

2010

## Talkin' Bout a Humane Revolution: New Standards for Farming Practices and How They Could Change International Trade as We Know It

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### Recommended Citation

Lesley Peterson, *Talkin' Bout a Humane Revolution: New Standards for Farming Practices and How They Could Change International Trade as We Know It*, 36 *Brook. J. Int'l L.* (2010).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol36/iss1/6>

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# TALKIN' 'BOUT A HUMANE REVOLUTION:<sup>1</sup> NEW STANDARDS FOR FARMING PRACTICES AND HOW THEY COULD CHANGE INTERNATIONAL TRADE AS WE KNOW IT

## INTRODUCTION

What we eat and where it comes from matters.<sup>2</sup> While over the past few decades animal activists have been advocating for the humane treatment of animals,<sup>3</sup> the battle over farm animal welfare recently made its way onto the November 2008 California state ballot,<sup>4</sup> in the form of Proposition 2 (“Prop 2”),<sup>5</sup> the Prevention of Farm Animal Cruelty Act.<sup>6</sup> This Act, while arguably “modest,”<sup>7</sup> will prospectively improve living standards for farm animals by prohibiting conditions that do not allow animals to lie down, stand up, fully extend their limbs, or to turn around,<sup>8</sup> thus banning in California three widely used agricultural

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1. This title was inspired by Tracy Chapman’s song, “Talkin’ ‘Bout A Revolution.” TRACY CHAPMAN, *Talkin’ ‘Bout A Revolution*, on TRACY CHAPMAN (Elektra/Asylum Records 1988).

2. See, e.g., JONATHAN SAFRAN FOER, *EATING ANIMALS* 32 (2009) (“There is something about eating animals that tends to polarize . . . become an activist or disdain activists . . . If and how we eat animals cuts to something deep.”).

3. See Kristen Stuber Snyder, Note, *No Cracks In the Wall: The Standing Barrier and the Need for Restructuring Animal Protection Laws*, 57 CLEV. ST. L. REV. 137, 142 (2009).

4. See *California Online Voter Guide November 2008 General Election*, CAL. VOTER FOUND., <http://www.calvoter.org/voter/elections/2008/general/props/index.html> (last visited Aug. 19, 2010).

5. See *id.*

6. The California Health and Safety Code’s Farm Animal Cruelty provision provides:

In addition to other applicable provisions of law, a person shall not tether or confine any covered animal, on a farm, for all or the majority of any day, in a manner that prevents such animal from:

Lying down, standing up, and fully extending his or her limbs; and

Turning around freely.

CAL. HEALTH & SAFETY CODE § 25990 (West 2010) (effective Jan. 1, 2015).

7. *Get Involved, Action Alerts & Updates, November 4, 2008: SUCCESS ON PROP 2!*, FARM SANCTUARY (Nov. 4, 2008), [http://farmsanctuary.org/get\\_involved/yesonprop2.html](http://farmsanctuary.org/get_involved/yesonprop2.html) [hereinafter *Get Involved, Action Alerts & Updates*].

8. CAL. HEALTH & SAFETY CODE § 25990 (West 2010) (effective Jan. 1, 2015).

confinement systems:<sup>9</sup> the battery cage for egg-laying hens,<sup>10</sup> the veal crate for baby male cows,<sup>11</sup> and the gestation crate for pregnant pigs.<sup>12</sup> Due to the nature of California's agricultural industry, this Act prompted a fight between the egg industry and Prop 2 supporters.<sup>13</sup> According to the agricultural trade magazine *Egg Industry*,<sup>14</sup> animal activists' efforts to bring Prop 2 to the California ballot was not something to be taken lightly; United Egg Producers ("UEP")<sup>15</sup> stated that it needed "all hands on deck" for what the magazine deemed possibly "one of the biggest and most important battles of U.S. egg industry history."<sup>16</sup> UEP was justified in its concern; on November 4, 2008 animal rights advocates around the U.S. celebrated<sup>17</sup> at the expense of agribusiness as Prop 2 passed by

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9. See, e.g., *Get Involved, Action Alerts & Updates*, *supra* note 7.

10. About 95% of commercial egg production in the U.S. takes place in these "caged layers." UNITED EGG PRODUCERS, ANIMAL HUSBANDRY GUIDELINES FOR U.S. EGG LAYING FLOCKS 1 (2010), available at <http://www.uepcertified.com/media/pdf/UEP-Animal-Welfare-Guidelines.pdf>. "Space allowance should be in the range of 67 to 86 square inches of usable space per bird to optimize hen welfare." *Id.* at 18. This translates into "giv[ing] hens less space than the area of a letter-sized sheet of paper in which to eat, sleep, lay eggs, and defecate." Jonathan R. Lovvorn & Nancy V. Perry, *California Proposition 2: A Watershed Moment for Animal Law*, 15 ANIMAL L. 149, 152 (2009).

11. "[V]eal calves are confined in wooden stalls so small that the young animal cannot turn around." Mariann Sullivan & David J. Wolfson, *If It Looks Like A Duck . . . New Jersey, the Regulation of Common Farming Practices, and the Meaning of "Humane,"* in ANIMAL LAW AND THE COURTS: A READER 94, 94 (Taimie L. Bryant, et al. eds., 2008).

12. "[B]reeding pigs spend nearly all of their three to four years on earth in metal stalls, generally able to take no more than one step forward or back, never able to turn around." *Id.*

13. Prop 2 focused on the hens, because "California doesn't have much of a veal or pork industry . . . California produces 6% of the nation's eggs." Julie Schmit, *California Vote Could Change U.S. Agribusiness*, USA TODAY, Nov. 6, 2008, at 4B.

14. See EGG INDUSTRY, <http://www.eggindustry-digital.com/eggindustry/200912#pg1> (last visited Aug. 19, 2010).

15. UEP is an organization of egg producers that provides services to its members in "government relations, animal welfare, environment, food safety, industry coalition building, nutrition, egg trading, member service programs, and communications." *History and Background*, UNITED EGG PRODUCERS, <http://www.unitedegg.org/history/default.cfm> (last visited July 7, 2010).

16. Edward Clark, *Standing-Room-Only as UEP Debates How to Counter Activists*, EGG INDUSTRY 8 (Mar. 2008), <http://www.eggindustry-digital.com/eggindustry/200803?pg=8&pm=2&fs=1#pg8>. Prop 2 "effectively bans" standard battery cages. Schmit, *supra* note 13.

17. It is important to note that not all animal advocates supported Prop 2. See, e.g., Gary L. Francione & Anna E. Charlton, *Animal Advocacy in the 21st Century: The Abolition of the Property Status of Nonhumans*, in ANIMAL LAW AND THE COURTS: A READER 7, 24 (Taimie L. Bryant, et al. eds., 2008) (in support of the "abolitionist approach" to animal advocacy: "As long as a majority of people think that eating animals and animal

63.2%,<sup>18</sup> thus securing more humane treatment for farm animals raised in California.<sup>19</sup>

The current American “farm” house, with thousands of animals in a large-scale, factory-type<sup>20</sup> setting, is a relatively recent phenomenon.<sup>21</sup> Although the U.S. Congress enacted the federal Animal Welfare Act<sup>22</sup> in 1966 to provide federal protection for animals,<sup>23</sup> it contains a specific exemption for farm animals.<sup>24</sup> Thus, states retain the responsibility of protecting farm animals.<sup>25</sup> Until the recent passing of Prop 2<sup>26</sup> and simi-

products is a morally acceptable behavior, nothing will change.”); *see also* Gary L. Francione, *What to Do on Proposition 2?*, ANIMAL RIGHTS: THE ABOLITIONIST APPROACH (Sept. 2, 2008, 4:02 AM EST), <http://www.abolitionistapproach.com/what-to-do-on-proposition-2/> (Gary Francione’s personal blog, which in this posting outlines the reasons why animal advocates should vote “no” for Prop 2).

18. *California - Election Results 2008*, N.Y. TIMES, (Dec. 9, 2008), <http://elections.nytimes.com/2008/results/states/california.html>. More than 8.2 million California voters said “yes” to Prop 2. *Id.*; *see Lovvorn & Perry, supra* note 10, at 167 (citing *Proposition 2 - Standards for Confining Farm Animals*, CAL. SEC’Y OF STATE DEBRA BROWN, [http://www.sos.ca.gov/elections/sov/2008\\_general/maps/returns/props/prop-2.htm](http://www.sos.ca.gov/elections/sov/2008_general/maps/returns/props/prop-2.htm) (last visited Aug. 19, 2010)).

19. For the viewpoint that Prop 2 will eliminate California industry and jobs, and will create less safe egg conditions, *see generally Proposition 2, Standards for Confining Farm Animals, State of California*, SMART VOTER, LEAGUE OF WOMEN VOTERS, <http://www.smartvoter.org/2008/11/04/ca/state/prop/2/> (last visited Aug. 19, 2010); *see also* Michael J. Crumb, *Researchers Ask: Are Caged Chickens Miserable?*, ABC NEWS (Nov. 19, 2009), <http://abcnews.go.com/Technology/wirestory?id=9123424&page=2> (discussing how egg producers claim that “caged chickens are healthier and satisfied with the only lives they’ve ever known”).

20. For a discussion of large-scale factory farms, *see* Jim Mason, *Brave New Farm?* in *IN DEFENSE OF ANIMALS* 89, 89–107 (Peter Singer ed., 1985).

21. *See* Sullivan & Wolfson, *supra* note 11, at 95 (discussing how industrial farming methods that developed after World War II caused farm animal cruelty to become “embedded in the methods of production themselves, and the life of each individual animal has become much less valuable to the producers who raise them for food”).

22. *See* 7 U.S.C. §§ 2131–2159.

23. *See* 7 U.S.C. § 2131 (1976).

24. *See* 7 U.S.C. § 2132(g)(3) (2002); *see also* Sullivan & Wolfson, *supra* note 11, at 96 (discussing how, since the U.S. does not have a federal law that protects and regulates the way that farmed animals are raised, the U.S. Department of Agriculture (“USDA”) cannot create regulations for farm animal welfare).

25. *See* Sullivan & Wolfson, *supra* note 11, at 96. Additionally, egg sale regulation is considered to be a part of the state police power, and is valid so long as it is “intended to protect the public health against unwholesome eggs.” 35A AM. JUR. 2D *Food* § 35 (2010); *see also* *Rose Acre Farms, Inc. v. Madigan*, 956 F.2d 670 (7<sup>th</sup> Cir. 1992). Egg sale production regulations must also be reasonable and cannot infringe on the U.S. Constitution’s Commerce Clause. 35A AM. JUR. 2D *Food* § 35 (2010). A law regulating the sale of eggs between states could be challenged under the U.S. Constitution’s Commerce

lar statutes,<sup>27</sup> anti-cruelty statutes were the sole means of protection for farmed animals, but they were extremely ineffective due to exemptions for “customary” farming practices,<sup>28</sup> such as battery cage housing for hens.<sup>29</sup> While similar laws previously passed in Florida,<sup>30</sup> Arizona,<sup>31</sup> Oregon,<sup>32</sup> and Colorado,<sup>33</sup> Prop 2<sup>34</sup> is the first to create minimum farm animal welfare standards for battery cage hens, and thus, is groundbreaking.<sup>35</sup> In fact, *Feedstuffs*, deemed “one of the largest agribusiness

Clause, which gives Congress the right “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes” U.S. CONST. art. I, § 8, cl. 3. See also Kim Walker & Jacob Bylund, *California’s Prop 2: Is It Constitutional? (Commentary)*, FEEDSTUFFS FOODLINK (Dec. 1, 2008), <http://www.feedstuffsfoodlink.com/ME2/dirmod.asp?sid=F4A490F89845425D8362C0250A1FE984&nm=&type=news&mod=News&mid=9A02E3B96F2A415ABC72CB5F516B4C10&tier=3&nid=56A43ADC0FA34373BB2A199FC33AAFC1>.

26. CAL. HEALTH & SAFETY CODE § 25990 (West 2010) (effective Jan. 1, 2015).

27. *Maine Becomes Sixth U.S. State to Ban Extreme Confinement*, HUMANE SOC’Y OF THE U.S. (May 13, 2009), [http://www.hsus.org/farm/news/ournews/maine\\_bans\\_veal\\_gestation\\_crates\\_051309.html](http://www.hsus.org/farm/news/ournews/maine_bans_veal_gestation_crates_051309.html) [hereinafter *Maine*]; 2009: A Record-Breaking Year of State Victories, HUMANE SOC’Y OF THE U.S. (Dec. 15, 2009), [http://www.humanesociety.org/about/departments/legislation/state\\_leg\\_victories.html](http://www.humanesociety.org/about/departments/legislation/state_leg_victories.html) [hereinafter *Record-Breaking*].

