FARM ANIMAL WELFARE AND WTO LAW

ASSESSING THE LEGALITY OF POLICY MEASURES

Master of Arts in Law and Diplomacy Thesis

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> The care of animals brings with it often complicated problems of economics, ecology, and science. But above all it confronts us with questions of conscience. Many of us seem to have lost all sense of restraint toward animals, an understanding of natural boundaries, a respect for them as beings with needs and wants and a place and purpose of their own. Too often, too casually, we assume that our interests always come first, and if it's profitable or expedient that is all we need to know. We assume that all these other creatures with whom we share the earth are here for us, and only for us. We assume, in effect that we are everything and they are nothing.
>
> Animals are more than ever a test of our character, of mankind's capacity for empathy and for decent, honorable conduct and faithful stewardship. We are called to treat them with kindness, not because they have rights or power or some claim to equality, but in a sense because they don't; because they all stand unequal and powerless before us.
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> -Matthew Scully, *Dominion*, pp. xi-xii.

> An inchoate public is capable of organization only when indirect consequences are perceived, and when it is possible to project agencies which order their occurrence.
>
> -John Dewey, *the Eclipse of the Public*

Introduction

As Dewey noted almost a century ago, public oversight of production processes depends not only on transparency, but also on a thorough understanding of causation. In more recent decades, and as industry practices become more widely known and scrutinized in works like Scully's *Dominion*, the legal and ethical treatment of nonhuman animals has become a policy priority for many citizens—and for some governments—around the world.

As a result, the scientific and commercial uses of animals in toxicology and behavioral research, in agricultural production, and for entertainment have come under increasing pressure during a time of systemic change[1] in the food industry and research communities. This paper clarifies the lay of the international legal land in the domain

[1] See *Livestock's Long Shadow*, a 2006 FAO report, for data on the "livestock revolution".

affecting the largest number of nonhuman animals: the rearing, transport, and slaughter of animals raised for food and fiber production.

Although the root causes of the clash between human and animal interests more generally are rooted in a range of social, religious, and economic pressures reinforced by the legitimizing glue of Western history,[2] this paper addresses a much narrower topic:[3] defining animal welfare, distinguishing the measures available to improve it, and assessing the likelihood of a successful legal challenge against those measures.

Specifically, a wealth of recent jurisprudence by the WTO Dispute Settlement Body's Appellate Body (AB) has for the first time clarified most of the relevant GATT-provisions pertaining to the legality of governmental measures intended to promote high farm animal welfare (FAW) standards in livestock production.[4] Combined with the designation of the World Organization for Animal Health (OIE[5]) as the WTO-sanctioned body pertaining to animal welfare, AB rulings on the interpretation and application of Articles III, XI, and XX of the GATT 1994—and on the relevant provisions of the Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT)

[2] This paper does not address the heated animal welfare 'vs.' animal rights divide that is currently playing out in the animal advocacy domain. For an important explication of the latter view, see Steven Wise, *Rattling the Cage: Toward Legal Rights for Animals*. Perseus Books: Cambridge, 2000. For an indication of how the even more heated debate between animal protectionists and livestock producers can tend to distort the truth of both sides' arguments, see D. Fraser, "The "New Perception" of animal agriculture: Legless cows, featherless chickens, and a need for genuine analysis", *Journal of Animal Science*, Vol. 79, 2001, pp. 634-641.

[3] I also refrain from conducting an in-depth stakeholder analysis. For an overview of the non-governmental agencies with a stake in animal advocacy, see "Animal Welfare: the role of non-governmental organizations," *Rev. Sci. Tech. Off. Int. Epiz.*, Vol. 2, no. 24, 2005, pp.625-638. Other relevant stakeholders include, most prominently, domestic and foreign livestock industry companies and trade associations, government oversight and regulatory agencies, and the citizen and consuming public.

[4] This paper focuses specifically on developed country scenarios, primarily because my analysis best fits the likely future trade restrictive activities of the European Union, the group of countries with the highest FAW standards currently in practice. The issues affecting FAW in developing countries, while important, are qualitatively different; whereas most developed country welfare problems originate from high stocking densities, developing country issues include draught animal overbearing, forced marching, malnutrition, and other such forms of mistreatment.

