals*, *supra* note 131, ¶¶ 243, 248 (presenting China’s defense that the restrictions were “[necessary] to protect public morals by avoiding the dissemination of goods containing prohibited content within China”).

142. GATT 1947, *supra* note 68, at art. XX(b).

143. Panel Report, *Tuna-Dolphin*, *supra* note 102, at 10.

severable from human health,<sup>144</sup> any argument predicated on the consideration for an animal's health and welfare will be undercut by the reality that the animal is, ultimately, part of the food chain.

An argument founded on *human health* concerns will be far more persuasive. The appellate body in *Brazil—Tyres* affirmed the panel's judgment that human health concerns are worthy of more pronounced consideration.<sup>145</sup> Brazil could have defended its import ban on retreaded tires by arguing that the tires' short life spans created environmental hazards in the form of overflowing landfills. Instead, Brazil cleverly stressed the human health hazards created by these overflowing landfills, which they argued attracted mosquitoes carrying dengue fever and malaria.<sup>146</sup> The Appellate Body mirrored its analysis on *E.C.—Asbestos*, and found that the health concerns were so valuable as to outweigh other factors or even alternative measures that were "less trade restrictive while providing an equivalent contribution to the achievement of the objective."<sup>147</sup> Thus, in arguing for this GATT exception, the E.U. should cite both *E.C.—Asbestos* and *Brazil—Tyres* for the propositions that a nation has the "right to determine a level of protection of health that [it considers] appropriate in a given situation" and that "there is no requirement under Article XX(b) to quantify, as such, the risk to human life or health."<sup>148</sup>

The greatest obstacle to using this exception will be connecting a human health risk to the products at issue. *E.C.—Hormones* demonstrates this problem, but it does not foreclose the possibility that the E.U. could produce sufficient scientific evidence to persuade the DSB that a ban is legitimate under both exception XX(b) and the SPS Agreement's

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144. Appellate Body Report, *Brazil—Tyres*, *supra* note 83, ¶ 179.

145. *Id.* The Panel decided that the trade restriction could not pass the chapeau because Brazil allowed retreaded tire imports from nations with which it had a separate trade agreement, and also allowed domestic companies to retread tires. Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R (June 12, 2007), *amended by* Appellate Body Report, *Brazil—Tyres* [hereinafter Panel Report, *Brazil—Tyres*]. The Appellate Body rejected the Panel's use of *U.S.—Gambling's* chapeau analysis assessing the necessity of a trade measure by whether the measure is "located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to.'" Appellate Body Report, *Brazil—Tyres*, *supra* note 83, ¶ 90.

146. Panel Report, *Brazil—Tyres*, *supra* note 145, ¶¶ 7.109, 7.118, ("The Panel notes that the European Communities' argument concerns the issue of quantification of the reduction of waste tyres in Brazil while Brazil's answer to that argument concentrates on the quantification of the risk to human health and life.").

147. Appellate Body Report, *Brazil—Tyres*, *supra* note 83, ¶¶ 178.

148. Panel Report, *Brazil—Tyres*, *supra* note 145, ¶ 5.3 (quoting Appellate Body Report, *E.C.—Asbestos*, *supra* note 103, ¶¶ 167–168).

requirement to base sanitary and phytosanitary restrictions on “scientific justification.”<sup>149</sup>

The Board’s interpretation of the SPS risk assessment requirements appears to be slightly relaxed under *E.C.—Asbestos* and *Brazil—Tyres*. A sanitary measure need only be “based on an assessment, as appropriate for the circumstances,” whether carried out by the defending member, another member country, or a third-party organization.<sup>150</sup> Moreover, a health risk assessment does not need to be dispositive. “The requirement that an SPS measure be ‘based on’ a risk assessment is a substantive requirement that there be a *rational relationship* between the measure and the risk assessment.”<sup>151</sup> What this means, exactly, is open to interpretation. It has been suggested that the Appellate Body has demonstrated a willingness to apply an “holistic-risk logic” in determining whether a rational relationship exists, as opposed to a stricter and more mainstream “quantitative-risk logic.”<sup>152</sup> In other words, the Appellate Body’s most recent *E.C.—Hormones* decision may indicate a willingness to consider societal ethics and values in addition to scientific evidence that a certain practice creates a probable risk of a harmful result.<sup>153</sup> The risk assessment option thus becomes a waiting game, with the E.U. stalling for time while it develops the scientific evidence necessary to support its domestic policies and trade restrictions. The U.S. is left in the uncomfortable position of having to defend its preference for industry-led reform, and celebrating dubious triumphs such as the 2009 Memorandum of Understanding (MOU) allowing U.S. beef products *not* produced using hormones into E.U. countries, duty-free.<sup>154</sup> Although hailed as a U.S. victory, the MOU created no more access to E.U. markets than hormone-free U.S. beef had in 1989,

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149. Appellate Body Report, *E.C.—Hormones*, *supra* note 2, ¶ 172. The Appellate Body in *E.C.—Asbestos* affirmed that a country may base its domestic ban and trade restrictions on its own scientific studies. Appellate Body Report, *E.C.—Asbestos*, *supra* note 103, ¶ 178.