28. Sullivan & Wolfson, *supra* note 11, at 97 (discussing how, in states with these exceptions, farmers are able to control what is deemed to be customary).

29. See, e.g., David J. Wolfson, *Beyond the Law: Agribusiness and the Systematic Abuse of Animals Raised for Food or Food Production*, 2 ANIMAL L. 123, 134–5 (1996). Even without exemptions, states have found a host of enforcement problems when it comes to bringing a farm animal cruelty case. *Id.* For a discussion of the difficulty in a prosecutor’s task of bringing an anti-cruelty case, see Sullivan & Wolfson, *supra* note 11, at 96. “There has not been a successful prosecution of a standard practice for the rearing of farmed animals in any state pursuant to a general anticruelty statute.” *Id.* at 100.

30. Press Release, Humane Soc’y of the U.S., Voters Protect Pigs in Florida, Ban Cockfighting in Oklahoma, (Nov. 6, 2002), available at [http://www.hsus.org/press\\_and\\_publications/press\\_releases/voters\\_protect\\_pigs\\_in\\_florida\\_ban\\_cockfighting\\_in\\_oklahoma.html](http://www.hsus.org/press_and_publications/press_releases/voters_protect_pigs_in_florida_ban_cockfighting_in_oklahoma.html).

31. *Election ‘06: Animals Win in Arizona and Michigan*, HUMANE SOC’Y OF THE U.S. (Nov. 7, 2006), [http://www.hsus.org/legislation\\_laws/ballot\\_initiatives/election\\_06\\_animals\\_win\\_.html](http://www.hsus.org/legislation_laws/ballot_initiatives/election_06_animals_win_.html).

32. *Oregon Makes History by Banning Gestation Crates*, HUMANE SOC’Y OF THE U.S. (June 28, 2007), [http://www.hsus.org/farm/news/ournews/oregon\\_gestation\\_crates.html](http://www.hsus.org/farm/news/ournews/oregon_gestation_crates.html).

33. *Landmark Farm Animal Welfare Bill Approved in Colorado*, HUMANE SOC’Y OF THE U.S. (May 14, 2008), [http://www.hsus.org/farm/news/ournews/colo\\_gestation\\_crate\\_veal\\_crate\\_bill\\_051408.html](http://www.hsus.org/farm/news/ournews/colo_gestation_crate_veal_crate_bill_051408.html).

34. CAL. HEALTH & SAFETY CODE § 25990 (West 2010) (effective Jan. 1, 2015).

35. See Lovvorn & Perry, *supra* note 10, at 150 (describing Prop 2 as “the most important animal law reform in the last decade”).

newspapers in the country,”<sup>36</sup> states that Prop 2 will affect the production of livestock and poultry throughout the U.S., and possibly all of North America.<sup>37</sup> Since its passing, Maine and Michigan passed similar laws, and Ohio negotiated an agreement between animal advocacy organizations, members of the agriculture industry, and its governor, to change industry practices.<sup>38</sup> Laws are also pending before other state legislatures.<sup>39</sup> Furthermore, the Humane Society of the United States (“HSUS”) announced a push for federal legislation prohibiting federal programs from contracting with suppliers who raise animals used for meat, egg, and dairy products, in conditions of extreme confinement.<sup>40</sup>

However, it is still unclear how far these humane treatment laws will extend. For example, some farms contest what standards are deemed acceptable by Prop 2’s requirements;<sup>41</sup> others speculate that, due to necessary cost-prohibitive renovations, they will have to “downsize or

36. *Id.*

37. *Id.* (citing Editorial, *California Dam Must Not Be Breached*, FEEDSTUFFS, June 29, 2008, <http://www.feedstuffs.com/ME2/dirmod.asp?sid=49804C6972614A63A1A10DF54CD95D65&nm=Search+our+Archives&type=Publishing&mod=Publications%3A%3AArticle&mid=AA01E1C62E954234AA0052ECD5818EF4&tier=4&id=6F3F259E892B4329B83E0B0AAFFCE2A6> (last visited July 27, 2010)).

38. *Maine*, *supra* note 27; *Record-Breaking*, *supra* note 27; see Press Release, Humane Soc’y of the U.S., Landmark Ohio Animal Welfare Agreement Reached Among HSUS, Ohioans for Humane Farms, Gov. Strickland, and Leading Livestock Organizations, (June 30, 2010), available at [http://www.humanesociety.org/news/press\\_releases/2010/06/landmark\\_ohio\\_agreement\\_063010.html](http://www.humanesociety.org/news/press_releases/2010/06/landmark_ohio_agreement_063010.html).

39. For example, a bill similar to Prop 2 is currently pending before the New York State Legislature. Assemb. A08163, Reg. Sess. (N.Y. 2010).

40. See *Prevention of Farm Animal Cruelty Act*, HUMANE SOC’Y OF THE U.S., [http://www.humanesociety.org/action/fed\\_bill/farm\\_animals/prevention\\_of\\_farm\\_animal\\_cruelty\\_act.html](http://www.humanesociety.org/action/fed_bill/farm_animals/prevention_of_farm_animal_cruelty_act.html) (last visited Aug. 19, 2010); see also H.R. 4733, 111th Cong. (2009–2010).

41. J.S. West & Co., a California egg producer, built a new facility that, in its opinion, meets Prop 2’s requirements: “The new enclosures provide an average of 116 square inches of floor space per hen . . . [and] add[] features designed to meet various hen needs—a curtained area for nesting, a pair of metal tubes for perching and a ‘scratch pad’ that helps the bird clean itself.” John Holland, *J.S. West Enlarges Its Hen Cages But Will They Comply With Space Standards?*, MODESTO BEE, June 22, 2010, at B1, available at <http://www.modbee.com/2010/06/21/v-print/1220229/js-west-enlarges-its-hen-cages.html>. However, HSUS believes that no confinement system will meet the requirements. See *id.* See also Press Release, Humane Soc’y of the U.S., California Egg Producer Falsely Claims That Inhumane Confinement System Will Comply With Proposition 2, (Sept. 15, 2009), available at [http://www.hsus.org/press\\_and\\_publications/press\\_releases/js\\_west\\_09152009.html](http://www.hsus.org/press_and_publications/press_releases/js_west_09152009.html).

close.”<sup>42</sup> Furthermore, the new laws for gestation and veal crates currently only apply to in-state agricultural producers, while the law regarding eggs was recently extended to prospectively cover the production methods of all whole eggs sold in California (regardless of the state where they were originally produced).<sup>43</sup> The strong public support for Prop 2<sup>44</sup> begs the question—how much longer will American consumers continue to accept the production of eggs raised in intensive confinement systems?<sup>45</sup>

Arguably one of the most significant implications of the increase in humane farming legislation in the U.S. is the potential impact on international trade. The U.S. has certain international treaty obligations that it must uphold when trading with other countries;<sup>46</sup> these commitments can be found in the General Agreement on Tariffs and Trade<sup>47</sup> (“GATT”), which is the World Trade Organization’s (“WTO”)<sup>48</sup> agreement to re-

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42. Courtenay Edelhart, *Can They Survive? Farmers Worry About Impact of Proposition 2*, BAKERSFIELD CALIFORNIAN (Nov. 7, 2008), <http://www.bakersfield.com/news/business/economy/x1998580391/Can-they-survive-Farmers-worry-about-impact-of-Proposition-2>.

43. See Press Release, Humane Soc’y of the U.S., Governor Schwarzenegger Signs Landmark Egg Bill into Law, (July 6, 2010), *available at* [http://www.humanesociety.org/news/press\\_releases/2010/07/ab1437\\_passage\\_070610.html](http://www.humanesociety.org/news/press_releases/2010/07/ab1437_passage_070610.html).

44. The strong public response was demonstrated by voter turn-out in California. See *Proposition 2 - Standards for Confining Farm Animals*, *supra* note 18. It was also demonstrated by Prop 2’s successful passage; see *Californians Make History by Banning Veal Crates, Battery Cages, and Gestation Crates*, HUMANE SOC’Y OF THE U.S. (Nov. 4, 2008), [http://www.hsus.org/farm/news/ournews/prop2\\_california\\_110408.html](http://www.hsus.org/farm/news/ournews/prop2_california_110408.html); and subsequent similar bills in other states; see, e.g., *Maine*, *supra* note 27.

45. “[M]ore than four-fifths of Americans believe there should be effective laws that protect farm animals against cruelty, and nearly three-quarters believe there ought to be federal inspections of farms to ensure humane treatment.” Lovvorn & Perry, *supra* note 10, at 153 (citing ZOGBY INT’L, *NATIONWIDE VIEWS ON THE TREATMENT OF FARM ANIMALS* 6 (2003), *available at* <http://civileats.com/wp-content/uploads/2009/09/AWT-final-poll-report-10-22.pdf>).

46. See DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, *INTERNATIONAL TRADE LAW* 102 (2008) (discussing how “[e]ach member of the WTO that undertakes an international trade obligation has a duty to transform and implement that obligation in its domestic legal order”). However, WTO agreements have been defined as “non-self-executing agreements,” which means they do not automatically take effect in U.S. law. *Id.* at 133, 137.

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

48. The WTO was created to “provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments.” Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, art. 2.

duce trade barriers for goods.<sup>49</sup> According to the Vienna Convention,<sup>50</sup> which contains rules governing treaty enforcement,<sup>51</sup> treaties must be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”<sup>52</sup> Furthermore, “[s]ince clarity and predictability are goals of the dispute settlement system,<sup>53</sup> WTO [dispute settlement] Panels have consistently said that the Vienna Convention is the tool they use to interpret the GATT.”<sup>54</sup>

Importantly, the GATT’s goal of reducing trade barriers through its various provisions, as interpreted by the Vienna Convention, could conflict with potential new animal welfare standards that lay out new expectations for both domestic and foreign producers. However, the fact that the U.S. and other countries are beginning to recognize and promote animal welfare standards,<sup>55</sup> suggests that as countries begin to modify their own measures at home, they will demand similar measures from their trading partners as well.<sup>56</sup> In turn, this may place pressure on the WTO to

49. *See id.*

50. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

51. *See* CHOW & SCHOENBAUM, *supra* note 46, at 9.

52. Vienna Convention, *supra* note 50, art. 31(1).

53. A WTO dispute settlement panel decides whether a nation has violated one of its obligations under the GATT. *See* CHOW & SCHOENBAUM, *supra* note 46, at 52–53. If so, the WTO recommends that the violating country “bring its non-conforming measure into compliance with the WTO.” *Id.* The WTO has also created an Appellate Body to review Panel decisions. *Id.* at 53.

54. Peter C. Maki, Note, *Interpreting GATT Using the Vienna Convention on the Law of Treaties: A Method to Increase the Legitimacy of the Dispute Settlement System*, 9 MINN. J. GLOBAL TRADE 343, 352 (2000).

55. An example worthy of recognition is the European Union (“EU”), which passed the EU Laying Hens Directive in 1999, requiring a ban on battery cages for all hen-laying eggs in the EU by 2012. Council Directive 99/74, 1999 O.J. (L 203/53), *amended by* Council Regulation 806/2003, 2003 O.J. (L 122) (EC); *see also* 2012 EU Battery Cage Ban Will Be Upheld, COMPASSION IN WORLD FARMING (Jan. 10, 2008), [http://www.ciwf.org.uk/news/laying\\_hens/cage\\_ban\\_will\\_be\\_upheld.aspx](http://www.ciwf.org.uk/news/laying_hens/cage_ban_will_be_upheld.aspx). Labour Member of the European Parliament (“MEP”) Mark Watts stated, “It is a myth that consumers won’t buy free-range eggs. The fact is that 89% of the British public believe [*sic*] keeping hens in small cages is cruel . . . .” *EU Bans Battery Hen Cages*, BBC NEWS, (Jan. 28, 1999), [http://news.bbc.co.uk/2/hi/uk\\_news/264607.stm](http://news.bbc.co.uk/2/hi/uk_news/264607.stm).

56. *See, e.g.,* Gaverick Matheny & Cheryl Leahy, *Farm-Animal Welfare, Legislation, and Trade*, 70 LAW & CONTEMP. PROBS. 325, 349 (2007) (citing Committee on Agriculture Special Session, *European Communities Proposal: Animal Welfare and Trade in Agriculture*, G/AG/NG/W/19 (June 28, 2000), *available at* [www.wto.org/english/tratop\\_e/agric\\_e/ngw19\\_e.doc](http://www.wto.org/english/tratop_e/agric_e/ngw19_e.doc)) (“[A]nimal welfare standards . . . could be undermined if there is no way of ensuring that agricultural and food products produced to domestic animal welfare standards are not simply replaced by imports pro-

accept animal welfare standards as complying with GATT trading obligations. Further, this trend suggests that animal welfare may begin to play a role in determining trade rules between countries, or at the very least, may begin to have a presence amidst trade discussions, concerns, and objectives.<sup>57</sup> However, when analyzing a dispute between nations, it is still unclear if a WTO dispute settlement panel would see a trade restriction such as a countrywide ban on the production and importation of battery cage eggs, as a violation of WTO obligations. The WTO should accept and recognize such a restriction as complying with the GATT, due to the fact that the purpose of such a measure coincides with the plain meaning and purpose of certain GATT provisions.

Part I of this Note analyzes the U.S.'s trade obligations under the GATT. Part II discusses the potential ability of various GATT provisions to support a trade measure banning battery cage eggs. Part III discusses the U.S.'s potential ability to create such an animal welfare provision, while upholding its obligations in the Agreements annexed to the GATT. The Note concludes that an appropriately tailored animal welfare measure banning battery cages for hens should be able to survive under the GATT and its annexed agreements.

#### I. CURRENT LAY OF THE LAND: AN ANALYSIS OF TWO WTO TRADING OBLIGATIONS

While seemingly removed from farm animal welfare issues, trade agreements have the ability to bring about significant animal welfare reform in the agricultural industry.<sup>58</sup> Currently, the WTO can be seen as both a friend and a foe to initiatives seeking to improve animal welfare in

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duced to lower standards"). The EU has begun to provide for animal welfare provisions in some of its free trade agreements. *Improving Animal Welfare: EU Action Plan*, POULTRY SITE (Jan. 2006), <http://www.thepoultrysite.com/articles/511/improving-animal-welfare-eu-action-plan>. Two examples of such agreements are between the EU and Canada, and the EU and Chile. *Id.* Free trade agreements are permissible under the GATT, Article XXIV.4. GATT, *supra* note 47, art. XXIV.4.

57. See, e.g., USDA FOREIGN AGRIC. SERV., GAIN REPORT, EU HOSTS GLOBAL CONFERENCE ON TRADE AND FARM ANIMAL WELFARE (2009), available at <http://www.fas.usda.gov/gainfiles/200902/146327292.pdf> (discussing the January 2009 European Commission's conference regarding international trade and farm animal welfare).

58. See DAVID S. FAVRE, *Agricultural Animals*, in ANIMAL LAW: WELFARE, INTERESTS, AND RIGHTS 287, 315 (2008). The international trade problems surrounding a country's decision to restrict imports that do not meet the country's animal welfare standards, have already been contemplated. See Matheny & Leahy, *supra* note 56. However, their argument focuses more on the potential for change through consumer and retailer campaigns. *Id.*

farming practices.<sup>59</sup> The GATT contains many obligations for member countries that restrict the way that products can be differentiated. For example, under Article I(1),<sup>60</sup> the Most-Favored Nation (“MFN”) clause, and Article III(1),<sup>61</sup> the National Treatment clause, a WTO member cannot treat “like” products<sup>62</sup> from other WTO member countries less favorably than the same products from any other country,<sup>63</sup> or less favorably than its own domestic products.<sup>64</sup> These obligations limit WTO members’ abilities to create trade restrictions on battery cage eggs.

Article I’s MFN principle mandates that “any advantage, favour, privilege or immunity” granted by a WTO member to another country’s product “shall be accorded immediately and unconditionally” by that WTO member to any other WTO member’s like product.<sup>65</sup> In essence, instead of permitting one country to bestow special treatment on another country, MFN requires equal treatment for all WTO members.<sup>66</sup> Article III contains the National Treatment principle, which mandates that internal charges cannot be applied in a way “so as to afford protection to domestic production.”<sup>67</sup> It is important to emphasize that in both MFN and National Treatment, the principles only prohibit discrimination against “like” products.<sup>68</sup> While at first glance, it may appear that the differing

59. Critics have focused on the WTO’s support of “industrial farming by virtue of reducing trade barriers for large farms. On the other hand . . . the WTO is focused on the eventual eradication of subsidies that make these horrific factory farms competitive with traditional animal farming, or indeed enable factory farms to continue operating at all.” Kyle Ash, *Why “Managing” Biodiversity Will Fail: An Alternative Approach to Sustainable Exploitation for International Law*, 13 *ANIMAL L.* 209, 221 (2007).

60. GATT, *supra* note 47, art. I.1.

61. *Id.* art. III.1.

62. An examination of whether products are “like” products is conducted case-by-case with several considerations, such as “the product’s end-uses in a given market; consumers’ tastes and habits, which change from country to country; the product’s properties, nature, and quality.” Report of the Working Party on Border Tax Adjustments, ¶ 18, L/3464 (Dec. 2. 1970).

63. GATT, *supra* note 47, art. I.1.

64. *Id.* art. III.1.

65. *Id.* art. I.1.

66. *See, e.g.* MITSUO MATSUSHITA ET AL., *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* 143 (2003).

67. GATT, *supra* note 47, art. III.1. Through Article III, MFN also incorporates equal treatment for “internal taxes and other internal charges.” *Id.* art. III.2.

68. *See, e.g.* MATSUSHITA ET AL., *supra* note 66, at 150. What constitutes “like” products under the MFN principle is deemed case-by-case, but the analysis can include looking at the products’ tariff classifications, product end uses, physical characteristics, and consumer tastes. *See id.* at 150–1. What constitutes “like” products under the National Treatment principle is deemed case-by-case, and it can include the same analyses as MFN, as well as whether the two products are “directly competitive or substitutable

manners in which products are produced (such as eggs from battery cages and eggs from cage-free facilities) change them so that they are not “like” one another, these differences are considered to be “processes and production methods” (“PPMs”),<sup>69</sup> which generally do not change a product’s likeness to another product.<sup>70</sup>

In *The World Trade Organisation Rules: A Legal Analysis of Their Adverse Impact on Animal Welfare*,<sup>71</sup> Peter Stevenson cites two WTO Panel reports, the *Tuna-Dolphin* cases,<sup>72</sup> that demonstrate how the WTO has held that two commodities (in this case, tuna caught in seine nets, which cause high mortality rates amongst dolphins (“non-dolphin-safe nets”), and tuna caught in nets designed to reduce dolphin mortality rates (“dolphin-safe nets”)), are the same product, and cannot be distinguished from one another based on the way they are caught.<sup>73</sup> Specifically, the first Panel held that Article III requires “a comparison of the treatment of imported tuna *as a product* with that of domestic tuna *as a product*. Regulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product.”<sup>74</sup> GATT Panel reports like those from the *Tuna/Dolphin* cases<sup>75</sup> articulate that a country cannot take into account the way that a product is produced when deter-

product[s].” GATT, *supra* note 47, art. Annex I, Ad Article III.2; *see also id.* arts. I.1, III.2, III.4; MATSUSHITA ET AL., *supra* note 66, at 159–160.

69. *See* MATSUSHITA ET AL., *supra* note 66, at 461.

70. *See, e.g., id.* “Some PPMs are related directly to the characteristics of the products concerned. For example, pesticides used on food crops produce residues on food products . . . Other PPMs, however, are not reflected in the characteristics of the associated product . . . [and] probably cannot be justified under [the other WTO Agreements].” *Id.* at 461–2; *see also* FOOD AND AGRIC. ORG. OF THE UNITED NATIONS, DEVELOPING ANIMAL WELFARE: THE OPPORTUNITIES FOR TRADE IN HIGH WELFARE PRODUCTS FROM DEVELOPING COUNTRIES (2005), *available at* [http://www.fao.org/fileadmin/user\\_upload/animalwelfare/Developing%20country%20report.pdf](http://www.fao.org/fileadmin/user_upload/animalwelfare/Developing%20country%20report.pdf) (discussing how almost all animal welfare concerns stem from manners of producing a product, which cannot be seen in the final product, and how “[i]t is generally presumed that product distinctions based on such PPMs conflict with Article III of the . . . GATT[.]”).

71. Peter Stevenson, *The World Trade Organisation Rules: A Legal Analysis of Their Adverse Impact on Animal Welfare*, 8 ANIMAL L. 107 (2002).

72. *Id.* at 111 (citing Panel Report, *United States – Restrictions on Imports of Tuna*, WT/DS 21/R (Sept. 3, 1991) [hereinafter *Tuna-Dolphin I*]; Panel Report, *United States – Restrictions on Imports of Tuna*, WT/DS29/R (Jun. 16, 1994) [hereinafter *Tuna-Dolphin II*]). Neither panel report was adopted by the GATT Council. Stevenson, *supra* note 71, at 111, n. 24, 26.

73. *See* Stevenson, *supra* note 71, at 114.

74. *Id.* (citing *Tuna-Dolphin I*, *supra* note 72, ¶ 5.15).

75. *Tuna-Dolphin I*, *supra* note 72; *Tuna-Dolphin II*, *supra* note 72.

mining if it is “like” another product,<sup>76</sup> because the production method does not change the end product.<sup>77</sup> Furthermore, whether or not a product is “like” another product is “fundamentally, a determination about the nature and extent of a competitive relationship between and among products.”<sup>78</sup> For example, tuna products caught in non-dolphin-safe nets are seen as directly competing in the marketplace with tuna products that are caught in dolphin-safe nets. Therefore, the WTO reasons that despite having different PPMs, these tuna products are “like” products.<sup>79</sup> In fact, no GATT Panel has thus far allowed a country to distinguish “like” products based on differing PPMs (with the exception of differing PPMs that can cause severe health risks).<sup>80</sup>

However, there is a strong argument that eggs produced by battery cage hens and eggs produced by cage-free hens undergo such vastly different production methods, that they should not be considered “like” products.<sup>81</sup> The analysis of whether two products are “like” one another is dependent—at least in part—upon consumer preferences,<sup>82</sup> since “consumers’ tastes and habits are one of the key elements in the competitive relationship between products in the marketplace.”<sup>83</sup> Importantly, consumers who buy cage-free eggs do not see these two products as “like” one another,<sup>84</sup> since they make the conscious decision to buy one product based on its more “humane” production method.<sup>85</sup> Furthermore, if hens

76. See Stevenson, *supra* note 71, at 110; see also 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, 17 (2008) (discussing how the “Tuna/Dolphin I dispute panel held that an environmentally and animal-welfare motivated PPM distinction was forbidden by the world trading regime”).

77. See, e.g., *Tuna-Dolphin I*, *supra* note 72, ¶ 5.15.

78. Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 99, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *Asbestos*].

79. *Tuna-Dolphin I*, *supra* note 72, ¶ 5.15.

80. See generally *Asbestos*, *supra* note 78.

81. See Stevenson, *supra* note 71, at 111.

82. See MATSUSHITA ET AL., *supra* note 66, at 151.

83. Stevenson, *supra* note 71, at 117; see also *Asbestos*, *supra* note 78, ¶ 117.

84. See Peter Singer & Jim Mason, *Introduction: Food and Ethics*, in *THE WAY WE EAT: WHY OUR FOOD CHOICES MATTER* 4 (2006) (discussing various reasons, for example, why consumers choose to purchase organic food, from “an ethical concern for the environment to a desire to avoid ingesting pesticides and the conviction that organic food tastes better than food from conventional sources”); see also Stevenson, *supra* note 71, at 111.

85. See Archibald, *supra* note 76, at 45–46 (discussing how “the words ‘like products’ should not refer to two products whose production methods result in vastly different ‘ecological footprints’ . . . .”); see also Stevenson, *supra* note 71, at 120–121 (holding that in the future, the WTO could rule “that, despite being physically identical or similar,

are fed grass at pasture (as opposed to a seed diet in battery cages) they arguably produce a healthier egg.<sup>86</sup> Since consumers treat these two products (battery cage and cage-free eggs) differently, the WTO should follow suit. However, past Panel decisions have given no indication that future Panels will consider PPMs as affecting products' likeness to one another.<sup>87</sup>

## II. AN ANALYSIS OF THE GATT AGREEMENT AND ANIMAL WELFARE MEASURES UNDER THE EXCEPTIONS ARTICLE

Historically, the GATT treated measures made in pursuit of animal welfare goals unfavorably;<sup>88</sup> however, some GATT provisions actually indicate that such measures should be protected.<sup>89</sup> Even if a country's trade measure violates a trading obligation, such as MFN or National Treatment, it may be upheld as a permissible exception under GATT Article XX,<sup>90</sup> arguably one of the most important Articles in the GATT.<sup>91</sup> This exceptions provision allows, in "certain circumstances, legitimate public policy considerations other than trade liberalisation to take prece-

two products are not 'like' each other because a significant number of consumers in fact view them as being different . . . . [I]n an increasing number of countries . . . consumers distinguish between products derived from cruel practice and those coming from more humane practices"); *see also* Matheny & Leahy, *supra* note 56, at 350.