150. Appellate Body Report, *E.C.—Hormones*, *supra* note 2, ¶ 190 (quoting SPS Agreement, *supra* note 15, at art. 5.1).

151. *Id.* ¶ 193 (emphasis added). The Board found that the reports offered by the E.U. conforming to “risk assessment” guidelines were not rationally related to the E.U. directives banning the use of growth hormones. *Id.* ¶¶ 195–97.

152. Alessandra Arcuri, *Food Safety at the WTO After ‘Continued Suspension’: A Paradigm Shift?* 12–13 (Rotterdam Inst. of Law & Econ., Working Paper No. 2010/04) (analyzing Appellate Body Reports in *Continued Suspension of Obligations in the E.C.—Hormones Dispute*, WT/DS321/AB/R, WT/DS320/AB/R (Nov. 14, 2008)).

153. *Id.* at 13.

154. Press Release, Office of the United States Trade Representative, USTR Announces Agreement with European Union in Beef Hormones Dispute (May 13, 2009), available at <http://www.ustr.gov/about-us/press-office/press-releases/2009/may/ustr-announces-agreement-european-union-beef-hormones->. The agreement reached by the U.S. and E.U. allows conforming American beef products to be exported to the E.U. duty-free, instead of at the normal twenty percent tariff rate. *Id.*

when a task force representing these major trading partners reached a similar agreement.<sup>155</sup>

c. Necessary to Secure Compliance with Domestic Laws<sup>156</sup>

An alternative argument, but one unlikely to prevail, is that a trade ban would be necessary to secure compliance with domestic public health and safety laws. As discussed above, this argument was unsuccessful when Mexico used it to support a tariff on beverages and syrups containing HFCS. Even more demonstrative is *Korea—Beef*, a dispute in which the DSB struck down Korea’s retail restrictions on the sale of imported and domestic beef.<sup>157</sup>

Korea’s retail regulations, which applied only to fresh or chilled beef sold sliced and unpackaged, required butcher shops and other retail establishments to choose between selling imported or domestic beef. This was the government’s solution to the “strong incentive” butcher shops had to pass off less expensive imported beef as the more expensive domestic variety, a violation of consumer fraud laws.<sup>158</sup> When Korea argued that the restrictions were “necessary to secure compliance with” its deceptive businesses practices act,<sup>159</sup> the panel held the restriction to an almost impossible standard, requiring Korea to prove that *no alternative* measures were available to accomplish the same goal.<sup>160</sup>

The U.S. argued that a less restrictive alternative solution would be to actively enforce the deceptive practices law with prosecutions and fines, but

155. Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones): Complaint by the U.S.*, ¶ 2.35, WT/DS/26/R/USA (Aug. 18, 1997).

156. GATT 1947, *supra* note 68, at art. XX(d).

157. Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶¶ 5, 186–87, WT/DS161/AB/RW, WT/DS169/AB/RW (Apr. 21, 2001) [hereinafter Appellate Body Report, *Korea—Beef*]; Panel Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R (July 31, 2000) (*amended by* Appellate Body Report, *Korea—Beef*) [hereinafter Panel Report, *Korea—Beef*].

158. Panel Report, *Korea—Beef*, *supra* note 157, ¶¶ 237–38. While Korea stipulated that imported and domestic beef were “like products,” it argued that the stores were regulated identically, irrespective of which type of beef they choose to sell. *Id.* ¶¶ 179, 621–22 The Panel focused instead on the fact that the number of stores selling domestic beef outnumbered those selling imported beef by approximately nine-to-one. No evidence was introduced that the government was responsible for the imbalance, but the Panel found this disparity “limit[ed] the possibility for consumers to compare imported and domestic products and effectively base their consumption choice on the differences in quality, characteristic and prices of products, . . . [t]hereby . . . reduc[ing] opportunities for imported products to compete directly with domestic products.” *Id.* ¶ 631.

159. *Id.* ¶ 250 (citing Unfair Competition Prevention and Business Secret Protection Act, Act No. 6421, Feb. 3, 2001 (S. Kor.)).

160. *Id.* ¶ 659 (emphasis added).