86. *See* MICHAEL POLLAN, IN DEFENSE OF FOOD 167–168 (2008). Pollan argues that for most animals who are fed grass, the result is animal products with "healthier fats . . . as well as . . . higher levels of vitamins and antioxidants . . . [Though grass-fed and seed-fed products look the same,] they are for all intents and purposes two completely different foods." *Id.* Importantly, Pollan notes that "free-range" hens do not necessarily have access to fresh grass. *Id.* at 168.

87. *See, e.g., Tuna-Dolphin I, supra* note 72, ¶ 5.15.

88. *See* Stevenson, *supra* note 71, at 109 (discussing how GATT rules make it difficult for WTO members to introduce animal welfare measures, because "under GATT rules the E.U. cannot prohibit the importation of meat derived from animals reared in non-E.U. countries [in cruel manners] . . . . GATT rules act as a powerful disincentive to the E.U. to prohibit the system within its own territory").

89. *See* GATT, *supra* note 47, art. XX. *But see* Matheny & Leahy, *supra* note 56, at 325 (arguing that "[a]lthough recognition in trade agreements and restrictions on sale could help to protect animal welfare, they may rarely be politically feasible").

90. GATT, *supra* note 47, art. XX.

91. *See, e.g.,* Hal S. Shapiro, *The Rules That Swallowed the Exceptions: The WTO SPS Agreement and Its Relationship to GATT Articles XX and XXI: The Threat of the EU-GMO Dispute*, 24 ARIZ. J. INT'L & COMP. LAW 199, 200 (2007) (discussing how this exception is linked to "some of the most powerful political and policy debates connected to the WTO—i.e, whether the WTO is sufficiently sensitive to labor, environmental, human rights and other issues").

dence over the free trade requirements of the main GATT articles.”<sup>92</sup> When analyzing a country’s trade measure under Article XX, the WTO must first look at the particular provision of the Article, to see if the measure appropriately fits under the provision’s described exception;<sup>93</sup> then, the WTO analyzes the measure under the “chapeau”<sup>94</sup> of Article XX to ensure that the measure is not “arbitrary or unjustifiable discrimination . . . or a disguised restriction on international trade.”<sup>95</sup> The chapeau is important for its role in helping to “rein in national abuse of the exceptions.”<sup>96</sup> There are three different provisions within Article XX that could potentially be used to protect an animal welfare measure from violating the GATT.

*A. Article XX(g): Exception for Exhaustible Natural Resources*

Article XX(g) is most likely the weakest of the three potential provisions to support a battery cage ban. This provision allows WTO members to enact measures applying to both foreign and domestic products, in order to conserve “exhaustible natural resources.”<sup>97</sup> However, it has been analyzed by GATT Panels and the Appellate Body in the *Shrimp/Turtle* cases<sup>98</sup> in a way that is favorable for only some animal welfare measures.<sup>99</sup> In *Shrimp/Turtle I*, the Panel recounts how the U.S. passed a regulation in 1987<sup>100</sup> that required shrimp trawling fishermen to use certain methods to decrease turtle mortality caused by traditional shrimp trawl-

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92. Stevenson, *supra* note 71, at 128. “Increased trade liberalization may be the goal of the WTO, but the organization understands that competing interests should be recognized.” Colm Patrick McInerney, *From Shrimps and Dolphins to Retreaded Tyres: An Overview of the World Trade Organization Disputes, Discussing Exceptions to Trading Rules*, 22 N.Y. INT’L L. REV. 153, 158–9 (2009).

93. See, e.g., *Asbestos*, *supra* note 78, ¶ 155.

94. See, e.g., Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 147, 150, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp/Turtle II*]. The “chapeau” is “[t]he introductory section of Article XX.” CHOW & SCHOENBAUM, *supra* note 46, at 491.

95. GATT, *supra* note 47, art. XX.

96. Sanford Gaines, *The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT’L ECON. L. 739, 851 (2001).

97. GATT, *supra* note 47, art. XX(g).

98. See Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (May 15, 1998) [hereinafter *Shrimp/Turtle I*]; *Shrimp/Turtle II*, *supra* note 94; Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 by Malaysia*, WT/DS58/AB/RW (June 15, 2001) [hereinafter *Shrimp/Turtle Malaysia I*].

99. See, e.g., *Shrimp/Turtle Malaysia I*, *supra* note 98.

100. *Shrimp/Turtle I*, *supra* note 98, ¶ 2.6; see also 50 C.F.R. §§ 217, 222, 227.

ing.<sup>101</sup> In 1989, the U.S. passed Public Law 609,<sup>102</sup> which prohibited the importation of shrimp products that had been harvested with fishing technology that adversely affected sea turtles.<sup>103</sup> Malaysia, India, Pakistan, and Thailand challenged this law before the WTO,<sup>104</sup> and after an appeal, the Appellate Body found that the measure did not fit within any Article XX exception, due to the fact that it created “arbitrary or unjustified discrimination.”<sup>105</sup> Consequently, the U.S. changed its law to mandate shrimping in a manner that was “comparable in effectiveness” (but not exactly the same) as that of the U.S.<sup>106</sup> Malaysia again brought an action before the WTO in *Shrimp/Turtle Malaysia I*, but the Panel and subsequent Appellate Body (*Shrimp/Turtle Malaysia II*) found the revised U.S. law to be non-discriminatory.<sup>107</sup> This holding significantly deviated from the previous cases in that it allowed the U.S. to restrict

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101. The regulation required shrimp trawling fishermen to use Turtle Excluder Devices (“TEDs”) or tow time restrictions “in specified areas where there was a significant mortality of sea turtles.” *Shrimp/Turtle I*, *supra* note 98, ¶ 2.6. “A TED is a grid trapdoor installed inside a [shrimp] trawling net . . . to allow shrimp to pass to the back of the net while directing sea turtles . . . out of the net.” *Id.* n. 613. The WTO Panel noted that all marine turtles (which are migratory creatures), were considered to be endangered species by the Convention on International Trade in Endangered Species. *Id.* ¶¶ 2.3, 3.9(d).

102. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101–162 (codified at 16 U.S.C. § 1537 (1989)); *see also Shrimp/Turtle I*, *supra* note 98, ¶ 2.7. Public Law 609 did permit shrimp trawling measures taken by a nation if the nation had a comparable regulatory program and incidental take rate to the U.S., or if it had a fishing environment that did not “not pose a threat of the incidental taking of sea turtles in the course of shrimp harvesting.” *Shrimp/Turtle II*, *supra* note 94, ¶ 3. The U.S. subsequently passed guidelines in 1991 and 1993 which assessed how foreign regulatory programs compared to those of the U.S. *Id.* ¶¶ 3–4. After the US Court of International Trade (“CIT”) found the guidelines to be “contrary to law,” the U.S. modified them in 1996. *Shrimp/Turtle I*, *supra* note 98, ¶¶ 2.10, 2.11.

103. 16 U.S.C. § 1537 (1989).

104. The countries argued that the law was not covered by Article XX(b) or XX(g) exceptions, and that the law effectively “nullified or impaired benefits” owed to the countries. *Shrimp/Turtle I*, *supra* note 98, ¶ 3.1.

105. *Shrimp/Turtle I*, *supra* note 98, ¶ 5.394.

106. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, ¶ 5, WT/DSS8/AB/RW (Oct. 22, 2001) [hereinafter *Shrimp/Turtle Malaysia II*]; *see also* Archibald, *supra* note 76, at 46.

107. However, the Appellate Body held that the U.S. needed to continue “ongoing serious, good faith efforts to reach a multilateral agreement” with other nations regarding how to protect the turtles. *Shrimp/Turtle Malaysia II*, *supra* note 106, ¶ 152; *see also* Archibald, *supra* note 76, at 46.

trade based on the objective of protecting a natural resource,<sup>108</sup> albeit not in an unjustifiable or arbitrarily discriminatory manner.<sup>109</sup>

Some argue that the *Shrimp/Turtle Malaysia II* decision should extend to future cases and the WTO should “interpret any ambiguities in the regime in a way that is favourable to protecting the environment and/or animal welfare.”<sup>110</sup> The impact of *Shrimp/Turtle Malaysia II* should not be understated; it was the first time in GATT and WTO history that a “unilateral extraterritorial national measure was upheld on environmental grounds.”<sup>111</sup> The *Shrimp/Turtle* decisions demonstrate that a country can restrict or ban foreign products to conserve “exhaustible natural resources,”<sup>112</sup> if the restriction is concurrent with similar domestic restrictions,<sup>113</sup> and indicates that a country may be able to exert some control over PPMs.<sup>114</sup>

However, the decision’s usefulness in relation to a battery cage egg ban may be limited. A dispute settlement panel would be unlikely to extend the *Shrimp/Turtle Malaysia II* holding, which affected an endangered species,<sup>115</sup> to farm animals such as egg-laying hens that eventually

108. Archibald, *supra* note 76, at 47–48.

109. *Shrimp/Turtle Malaysia II*, *supra* note 106; *see also* Archibald, *supra* note 76, at 48. Archibald stresses that if a country wants to create a measure restricting trade for the conservation of a natural resource, the country should ensure that the standards that the foreign country has to meet are “no harsher” than the domestic standards; that the country “attempt[s] to start . . . negotiations . . . ha[s] full transparency of the decision-making process . . . [and has flexible standards] so that a country . . . [can] meet the environmental or animal welfare goal through different methods than those used by the importing and restricting country.” *Id.*

110. Archibald, *supra* note 76, at 18.

111. *Id.* at 47; *see also* Andres Rueda, *Shrimp and Turtles: What About Environmental Embargoes Under NAFTA?*, in *RECONCILING ENVIRONMENT AND TRADE* 519, 537 (Edith Brown Weiss & John H. Jackson eds., 2001) (discussing how environmentally, “the Shrimp-Turtle decision is almost unprecedented. It allows for the imposition of unilateral sanctions for extraterritorial, process-related reasons, provided that certain basic conditions are met”).

112. GATT, *supra* note 47, art. XX(g).

113. Archibald, *supra* note 76, at 48. *But see* Gaines, *supra* note 96, at 804 (“By disqualifying under the Article XX chapeau any measure that has the result of applying the economic pressure of a trade restriction on other governments unless they change their resource conservation policies, the Appellate Body effectively nullified Article XX(g)”).

114. *See Shrimp/Turtle Malaysia I*, *supra* note 98. For a criticism of the two *Shrimp/Turtle* decisions and the idea that “the latest [*Shrimp/Turtle* decisions] establish a WTO rule that imposes extraordinary preconditions on member governments before they resort to Article XX for environmental measures,” *see* Gaines, *supra* note 96, at 745.

115. *Shrimp/Turtle Malaysia II*, *supra* note 106.

will be killed for food.<sup>116</sup> The fact that hens are nowhere near species exhaustion<sup>117</sup> suggests that a dispute settlement panel may not interpret this provision to protect an animal welfare measure for cage-free eggs. However, the “exhaustible natural resources” provision<sup>118</sup> applies to more than just endangered species. In fact, in compliance with the Vienna Convention’s treaty interpretation method, according to the ordinary meaning of the treaty’s words,<sup>119</sup> a farm animal like a hen can be considered a “natural resource.”<sup>120</sup> Furthermore, under XX(g), the measure does not need to be “necessary” for conserving the natural resource, as is the case for some other Article XX measures;<sup>121</sup> it must simply “relate to” conserving the natural resource.<sup>122</sup> In sum, XX(g) could still be an option, but other provisions may provide stronger support.

*B. Article XX(b): Exceptions for Human, Animal, and Plant Health*

Unlike Article XX(g), Article XX(b) may be more successfully used to uphold a trade measure differentiating between farm products that are produced more humanely than others. This provision allows WTO members to enact measures “necessary to protect . . . animal . . . health.”<sup>123</sup> It is unclear whether a dispute settlement panel would interpret a measure banning battery cages for hens (in order to protect their welfare) as related to animal health; “the argument that animal health includes animal

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116. Compare Archibald, *supra* note 76, at 50 (noting that the *Shrimp/Turtle* decisions “leave open the question as to whether a measure that protects the welfare of a non-endangered species would receive as much protection as a measure that protects an endangered species”), with Stevenson, *supra* note 71, at 141 (“One must be careful not to extrapolate too far from the latest *Shrimp-Turtle* decisions as that case involves an endangered species, seen by some as more worthy of protection than non-endangered animals”).

117. See Sullivan & Wolfson, *supra* note 11 (“It is hard to comprehend the number of animals killed for food in the United States. More than ten billion animals (excluding fish) die every year”).

118. GATT, *supra* note 47, art. XX(g).

119. Vienna Convention, *supra* note 50, art. 31(1).

120. “Natural resource” is defined as “[a] material source of wealth, such as timber, fresh water, or a mineral deposit, that occurs in a natural state and has economic value.” *Renewable Energy Program: Definitions*, BUREAU OF OCEAN ENERGY MGMT., REG., & ENFORCEMENT: OFFSHORE ENERGY & MINERALS MGMT., <http://www.boemre.gov/offshore/RenewableEnergy/Definitions.htm> (last visited Sept. 9, 2010).

121. See, e.g., GATT *supra* note 47, arts. XX(a), XX(b).

122. Stevenson, *supra* note 71, at 127; GATT, *supra* note 47, art. XX(g).

123. GATT, *supra* note 47, art. XX(b).

welfare . . . has not yet been fully established or accepted.”<sup>124</sup> Additionally, previous GATT Panels have seen Article XX(b) as relating solely to “animal life and health” and not animal welfare.<sup>125</sup> This ambiguity, as to whether the WTO intended animal “health” to encompass animal “welfare,” could lead some critics to allege that this provision was not meant to protect the welfare of *all* animals. This sentiment is illustrated by the fact that some countries, like the U.S., have federal laws purporting to protect the welfare of all animals, but these laws specifically exempt farmed animals from their protection.<sup>126</sup> Traditionally, the WTO limits its recognition of animal health provisions to those regarding disease prevention and food product safety for humans.<sup>127</sup>

Additionally, it is unclear if a panel would interpret Article XX(b) as permitting Country A to enact a trade measure that would protect the welfare of hens in Country B (based on the idea that the eggs will eventually be imported into Country A).<sup>128</sup> In *Tuna-Dolphin I*, the Panel held

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124. FAVRE, *supra* note 58. However, at least one international body believes that there is a link between animal health and animal welfare. See *The OIE's Objectives and Achievements in Animal Welfare*, WORLD ORG. FOR ANIMAL HEALTH (Sept. 9, 2009), [http://www.oie.int/Eng/bien\\_etre/en\\_introduction.htm](http://www.oie.int/Eng/bien_etre/en_introduction.htm) [hereinafter *The OIE's Objectives*].

125. Edward M. Thomas, Note, *Playing Chicken at the WTO: Defending an Animal Welfare-Based Trade Restriction Under GATT's Moral Exception*, 34 B.C. ENVTL. AFF. L. REV. 605, 618 (2007); see also Matheny & Leahy, *supra* note 56, at 350.

126. See 7 U.S.C. § 2132(g)(3) (2002):

. . . (g) The term “animal” means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal . . . but such term excludes . . .

. . .

(3) other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber . . . .”

See also Mariann Sullivan & David J. Wolfson, *What's Good for the Goose . . . The Israeli Supreme Court, Foie Gras, and the Future of Farmed Animals in the United States*, 70 LAW & CONTEMP. PROBS. 139, 139 (2007) [hereinafter *What's Good for the Goose*] (discussing how “laws [in the U.S.] that govern the welfare of these animals have been altered to exempt cruel common practices or, when it comes to such practices, [they] are simply ignored”).

127. Thomas, *supra* note 125, at 618; see also Matheny & Leahy, *supra* note 56, at 350. In his article, Peter Stevenson does make the argument, though, that Article XX(b) should be expanded so that measures can be adopted for animal welfare. Stevenson, *supra* note 71, at 135–36.

128. “One major problem with Article XX is the ‘rule’ on extra-territoriality. The general position is that a WTO member nation may act to protect animals within its own territory but, generally, not those located outside its territorial jurisdiction . . . [however, this position is not] clear-cut and absolute.” Stevenson, *supra* note 71, at 122.

that Article XX(b) should be interpreted to allow a country to protect health only inside its own borders, because if a country was allowed to protect health outside of its borders, “each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement.”<sup>129</sup> Further, a measure protected by Article XX(b) must be deemed “necessary”<sup>130</sup> in order to be upheld—this is a difficult standard to meet, since “any number of hypothetical policies could fulfill a social objective without trade restrictions, even if such policies are unrealistic.”<sup>131</sup>

However, regardless of these problems, a future Panel should find that Article XX(b) can uphold a battery cage ban. While “[w]elfare” is a broader term than “health,”<sup>132</sup> the International Office of Epizootics (“OIE”)<sup>133</sup> sets international standards for The Agreement on the Application of Sanitary and Phytosanitary Measures (“SPS Agreement”),<sup>134</sup> which is annexed to the GATT (and discussed in Part III of this Note),<sup>135</sup> and has deemed the terms to be interconnected.<sup>136</sup> As will be discussed, the connection between Article XX(b) and the SPS Agreement,<sup>137</sup> as well as the current enhancements being made to the SPS Agreement, strengthen the case that animal welfare is related to animal health (and thus an animal welfare measure should be protected by Article XX(b)). Additionally, research has been conducted to show that battery cages prohibit hens from engaging in their normal behaviors and cause them to have

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129. *Tuna-Dolphin I*, *supra* note 72, ¶ 5.27; *see also* Archibald, *supra* note 76, at 32.

130. Stevenson, *supra* note 71, at 135 (citing Panel Report on *United States—Section 337 of the Tariff Act of 1930*, ¶ 5.26, (Nov. 7, 1989), GATT B.I.S.D. (36th Supp.) (1990)).

131. Matheny & Leahy, *supra* note 56, at 350.

132. Stevenson, *supra* note 71, at 136.

133. *The World Organisation for Animal Health (OIE)*, WORLD ORG. FOR ANIMAL HEALTH, [http://www.oie.int/eng/OIE/en\\_about.htm?e1d1](http://www.oie.int/eng/OIE/en_about.htm?e1d1) (last visited Oct. 5, 2010).

134. *See* Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1165 (1994) [hereinafter SPS].

135. *See* discussion *infra* Part III.A.

136. *See, e.g.*, WORLD ORG. FOR ANIMAL HEALTH, TERRESTRIAL ANIMAL HEALTH CODE §7.1.2.1 (2009), *available at* [http://www.oie.int/eng/normes/mcode/en\\_chapitre\\_1.7.1.htm](http://www.oie.int/eng/normes/mcode/en_chapitre_1.7.1.htm) [hereinafter TERRESTRIAL ANIMAL HEALTH CODE] (the OIE recognizes that “there is a critical relationship between animal health and animal welfare”).

137. *See* SPS, *supra* note 134, Annex A(1).

health and psychological problems.<sup>138</sup> Also, based on the ordinary meaning of Article XX(b), there is no indication of an intention to only allow a country to protect animal health within its borders,<sup>139</sup> and throughout history, countries have enacted trade measures which have the effect of controlling production in other countries.<sup>140</sup> Finally, a battery cage ban is “necessary” to protect animal welfare, since the battery cage production method itself has a detrimental effect on hens.<sup>141</sup>

However, a dispute settlement panel may give great weight to the monetary burden that such a production change would place on another country, particularly a developing country. Two disputes brought before the Appellate Body, one using Article XX(b) successfully as a defense<sup>142</sup> and another using Article XX(g) successfully as a defense,<sup>143</sup> demon-

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138. See, e.g., SARAH SHIELDS & IAN J.H. DUNCAN, AN HSUS REPORT: A COMPARISON OF THE WELFARE OF HENS IN BATTERY CAGES AND ALTERNATIVE SYSTEMS, HUMANE SOC’Y OF THE U.S. 1, 4, available at <http://www.hsus.org/web-files/PDF/farm/hsus-a-comparison-of-the-welfare-of-hens-in-battery-cages-and-alternative-systems.pdf>:

Cages prevent hens from performing the bulk of their natural behavior, including nesting, perching, dustbathing, scratching, foraging, exercising, running, jumping, flying, stretching, wing-flapping, and freely walking. Cages also lead to severe disuse osteoporosis due to lack of exercise. Alternative, cage-free systems allow hens to move freely through their environment and engage in most of the behavior thwarted by battery-system confinement . . . all caged hens are permanently denied the opportunity to express most of their basic behavior . . . [t]he science is clear that this deprivation represents a serious inherent welfare disadvantage compared to any cage-free production system . . . Barren, restrictive environments are detrimental to the psychological well-being of an animal.

*Id.*

See also Stevenson, *supra* note 71, at 136.

139. See, e.g., Archibald, *supra* note 76, at 32 (arguing that “[t]he plain reading of [Article XX] sets no limits and instead lets each country decide which life or health it wishes to protect”); see also GATT, *supra* note 47, art. XX(b).

140. See Archibald, *supra* note 76, at 32 (discussing how throughout history, before GATT negotiations, “countries were using trade bans to protect the environment . . . beyond their borders . . .”).

141. See, e.g., Shields & Duncan, *supra* note 138.

142. In *Brazil—Measures Affecting Imports of Retreaded Tyres*, the Appellate Body “stated that when a complaining member presents an alternative measure, the responding member must [sic] have the capabilities to enact it.” McInerney, *supra* note 92, at 200; see also Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 156, WT/DS332/AB/R (Dec. 3, 2007).

143. In *Shrimp/Turtle Malaysia II*, the Appellate Body states that a country’s trade measure that is protected under Article XX “should take account of differing technology

strate that the WTO will seriously consider the implications of a trade restriction on a developing country, even if it is otherwise appropriate under Article XX. In both cases, the Appellate Body considered the greater difficulty that developing countries may have in implementing animal welfare trade measures, but ultimately, concluded that the trade measures could succeed, as long as they were not too constrictive.<sup>144</sup>

With a battery cage ban, the alleged “costs” may not be as constrictive as critics assume. For example, developing countries may be better equipped to implement animal welfare standards than even some developed countries, due to the fact that more humane production methods are generally more “labor-intensive”<sup>145</sup> and developing countries tend to have cheaper labor costs than developed countries.<sup>146</sup> If the U.S. was to enact a trade measure that only sanctioned certain types of egg production for animal welfare-related reasons, it would need to acknowledge developing countries’ abilities to implement and enforce such a measure, and consequently would need to be flexible due to these differing abilities. If the U.S. created a battery cage ban with these considerations in mind, Article XX(b) should be able to defend such a measure.

### C. Article XX(a): The Public Morals Exception

Article XX(a), which allows WTO members to create measures “necessary to protect public morals,”<sup>147</sup> should also support a battery cage egg ban. While this provision has only been used on rare occasions,<sup>148</sup> trade restrictions in favor of more humane practices may be covered<sup>149</sup> as a result of society’s views on the need to treat animals humanely.<sup>150</sup> In

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levels of other members trying to meet the standard and should provide sufficient flexibility to do so.” McInerney, *supra* note 92, at 199–200; *see also Shrimp/Turtle Malaysia II*, *supra* note 106, ¶ 149.

144. *See generally Brazil—Measures Affecting Imports of Retreaded Tyres*, *supra* note 142; *Shrimp/Turtle Malaysia II*, *supra* note 106.

145. Matheny & Leahy, *supra* note 56, at 353 (discussing how “less-abusive production methods tend to be more labor-intensive while [common intensive farming] systems are more capital-intensive”).

146. *Id.* (discussing how cheaper labor could give developing countries “a comparative advantage in satisfying the demand for welfare-enhanced meat, eggs, and milk”).

147. GATT, *supra* note 47, art. XX(a).

148. *See, e.g., Shapiro*, *supra* note 91, at 215.

149. *See, e.g., Gaines*, *supra* note 96, at 799 (discussing how Article XX(a) may allow “a country to protect its ‘public morals’ against the effects of trade—most likely imported products—that undercut its own moral preferences within its borders . . .”).

150. *See, e.g., Joseph Vining, Animal Cruelty Laws and Factory Farming*, 106 MICH. L. REV. FIRST IMPRESSIONS 123, 123 (2008) (discussing the U.S.’s “background public policy of humane treatment of sentient creatures . . .”).

fact, the public morals provision may soon be invoked with regard to two recent requests for WTO dispute settlement consultations launched by Canada and Norway (non-EU members)<sup>151</sup> against the EU for its ban on imported seal products, which began in August 2010.<sup>152</sup> Canada and Norway allege that the ban violates the EU's trade obligations under the WTO.<sup>153</sup> The EU defends its ban based on public outrage over the cruelty associated with seal slaughtering practices;<sup>154</sup> in his expert submission to the European Parliament's Committee on the Internal Market and Consumer Protection, Jacques Bourgeois said, "It is fairly easy to demonstrate that the inhumane killing and skinning of seals is a matter of [European] public morality."<sup>155</sup> However, to meet XX(a)'s standards, the EU's ban must also be "necessary" to the protection of public morals and must meet the chapeau's requirements.<sup>156</sup> Humane Society International

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151. See *European Commission External Relations: Norway*, EUROPEAN COMM'N, [http://ec.europa.eu/external\\_relations/norway/index\\_en.htm](http://ec.europa.eu/external_relations/norway/index_en.htm) (last visited Sept. 9, 2010).