Korea objected that this would be prohibitively expensive.<sup>161</sup> The appellate body was not persuaded, observing that if Korea had the resources to identify the problem it must still have the resources to continue surveying the 50,000 retail outlets and butcher shops.<sup>162</sup>

This circular logic—that if a country has sufficient resources to identify a violation of law, it follows that it must have the sufficient resources to enforce the law—suggests that exception XX(d) will rarely apply.<sup>163</sup> Although the DSB asserts that “[t]he greater the contribution a measure makes to the objective pursued, the more likely it is to be characterized as ‘necessary,’” there is little precedent to support this avenue for a ban based on animal welfare or food safety laws.<sup>164</sup>

d. Relating to the Conservation of Exhaustible Natural Resources<sup>165</sup>

As with the previous exception, this exception is less than ideal for animal welfare based arguments. To claim this exception, the E.U. would need to demonstrate that: (1) farm animals are “natural resources;” (2) farm animals are exhaustible; and (3) an import ban on foods from inhumanely raised animals “relates to” the “conservation” of farm animals.<sup>166</sup> Farm animals are “natural resources” under *U.S.—Shrimp*,<sup>167</sup> but they are not “exhaustible” in the way the sea turtles in *U.S.—Shrimp* were exhaustible, by virtue of their “endangered” status under the Convention on International Trade in Endangered Species (CITES).<sup>168</sup>

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161. The U.S. offered three alternatives: labeling, record-keeping, and prosecutions and fines. *Id.* ¶¶ 666, 673–74. Labeling was never addressed (presumably because the restriction applied only to beef that could not be labeled), and advanced record-keeping was found to be too sophisticated to implement.

162. Appellate Body Report, *Korea—Beef*, *supra* note 157, ¶¶ 179–80.

163. In an observation that appears somewhat irrelevant to the analysis, the panel criticized the measure as under-inclusive, because (1) Korea did not implement similar measures to distinguish between imported and domestic products such as pork and seafood; and (2) the beef restriction did not apply in restaurants, where 45% of imported beef was sold. *Id.* ¶ 168. If Korea had charged that imported beef was being fraudulently sold in restaurants as domestic beef, then the Board’s inclusion of this data would appear more relevant.

164. Appellate Body Report, *China—Audiovisuals*, *supra* note 131, ¶ 251.

165. GATT 1947, *supra* note 68, at art. XX(g).

166. Brett Grosko, *Just When Is It That a Unilateral Trade Ban Satisfies the GATT?: The WTO Shrimp and Shrimp Products Case*, 5 ENVTL. LAW. 817, 829–30 (1999). The test for “relates to” was whether the trade limitation had a “close and genuine relationship of ends and means.” *Id.* Preventing unnecessary sea turtle mortality was the ends; the means was eliminating fishing methods that also ensnared turtles. *Id.*

167. *Id.* at 829.

168. *Id.* at 830.

Alternatively, the E.U. could assert that domestic prohibitions on industrial farming practices and a trade ban on imports produced using those practices are necessary to conserve other natural resources. The environmental costs societies incur from CAFO agriculture are well-documented, including ground and surface water pollution, deforestation of threatened ecosystems, and contributions to climate change.<sup>169</sup> The preamble to the Marrakesh Agreement urges WTO members to make “optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment,” and the E.U.’s position should be that its own laws are in pursuance of this directive.

As demonstrated in *U.S.—Gasoline*, trade barriers initiated under the guise of conserving natural resources must be supported by domestic policies.<sup>170</sup> In that dispute, the appellate body rejected American import limitations on gasoline that exceeded set levels of certain pollutants. In its stinging rebuke, the appellate body harshly criticized the U.S. for awarding its domestic refineries more generous pollutant standards and compliance deadlines, while entirely disregarding foreign refineries, a clear violation of GATT Article III:4.<sup>171</sup> The obvious lesson is that any E.U. trade ban offered under this exception must not be beyond the E.U.’s own natural resource protections.

#### CONCLUSION

If member nations are to continue recognizing the World Trade Organization Dispute Resolution Body’s expansive—and expanding—authority over international trade disputes, the WTO must address the

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169. Rick Weiss, *Report Targets Cost of Factory Farming*, WASH. POST, Apr. 30, 2008, at A02, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/29/AR2008042902602.html?wpisrc=newsletter>.

170. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter Appellate Body Report, *U.S.—Gasoline*].

171. *Id.* at 28.

Clearly, the United States did not feel it feasible to require its domestic refiners to incur the physical and financial costs and burdens entailed by immediate compliance with a statutory baseline. The United States wished to give domestic refiners time to restructure their operations and adjust to the requirements in the Gasoline Rule. This may very well have constituted sound domestic policy from the viewpoint of the EPA and U.S. refiners. At the same time we are bound to note that, while the United States counted the costs for its domestic refiners of statutory baselines, there is nothing in the record to indicate that it did other than disregard that kind of consideration when it came to foreign refiners.

*Id.*

political and ideological discord that created the chasms between the farm animal welfare and food safety regulatory systems discussed in this article. In doing so, it may become the final arbiter of international agricultural animal welfare standards, whether or not it is the appropriate body for this task. At least for the near future, the E.U.'s prospects for supporting its agricultural reforms with trade restrictions against non-conforming animal food products appear to be improving, and the E.U. should continue to exercise its sovereign determination to insure the viability of its domestic food production industry.