152. See *Canada, Norway Launch WTO Complaint Over EU Seal Ban*, INT'L CTR. FOR TRADE AND SUSTAINABLE DEV. (Nov. 13, 2009) [hereinafter *Canada, Norway*], available at <http://ictsd.org/i/news/biores/59391/>. The ban prohibits trade with "commercial sealing operations," but exempts non-commercial trading in Inuit communities. *Id.*

153. *Id.* Presumably, Canada and Norway will challenge the ban based on GATT Article XI, which prohibits restrictions on a country's number of imports. See Robert Galantucci, *Compassionate Consumerism Within the GATT Regime: Can Belgium's Ban on Seal Product Imports Be Justified Under Article XX?*, 39 CAL W. INT'L L. J. 281, 286 (2009).

154. See, e.g., *EU Ban Looms Over Seal Products*, BBC NEWS EUROPE (May 5, 2009), <http://news.bbc.co.uk/2/hi/europe/8033498.stm> (quoting MEP Arlene McCarthy as saying that the majority of Europeans "are horrified by the cruel clubbing to death of seals and this law will finally put an end to the cruel cull." Furthermore, "anti-hunt campaigners say some seals are skinned while still conscious. Hunters typically shoot the seals with rifles or bludgeon them to death with spiked clubs.").

155. JACQUES BOURGEOIS, WRITTEN EXPERT SUBMISSION TO THE COMMITTEE ON THE INTERNAL MARKET AND CONSUMER PROTECTION OF THE EUROPEAN PARLIAMENT ON THE PROPOSED REGULATION CONCERNING TRADE IN SEAL PRODUCTS, EUR. PARL., (2009), available at <http://www.europarl.europa.eu/document/activities/cont/200901/20090130ATT47720/20090130ATT47720EN.pdf>. The ban may also be defended under the Technical Barriers to Trade ("TBT") Agreement, which allows a WTO member to restrict trade in order to accomplish a "legitimate objective." *Id.*; see also Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493, art. 2.2.

156. GATT, *supra* note 47, art. XX(a); see also Sarah Stewart & David Thomas, *Comments on the Council's Legal Service's Paper On the WTO Compatibility of Measures Regulating the Seal Products Trade*, HUMANE SOC'Y INT'L & RESPECT FOR ANIMALS (Mar. 23, 2009), available at [http://www.hsus.org/about\\_us/humane\\_society\\_international\\_hsi/seal\\_trade\\_ban/learn\\_more/wto\\_compatibility.html](http://www.hsus.org/about_us/humane_society_international_hsi/seal_trade_ban/learn_more/wto_compatibility.html). (discussing how the Appellate Body in *Asbestos* upheld

(“HSI”) alleges that a total ban on seal products meets the “necessary” requirement because no alternative measures will produce the same desired effect,<sup>157</sup> that the ban meets the requirements of the chapeau since it applies to all seal products (and does not discriminate against one country’s products over another’s), and that it is not a disguised restriction on trade because it does not favor the EU’s seal products over foreign products.<sup>158</sup>

However, the dispute settlement panel may also consider the costs such a trade measure will impose on countries like Canada and Norway.<sup>159</sup> As previously acknowledged, higher animal welfare standards typically translate into increased production costs.<sup>160</sup> In this case, the EU is not proposing an alternative method of seal slaughter so the costs are even more significant, since the countries selling seal products will no longer have access to the EU market. Thus, such a measure may be seen as a trade barrier<sup>161</sup> that directly conflicts with the WTO’s overall mission to promote trade liberalization.<sup>162</sup> However, a dispute settlement panel

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France’s total ban on asbestos, based on France’s desire to protect the public from health risks associated with the product; this demonstrates that a total ban, in some instances, can be deemed appropriate and legal under the chapeau’s “flexibility” test, and, as in *Shrimp/Turtle Malaysia II*, the EU has engaged in attempts to create a multilateral agreement regarding welfare issues in seal hunting).

157. Neither of the two alternatives to a complete seal ban, (products from “humanely killed” seals or labeling to give purchasers information about the slaughter method), would work, because “[c]ommercial seal hunts, particularly in the environments in which they take place, cannot be consistently humane,” and because the seal hunt is the type of event “when moral sensibility demands that trade in an inhumanely produced product is banned . . . that public morality is offended by the very presence on the market of something which is inhumanely produced.” Stewart & Thomas, *supra* note 156.

158. *Id.*

159. See, e.g., *Shrimp/Turtle Malaysia II*, *supra* note 106, ¶ 149 (discussing how a successful trade measure needs to take into account any other country’s “specific conditions”); see also Archibald, *supra* note 76, at 48 (discussing how a country’s trade measure must be flexible enough so that another country is able to successfully meet the measure’s requirements through other methods).

160. See, e.g., D. Bowles et al., *Animal Welfare and Developing Countries: Opportunities for Trade in High-Welfare Products from Developing Countries*, 24 REV. SCI. TECH. OFF. INT. EPIZ. 783, 783 (2005), available at <http://www.oie.int/boutique/extrait/bowles783790.pdf> (discussing how “there is often a cost consequence from improving [animal welfare] standards”).

161. One example of a trade barrier that the WTO is concerned with is “internal government regulations and practices that impede imports or discriminate against foreign goods.” CHOW & SCHOENBAUM, *supra* note 46, at 348.

162. The GATT states that the WTO members chose to enter into agreements “directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.” GATT, *supra* note 47, pmbl.

should ultimately view these costs, even in the case of a total elimination of a market, as less important than the fact that the animal welfare measure meets all of the requirements of Article XX(a), as it is a necessary measure for the protection of public morals that does not violate the *chapeau*.

If the seal product ban is successful in defeating a WTO violation claim, it should open the door to use Article XX(a) to defend other animal welfare-driven measures.<sup>163</sup> Seal slaughter may be considered “inherently cruel”<sup>164</sup> because of the weather conditions and its isolated nature, while farming conditions can be controlled and changed. However, it is difficult to see how the seal hunt’s practices are any more inhumane than those common to intensive farming practices, such as battery cages.<sup>165</sup> Further, intensive confinement practices continue for the farm animals’ entire lives; this fact could offend public morals even more than an abhorrent seal slaughter technique. According to 2003 survey data, 96% of Americans believe that animals should have “at least some protection from harm and exploitation”<sup>166</sup> and 62% of Americans support the passage of “strict laws concerning the treatment of farm animals.”<sup>167</sup> As shown by these statistics, conventional intensive farming techniques that cause severe harm to animals are offensive to the American public. Fur-

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163. Although, especially in the case of banning certain practices in agriculture, it may be more difficult to succeed under the “necessary” section of Article XX. Unlike the slaughter of seals, which occurs on isolated ice floes, U.S. slaughterhouses are regulated by the Department of Agriculture. *See, e.g., Slaughter Inspection 101*, DEP’T OF AGRIC. FOOD SAFETY & INSPECTION SERV., [http://www.fsis.usda.gov/Factsheets/Slaughter\\_Inspection\\_101/index.asp](http://www.fsis.usda.gov/Factsheets/Slaughter_Inspection_101/index.asp) (last visited Aug. 19, 2010); *see also* HUMANE SOC’Y INT’L, *A COMPLETE BAN ON SEAL PRODUCTS IS JUSTIFIED UNDER THE WORLD TRADE ORGANIZATION (WTO) AGREEMENTS* (2009), *available at* <http://bansealtrade.files.wordpress.com/2009/10/hsi-seals-wto-handout.pdf> (“commercial seal hunting occurs in uncontrolled field settings plagued by . . . moving ice floes, extreme weather conditions, poor visibility, and high ocean swells. These conditions prohibit hunters from . . . consistently applying humane slaughter methods designed to protect animal welfare and avoid pain and suffering . . . [and] preclude authorities from adequately monitoring . . . and enforcing regulations”).

164. *Canada, Norway, supra* note 152.

165. *See, e.g.,* Michael Hlinka, *Money Talks: Michael Hlinka: EU Ban on Seal Products Outrageous*, CBC NEWS, (May 7, 2009), [http://www.cbc.ca/money/moneytalks/2009/05/michael\\_hlinka\\_eu\\_ban\\_on\\_seal.html](http://www.cbc.ca/money/moneytalks/2009/05/michael_hlinka_eu_ban_on_seal.html) (“We’re supposed to believe that there’s a heightened sensitivity to animal welfare on [the European] continent . . . [b]ut there’s no mention of the treatment of geese for foie gras, or the killing of baby calves for veal . . . this particular bill is just so selective in its outrage . . .”).

166. David W. Moore, *Public Lukewarm on Animal Rights*, GALLUP NEWS SERV., (May 21, 2003), <http://www.gallup.com/poll/8461/public-lukewarm-animal-rights.aspx>.

167. *Id.*

thermore, as previously discussed relevant to Article XX(b),<sup>168</sup> a total ban on battery cages would meet the “necessary” requirement of Article XX(a),<sup>169</sup> because the intensive production methods would need to be eliminated in order to reduce the harm to animal welfare. The ban would satisfy Article XX’s chapeau, since it would apply to all battery cage eggs from all countries, including those within the U.S. Additionally, a battery cage ban would not be a total trade barrier for eggs, since battery cage eggs could be replaced by cage-free eggs. Based on all of these factors, a dispute settlement panel should deem a battery cage ban protected under Article XX(a).

### III. POSSIBLE OPPORTUNITIES FOR ANIMAL WELFARE MEASURES UNDER THE SPS AGREEMENT AND THE AGREEMENT ON AGRICULTURE

Additionally, two Agreements annexed to the GATT should provide support for the legality of a trade measure such as a battery cage ban. First, the SPS Agreement was created to give WTO members “the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health,”<sup>170</sup> and is meant to be an elaboration of certain GATT provisions, “in particular the provisions of Article XX(b).”<sup>171</sup> Second, the Agreement on Agriculture (“AoA”)<sup>172</sup> was created to “strengthen[] multilateral rules for trade in agricultural products and require[] WTO members to reduce protection against imports, trade-distorting domestic support programs, and export subsidies.”<sup>173</sup> It also allows countries to create “non-trade-distorting,” or Green Box, subsidies.<sup>174</sup> The SPS Agreement and the AoA should be used to defend an-

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168. See *supra* Part II.B.

169. GATT, *supra* note 47, art. XX(a).

170. SPS, *supra* note 134, art. 2(1).

171. *Id.*, art. 2(4). For the argument that the SPS Agreement only applies to Article XX(b), see Shapiro, *supra* note 91, at 201–02.

172. Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter AoA].

173. OFFICE OF THE USTR, THE URUGUAY ROUND AGREEMENTS ACT STATEMENT OF ADMINISTRATIVE ACTION, AGREEMENT ON AGRICULTURE, (Sept. 27, 1994), available at 1994 WL 761603. The AoA is necessary because “[t]rade in agricultural products is the area of international trade most subject to government intervention and other protectionist measures that distort free trade.” CHOW & SCHOENBAUM, *supra* note 46, at 457.

174. Phoenix X. F. Cai, *Think Big and Ignore the Law: U.S. Corn and Ethanol Subsidies and WTO Law*, 40 GEO. J. INT'L L. 865, 875 (2009).

imal welfare trade measures and programs,<sup>175</sup> respectively, to incentivize the more humane treatment of farm animals.

#### A. *The SPS Agreement and OIE International Standards*

The SPS Agreement, especially when coupled with GATT Article XX(b), should provide protection for an animal welfare measure banning battery cages. Although the SPS Agreement applies to sanitary and phytosanitary measures to protect food safety or human, animal, or plant life or health,<sup>176</sup> the connections made between animal health and animal welfare<sup>177</sup> suggest that measures concerning animals who produce food products (such as egg-laying hens), are relevant under this Agreement. The SPS Agreement's "principal objective . . . is to promote the harmonization of national standards;"<sup>178</sup> measures that "conform to international standards, guidelines, or recommendations" are automatically deemed "necessary" for the protection of human, animal or plant life.<sup>179</sup> In connection with this goal of harmonization, the OIE, which is seen as "the primary source of . . . international health standards" on animal health issues,<sup>180</sup> is mandated by the SPS Agreement "to safeguard world trade by publishing health standards for international trade of animals and animal products."<sup>181</sup> The OIE's Terrestrial Animal Health Code ("Terrestrial Code")<sup>182</sup> contains a chapter with Animal Welfare provisions,<sup>183</sup>

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175. See, e.g., Matheny & Leahy, *supra* note 56, at 352.

176. SPS, *supra* note 134, Annex A(1).

177. See, e.g., *The OIE's Objectives*, *supra* note 124.

178. David G. Victor, *The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment After Five Years*, 32 N.Y.U. J. INT'L L. & POL. 865, 884 (2000); see also SPS, *supra* note 134.

179. SPS, *supra* note 134, art. 3.2; see also Shapiro, *supra* note 91, at 204 (discussing how SPS measures that follow international standards have a "presumption of compliance with the GATT because they are presumed to satisfy GATT Article XX(b)"). *But see The International Standards of the OIE*, WORLD ORG. FOR ANIMAL HEALTH, [http://www.oie.int/eng/normes/A\\_standardisation\\_activities.pdf](http://www.oie.int/eng/normes/A_standardisation_activities.pdf) (last visited July 31, 2010) (discussing how even when following an OIE-prescribed standard, a risk assessment may be necessary, to "link[] the hazards identified for the specific commodity, the disease statuses of the exporting and importing countries, and the recommendations in the [OIE-prescribed] Codes").

180. FAVRE, *supra* note 58, at 316.

181. *What Is the OIE?*, WORLD ORG. FOR ANIMAL HEALTH (Feb. 2, 2010), [http://www.oie.int/eng/oie/en\\_oie.htm](http://www.oie.int/eng/oie/en_oie.htm).

182. TERRESTRIAL ANIMAL HEALTH CODE, *supra* note 136. The Code includes standards "to assure the sanitary safety of international trade in terrestrial animals." *Id.*, forward, available at [http://www.oie.int/eng/normes/Mcode/en\\_preface.htm#sous-chapitre-0](http://www.oie.int/eng/normes/Mcode/en_preface.htm#sous-chapitre-0).

but the chapter focuses on transporting animals by sea,<sup>184</sup> land,<sup>185</sup> or air;<sup>186</sup> slaughtering animals;<sup>187</sup> killing animals for controlling disease;<sup>188</sup> guidelines on how to control stray dog populations;<sup>189</sup> and guidelines for using animals for research or education purposes.<sup>190</sup> The Code references the importance of animal welfare by stating that humans who use animals have an “ethical responsibility” to ensure animal welfare “to the greatest extent practicable,”<sup>191</sup> and also that higher animal welfare can often improve food safety.<sup>192</sup>

While the OIE’s current statements do not set international standards that easily translate to animal welfare measures,<sup>193</sup> there are signs that this may soon change. The OIE publicly vocalized its commitment to setting standards for animal welfare;<sup>194</sup> the organization further defined the link between animal health and welfare by declaring that “animals managed in accordance with the OIE recommendations on animal welfare may be more productive, with associated benefits for food security

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183. *Id.*, § 7: Animal Welfare, available at [http://www.oie.int/eng/normes/Mcode/en\\_titre\\_1.7.htm](http://www.oie.int/eng/normes/Mcode/en_titre_1.7.htm).

184. *Id.*, ch. 7.2: Transport of animals by sea, available at [http://www.oie.int/eng/normes/Mcode/en\\_chapitre\\_1.7.2.htm](http://www.oie.int/eng/normes/Mcode/en_chapitre_1.7.2.htm).

185. *Id.*, ch. 7.3: Transport of animals by land, available at [http://www.oie.int/eng/normes/Mcode/en\\_chapitre\\_1.7.3.htm](http://www.oie.int/eng/normes/Mcode/en_chapitre_1.7.3.htm).

186. *Id.*, ch. 7.4: Transport of animals by air, available at [http://www.oie.int/eng/normes/Mcode/en\\_chapitre\\_1.7.4.htm](http://www.oie.int/eng/normes/Mcode/en_chapitre_1.7.4.htm).

187. *Id.*, ch. 7.5: Slaughter of animals, available at [http://www.oie.int/eng/normes/Mcode/en\\_chapitre\\_1.7.5.htm](http://www.oie.int/eng/normes/Mcode/en_chapitre_1.7.5.htm).

188. *Id.*, ch. 7.6: Killing animals for disease control purposes, available at [http://www.oie.int/eng/normes/Mcode/en\\_chapitre\\_1.7.6.htm](http://www.oie.int/eng/normes/Mcode/en_chapitre_1.7.6.htm).

189. *Id.*, ch. 7.7: Guidelines on stray dog population control, available at [http://www.oie.int/eng/normes/Mcode/en\\_chapitre\\_1.7.7.htm](http://www.oie.int/eng/normes/Mcode/en_chapitre_1.7.7.htm).

190. *Id.*, ch. 7.8: Use of animals in research and education, available at [http://www.oie.int/eng/normes/mcode/en\\_chapitre\\_1.7.8.htm](http://www.oie.int/eng/normes/mcode/en_chapitre_1.7.8.htm).

191. *Id.*, art. 7.1.2.6, available at [http://www.oie.int/eng/normes/mcode/en\\_chapitre\\_1.7.1.htm](http://www.oie.int/eng/normes/mcode/en_chapitre_1.7.1.htm).

192. *Id.*, art. 7.1.2.7.

193. However, the Terrestrial Code does acknowledge the “five freedoms” (“freedom from hunger; thirst and malnutrition; freedom from fear and distress; freedom from physical and thermal discomfort; freedom from pain, injury and disease; and freedom to express normal patterns of behaviour”) and how they provide “valuable guidance in animal welfare.” *Id.*, art. 7.1.2.2.

194. The OIE’s website states that it intends to “elaborate recommendations and guidelines covering animal welfare practices, reaffirming that animal health is a key component of animal welfare.” *The OIE’s Objectives*, *supra* note 124; *see also* Matheny & Leahy, *supra* note 56, at 351; Michael Bowman, “Normalizing” the International Convention for the Regulation of Whaling, 29 MICH. J. INT’L L. 293, 341 (2008).

and poverty alleviation.”<sup>195</sup> An ad hoc Animal Welfare Group convened to develop new chapters for the Terrestrial Animal Health Code, which may be used to help uphold animal welfare measures in the future.<sup>196</sup> The Agreement’s main purpose is to create international standards. The Agreement specifically gives the OIE the power to create those standards for animal safety, and through the OIE’s creation of a new chapter, it will formally recognize that animal welfare is interrelated with animal health. At the same time, the OIE’s animal welfare chapter could just result in minimum standards. Further attention should be paid to ensure that the OIE’s standards do not become the de facto setting (and that countries are allowed to create higher animal welfare standards than those proscribed by the OIE).

However, even without OIE-prescribed international standards, the SPS Agreement should provide a safe-haven for animal welfare measures. While SPS Article 2 mandates that a sanitary or phytosanitary measure be “based on scientific principles and [that it] is not maintained without sufficient scientific evidence,” it also recognizes that there may not be relevant evidence available.<sup>197</sup> In that case, under Article 5.7, a WTO member may “provisionally adopt” measures “on the basis of available pertinent information,” but must thereafter try to acquire more information in order to make a “more objective assessment of risk” and to review the measure “within a reasonable period of time.”<sup>198</sup> However, in *European Communities—Measures Concerning Meat and Meat Products*,<sup>199</sup> the Appellate Body found that the European Community’s (“EC”) ban of meat from cattle that had received growth hormones was inconsistent with the requirements of the SPS Agreement.<sup>200</sup> In that case, the EC created a measure which was more stringent than international standards<sup>201</sup> and failed to ensure that its measure was based on an appro-

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195. Committee on Sanitary and Phytosanitary Measures, *Considerations Relevant To Private Standards in the Field of Animal Health, Food Safety and Animal Welfare*, ¶ 9, G/SPS/GEN/822 (Feb. 25, 2008), available at <http://ec.europa.eu/food/international/organisations/sps/docs/G-SPS-GEN-822.pdf>.

196. *The OIE’s Objectives*, *supra* note 124.

197. SPS, *supra* note 134, arts. 2.2, 5.7.

198. *Id.* art. 5.7.

199. Appellate Body Report, *EC—Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *EC—Measures Concerning Meat*].

200. *Id.*

201. WTO members are able to create measures higher than the international standard, “if there is a scientific justification,” or if they conform with the risk assessments found in Article 5. See SPS, *supra* note 134, arts. 3.3, 5.

priate risk assessment.<sup>202</sup> Thus, even measures such as the EC's, which "were previously regarded as purely internal policy measures," now must be justified to fit under the SPS Agreement's protection.<sup>203</sup>

Nevertheless, this case should not undermine the use of the SPS Agreement to defend a battery cage ban. Nations are generally given wide latitude "in setting their own food safety standards . . . [and] nearly all bona fide attempts to protect food safety will be consistent with the SPS Agreement."<sup>204</sup> In *EC—Measures Concerning Meat*, the available scientific evidence specifically did not support the EC's allegation that a hormone ban was necessary.<sup>205</sup> Additionally, in the case of a battery cage ban, there is little data on current intensive confinement practices' detrimental effects on animal health and welfare,<sup>206</sup> and much of the present data in the U.S. may be inaccurate since it is based on research funded by agribusiness.<sup>207</sup> It is clear that more studies need to be conducted by neutral third-parties; however, a few studies not funded by agribusiness do exist, which show the detrimental effects of battery cages on hens' wel-

202. *EC—Measures Concerning Meat*, *supra* note 199, ¶ 208. The EC invoked the "precautionary principle" in connection with SPS Article 5.7, which allows a WTO member to adopt SPS measures on a provisional basis when there is insufficient scientific evidence (however, WTO members must still follow Article 5.7 guidelines). *Id.* ¶ 13; SPS, *supra* note 134, art. 5.7. However, the Appellate Body "rejected this argument . . . the precise bounds of the precautionary principle remain unsettled . . . [but] [i]t appears that the precautionary principle may be used to justify time-limited SPS measures, but [it] is not an alternative to risk assessment and scientific evidence for a definitive standard." MATSUSHITA ET AL., *supra* note 66, at 500.

203. Victor, *supra* note 178, at 923.

204. *Id.* at 872.

205. See, e.g., *EC—Measures Concerning Meat*, *supra* note 199, ¶ 196–7.

206. See, e.g., Crumb, *supra* note 19 (discussing how the USDA is funding a three-year study to determine how battery cage practices affect hens, but animal welfare groups contend that this is a "delaying tactic" to banning cages; another study funded by the American Egg Board "weighs several issues involving caged chickens, including their welfare and impact on the environment and human health as well as food quality and safety"); see also Steven M. Wise, *An Argument for the Basic Legal Rights of Farmed Animals*, 106 MICH. L. REV. FIRST IMPRESSIONS 133, 135 (2008) ("We do not know much about the cognitive abilities of farmed animals, because those who make billions of dollars exploiting them have never bothered to conduct significant research into what sorts of beings they are").

207. See, e.g., *What's Good for the Goose*, *supra* note 126, at 163 (discussing how U.S. animal welfare science is controlled by agribusiness, in contrast to Europe, where animal welfare science "appears to have developed in a relatively objective manner"); see also F. Bailey Norwood & Jayson L. Lusk, *The Farm Animal Welfare Debate*, CHOICES MAGAZINE (2009), <http://www.choicesmagazine.org/magazine/article.php?article=89> ("Industry groups, especially the United Egg Producers . . . assert that their welfare standards are based on 'sound' science . . . but there are many studies backing HSUS's claim that cage-free eggs are superior to cage eggs in terms of animal welfare . . .").

fare and health.<sup>208</sup> Furthermore, in terms of human health risks, the Council for Agricultural Science and Technology (“CAST”),<sup>209</sup> with help from the OIE,<sup>210</sup> issued a 2005 report concluding that modern day intensive confinement systems have created a world in which “global risks of disease are increasing.”<sup>211</sup> In the meantime, the U.S. should be able to enact a measure on a provisional basis under SPS Article 5.7, while alleging insufficient available scientific evidence.<sup>212</sup> Under this measure, the U.S. could allege that on the basis of available information,<sup>213</sup> intensive confinement severely reduces animal health and welfare, which is directly correlated to sanitary and phytosanitary issues, and it could cite the EU’s recent Directive banning battery cages to show that other countries are similarly concerned and are passing similar measures.<sup>214</sup>

Of course, an SPS measure such as a battery cage ban could also be seen as a trade barrier due to the fact that it would affect a country’s production costs.<sup>215</sup> However, a GATT Panel should give these costs less weight considering the fact that the SPS Agreement was created, in part, to protect animal health, which OIE has proclaimed to be connected to animal welfare.<sup>216</sup> Therefore, if the welfare of a hen is compromised, so is her health. Additionally, as shown through a recent OIE study, even some developing countries demonstrate an interest in animal welfare concerns<sup>217</sup> and organic food production, which can lead to increased animal welfare,<sup>218</sup> thus illustrating that both developed and developing

208. See, e.g., Shields & Duncan, *supra* note 138.

209. CAST is a non-profit organization that is dedicated to publishing reports of science-based information, regarding issues of “animal sciences, food sciences and agricultural technology . . . .” *About CAST*, CAST, <http://www.cast-science.org/about.asp> (last visited Aug. 1, 2010).

210. CAST, GLOBAL RISKS OF INFECTIOUS ANIMAL DISEASES 1 (2005) [hereinafter CAST], available at <http://www.cast-science.org/publicationDetails.asp?idProduct=69>; see also FOER, *supra* note 2, at 142.

211. CAST, *supra* note 210, at 6; see also FOER, *supra* note 2, at 142.

212. SPS, *supra* note 134, art. 5.7.

213. See, e.g., Shields & Duncan, *supra* note 138.

214. See Council Directive 99/74, 1999 O.J. (L 203/53), amended by Council Regulation 806/2003, 2003 O.J. (L 122) (EC).

215. See CHOW & SCHOENBAUM, *supra* note 46, at 348.

216. See *The OIE’s Objectives*, *supra* note 124.

217. See, e.g., Bowles, *supra* note 160, at 784 (“Good agricultural practices and traceability systems are being implemented in Namibia, Botswana, South Africa and Zimbabwe”).

218. See, e.g., *id.* at 787 (“In both Argentina and Thailand, organic production is being promoted with government support . . . [g]rowth within the organic foods market is expected and will continue to allow many exporters in developing markets to access markets . . . organic production . . . can bring benefits for animal welfare”).

countries can still successfully produce products under an appropriately constructed animal welfare trade measure. Based on support from Article XX(b), the SPS Agreement, the OIE's acknowledgment of the link between animal health and welfare, and its plan to create animal welfare international standards,<sup>219</sup> a battery cage ban should be upheld under the SPS Agreement.

*B. The Agreement on Agriculture: Green Box Subsidies*

There should also be an opportunity for the AoA to support animal welfare measures. The AoA creates limits on a country's ability to give subsidies to its domestic agricultural producers "depending on how much [the subsidies] distort production and trade."<sup>220</sup> Subsidies that are "highly trade-distorting" are called "Amber Box;" "minimally trade-distorting" subsidies are called "Blue Box;" and "non-trade-distorting" subsidies are called "Green Box."<sup>221</sup> The AoA allows countries an unlimited allowance of Green Box subsidies,<sup>222</sup> provided that the subsidies are in the form of "publicly-funded government program[s] . . . not involving transfers from consumers" and provided that they do not "have the effect of providing price support to producers."<sup>223</sup> An example of a program which would affect production is the Biomass Crop Assistance Program, which "provides direct payments to farmers for establishing crops that can be converted to biomass."<sup>224</sup> However, if properly devised, Green Box subsidies should provide an opportunity for countries to create farm animal welfare programs to increase humane treatment.<sup>225</sup> Gaverick Ma-

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219. See *The OIE's Objectives*, *supra* note 124.

220. Cai, *supra* note 174.

221. *Id.* at 877. However, Green Box subsidies must meet the "minimally trade-distorting test," otherwise they risk reclassification or limitation. *Id.* See also Stacey Willemssen Person, Note, *International Trade: Pushing United States Agriculture Toward A Greener Future?*, 17 GEO. INT'L ENVTL. L. REV. 307, 327 (2005) ("[E]ven green box programs can have a trade-distorting effect if done on a large scale.").

222. See AoA, *supra* note 172, Annex 2.1.

223. *Id.*; see also CHOW & SCHOENBAUM, *supra* note 46, at 459 (discussing how Green Box subsidies include "programs for research, pest and disease control, training, extension and advisory services, marketing and promotional services, domestic food aid, insurance schemes, regional assistance, environmental programs, structural adjustment assistance, and income support payments 'decoupled' from agricultural production").

224. Kelly Christian, Note, *Worth Keeping Around? The United States' Biofuel Policies and Compliance with the World Trade Organization*, 38 GA. J. INT'L & COMP. L. 165, 190 (2009).

225. See Erin Morrow, *Agri-Environmentalism: A Farm Bill for 2007*, 38 TEX. TECH. L. REV. 345, 363 (2006) (discussing how concessions such as Green-Box Subsidies are a result of "the AoA recogniz[ing] that countries have a legitimate interest in protecting nontrade commodity benefits . . . [such as] environmental protection[] and animal wel-

they and Cheryl Leahy's article, *Farm-Animal Welfare, Legislation, and Trade*,<sup>226</sup> argues that subsidies to agricultural producers "for more animal-friendly housing, equipment, training, and certification" may meet Green Box requirements.<sup>227</sup> However, Green Box subsidies for animal welfare payments have not yet been "explicitly allowed" by the WTO<sup>228</sup> and "[b]ecause Green Box payments mean extra costs for governments, they must have widespread political support"<sup>229</sup> to rationalize those costs being passed on to taxpayers. Furthermore, some countries within the WTO are pushing to place limits on Green Box subsidies, alleging that they need to be amended to better reflect the concerns of developing countries.<sup>230</sup> For example, some developing countries argue that *any* type of subsidy causes trade distortions, because "[g]overnments in developing countries simply do not have the financial resources needed to subsidize their own farmers at the same levels that farmers in developed countries are being subsidized."<sup>231</sup>

However, the U.S. asserts that animal welfare subsidies should be considered as Green Box subsidies.<sup>232</sup> Furthermore, while a country must notify the WTO of its new Green Box programs, it has "a broad amount of discretion in the calculation and classification of [its] own domestic support programs."<sup>233</sup> Given the degree of leeway permitted through self-

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fare"); see also Gerrit Meester, *European Union, Common Agricultural Policy, and World Trade*, 14 KAN. J.L. & PUB. POL'Y 389, 410 (2005) (discussing how in order for European agriculture to remain competitive worldwide and maintain EU animal welfare standards, it might need "to aim for policies that stimulate and reward the 'public functions' of agriculture in a way that does not distort trade").

226. Matheny & Leahy, *supra* note 56.

227. *Id.* at 352.

228. *Id.*

229. *Id.* at 352–53.

230. See INT'L CENTRE FOR TRADE AND SUSTAINABLE DEV., AGRICULTURAL SUBSIDIES IN THE WTO GREEN BOX: ENSURING COHERENCE WITH SUSTAINABLE DEVELOPMENT GOALS: INFORMATION NOTE 16, 13 (Sept. 2009), available at <http://ictsd.org/downloads/2009/10/green-box-web-1.pdf> (discussing how during the Doha round of trade negotiations, several developing countries have worked to reduce Green Box subsidies, while developed countries such as Japan, Norway, Switzerland, the EU and the U.S. have argued against Green Box reform).

231. Person, *supra* note 221, at 327. Some developing countries believe that even green box subsidies "may cause irreparable injury . . . [because the developing countries] cannot compete against foreign treasuries." *Id.*

232. HUMANE SOC'Y & GLOBAL ALLIANCE FOR SUSTAINABLE DEV., HUMANE, SUSTAINABLE, AND ENVIRONMENTALLY FRIENDLY DEVELOPMENT: OPPORTUNITIES FOR EQUITABLE ACCESS TO INTERNATIONAL TRADE UNDER THE DOHA DEVELOPMENT AGENDA 4 (Dec. 13–18, 2005), available at [http://www.hsi.org/assets/pdfs/hsi\\_position\\_sixth\\_wto\\_conference.pdf](http://www.hsi.org/assets/pdfs/hsi_position_sixth_wto_conference.pdf).

233. Christian, *supra* note 224, at 181.

reporting, countries should be able to experiment with new programs with little oversight. However, this could lead to an abuse of power, as a subsidy program can affect production decisions. If a farmer uses the subsidy to create a more humane production system, the long-term labor costs associated with humane production, which are passed on to consumers in the form of higher prices, may affect the farmer's decision to produce more or less in the future.

On the other hand, if a Green Box subsidy program is created to give farmers financial and technical assistance or "income compensation for loss of competitiveness"<sup>234</sup> due to making animal welfare improvements, these changes can be viewed as comparable to U.S. environmental conservation programs that have already been deemed to meet Green Box requirements.<sup>235</sup> For example, the Conservation Technical Assistance program, which "provides technical assistance to farmers and ranchers who implement soil and water conservation and water quality improvement," is considered a Green Box program,<sup>236</sup> as is the Conservation Reserve Program, which "provides [technical and financial] assistance to farmers and ranchers in complying with Federal, State, and tribal environmental laws . . . ."<sup>237</sup> Like farmers who utilize these types of environmental conservation subsidies in order to conserve resources, farmers should be able to make their animal production systems more humane without having to sacrifice their market share. Furthermore, a program that provides support for animal-friendly housing should serve as a helpful tool for egg producers to use in order to comply with the new laws in the U.S.;<sup>238</sup> the U.S. should welcome such measures, given the recent increase in concern over animal welfare, as evidenced by statutes like Prop 2.

## CONCLUSION

Animal welfare is connected to public morals, animal health, and food safety—issues that are all acknowledged in GATT Articles XX(a),

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234. DAVID BLANDFORD & TIMOTHY JOSLING, INT'L FOOD & AGRIC. TRADE POL'Y COUNCIL, *SHOULD THE GREEN BOX BE MODIFIED?* 14 (2007).

235. See, e.g., Utpal Vasavada, et al., *AoA Issues Series: Green Box Policies and the Environment*, (Jan. 3, 2001), available at <http://www.ers.usda.gov/BRIEFING/wto/environm.htm>.

236. *Id.*

237. *Conservation Reserve Program*, USDA, NATURAL RES. CONSERVATION SERV., (June 23, 2009), <http://www.nrcs.usda.gov/programs/CRP/>.

238. See, e.g., Person, *supra* note 221, at 322 (citing CHARLES H. HANRAHAN ET. AL., CONG. RESEARCH SERV. REP. FOR CONG., *AGRICULTURAL TRADE ISSUES IN THE 108TH CONGRESS*, 15 (Apr. 3, 2003)) (discussing how the "Conservation Reserve Program" is considered a Green Box subsidy).

XX(b), and the SPS Agreement.<sup>239</sup> Therefore, the WTO should recognize animal welfare measures such as the battery cage bans that countries are beginning to enact. Although there are costs involved in implementing a battery cage ban given that producers will have to create new production systems,<sup>240</sup> WTO dispute settlement panels should find that any potential costs to a country will be outweighed by the fact that the measure is not discriminatory and it truly goes to the heart of Articles XX(a), (b), or the SPS Agreement. Finally, the U.S. should develop and offer Green Box subsidies to incentivize producers to create more humane agricultural production systems, especially given the recent outpouring of public support for the more humane treatment of animals.<sup>241</sup>

Public sentiment in the U.S. looks longingly back at traditional farming practices, when animals were perhaps treated more like sentient beings, and less like egg making machines. Yet, at the same time, factory farms still dominate the agricultural landscape. Globalization has and continues to change the way that our food is produced, yet current agricultural methods will need to be revised to comply with demands for more ethical practices.<sup>242</sup> While the WTO traditionally left animal welfare out of trade negotiations, the changing tide of public concern suggests that it is time to take a practical look at the interrelatedness of trade and animal welfare. As Steven Wise so succinctly stated, “There is only one reason not to determine what rights farmed animals are due and recognize them. That is the reason that once justified human slavery: powerful economic interests are arrayed against it.”<sup>243</sup> More humanely produced foods are in real demand, “based on consumers’ common sense understanding that such practices as gestation crates, veal crates and battery cages are not humane.”<sup>244</sup> One day, economics and animal wel-

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239. See GATT, *supra* note 47, art. XX; see also SPS, *supra* note 134.

240. See, e.g., G.L. Bagnara, Main Lecture at the Poultry Welfare Symposium: The Impact of Welfare on the European Poultry Production: Political Remarks, (May 18–22, 2009), (discussing how some EU farmers, particularly in Italy and Hungary, do not have the financial means to modify their production systems to comply with the EU battery cage phase-out, and that in Poland, the agricultural ministry “will support the egg producers to ask for a delay to apply the [new production methods]”).

241. See, e.g., *Maine*, *supra* note 27; *Record-Breaking*, *supra* note 27.

242. See, e.g., Meester, *supra* note 225, at 409. Meester makes a compelling argument about emerging clashes between globalization and consumer demands, and how it is predicted that in the future, “four or five supermarkets will operate worldwide. In the food processing industry around ten large producers will dominate . . . This, together with a new kind of consumer who is increasingly critical about quality and production methods, mean that primary agriculture become [*sic*] much more dependent on demands in the chain . . .” *Id.*

243. Wise, *supra* note 206, at 137.

244. Sullivan & Wolfson, *supra* note 11, at 122.

fare will need to strike a balance, and both interests will need to be preserved within international trade negotiations. Though it may not be today, we are moving in the right direction.

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\* B.A., Trinity College in Hartford, CT (2005); J.D., Brooklyn Law School (expected June 2011). I am indebted to my fiancé, Kevin, my parents and brother, Alex, as well as my friends who have all encouraged me throughout this process. I would like to thank Professor Mariann Sullivan who has served as an invaluable source of information and a mentor for the past two years, as well as Sarah Stewart from Humane Society International for her advice and oversight. I would like to thank the amazing executive staff of the *Brooklyn Journal of International Law* for its assistance in preparation of this Note. Finally, I would especially like to thank Buzzy and Peanut, who have served as the inspiration for this note, and who continue to inspire me to this day.