[5] Headquartered in Paris, the OIE's native title is the office international des épizooties.

agreements—make a legal analysis of measures promoting FAW ripe for review. This is especially the case when one considers that the WTO Member most likely to enact FAW measures—the European Community—is also the Member with the most substantial history as a WTO defendant in agricultural matters.[6]

The legal and policy arguments laid out below are meant to address the contentious issue of product-process methodology distinctions in national policy and international trade,[7] and this paper uses the European Community's recent focus on FAW issues as a likely template both for future disputes and possible collaborations. The EU has enacted a range of Community-wide legislation mandating minimum welfare standards over the last few decades, and is currently operating a five-year project, to be completed in 2009, titled "Welfare Quality: Science and society improving animal welfare in the food quality chain" at a cost of 16 million Euros. A part of the much-vaunted "from farm to fork" EU-wide program, the Welfare Quality "research program is designed to develop European standards for on-farm welfare assessment and product information systems as well as practical strategies for improving animal welfare." [8]

To best lay out the fact situation, the relevant laws and interpretations, and the legality of certain measures in light of these interpretations, this paper proceeds in two core parts which together are intended to identify and legally assess the policy measures

[6] Even as far as two decades back, the noted trade scholar Robert Hudec was able to state that "lawsuits over agricultural trade measures are clearly the reason why the EC is the GATT's most frequent defendant. In disputes not involving agricultural products, the EC has been sued no more often than the U.S." *from* Robert E. Hudec, "Legal Issues in US-EC Trade Policy: GATT Litigation 1960-1985", in *US-EC Trade Relations*, eds. Robert E. Baldwin, Carl B. Hamilton and André Sapir. Chicago: University of Chicago Press, 1988.

[7] Indeed, PPMs are not restricted to farm animal welfare. A wide range of labor and environmental standards are also describable as PPM-related measures.

[8] From www.welfarequality.net, last visited March 23, 2008; EU funded project FOOD-CT-2004-506508.

available to WTO Member States interested in promoting FAW, whether as restrictions on trade or as domestic support policies.

Part II begins with an overview of the different means of defining and assessing welfare determinants, and then proceeds to examine various FAW policy measures taken either pursuant to, or beyond the scope of, the Organization for Animal Health's (OIE's) Terrestrial Animal Health Code standards. Potential measures include:

- labeling schemes,
- tariffs on inhumanely raised meat and other animal products,
- taxes on the same,
- import bans and other quantitative restrictions,
- "green box" measures under Annex II of the Agreement on Agriculture, and
- special and differential treatment for developing countries.

In addition to being weighed against the relevant legal provisions of the GATT, the SPS Agreement, and the TBT Agreement, substantive trade-restrictive policy measures should be measured against the SPS-endorsed OIE Terrestrial Animal Health code. Specifically: do the measures fall within existing OIE code? If not, are they within the ambit of proposed OIE code that is currently in negotiation? If neither, does the policy measure have a scientific justification as defensible under the standard set out in *EC-Hormones*?

Critical measures and mechanisms of implementation affecting the likely success of a Panel and AB dispute at the WTO include: whether a measure taken applies equally to like domestic products and producers; whether a measure is taken as part of a comprehensive scheme intended to support the desired policy outcome; and whether the measure taken is the least trade-restrictive alternative reasonably available. Since these provisions and requirements are the primary reason that otherwise acceptable policy

exceptions under the relevant subparagraphs to Article XX have failed,[9] it is essential to understand and implement the requirements of the chapeau to Article XX.

Although Part II compartmentalizes the array of available policy measures, most governmental policy measures designed to promote FAW will necessarily be a combination of labeling and other schemes, both because of the relative importance of consumer right-to-know provisions in the European Community—the polity most likely to engage in FAW trade-restrictive measures—and because of the legal requirements under the chapeau to Article XX that trade-restrictive measures taken pursuant to public policy protection are only justifiable as part of a comprehensive program addressing FAW from as many substantive directions as possible.

It is important to highlight that part II does *not* contain a thorough analysis of why some measures would be preferable to others from the standpoint of effectiveness.[10] This section is not intended to be an exhaustive action plan that decides optimal policy measures. Rather, it is a superficial overview to help the reader understand the policy background against which the legality of FAW measures is being weighed. The purpose of this paper is simply to assess the legality of measures, so that policymakers can incorporate the costs of potential illegality into their FAW measure selection calculus.

Part III identifies the WTO texts and AB rulings that are relevant to the defensibility of import restrictions and domestic supports intended to promote FAW. This section begins with the determination of whether a restrictive measure falls under GATT Article III or XI. If the latter, a measure imposing quantitative restrictions will be

[9] *US-Shrimp* and *Brazil-Retreaded Tyres* are the most prominent examples in this regard.
[10] For a recent analysis on this topic, see Harald Grethe, "High animal welfare standards in the EU and international trade – How to prevent potential 'low animal welfare havens'?" *Food Policy*, Vol. 32, 2007, pp. 315-333.

assumed inconsistent and only justifiable under Article XX or as a measure taken pursuant to the SPS or TBT agreements. If the former, a thorough analysis of whether humanely and inhumanely raised beef requires a determination of "likeness" under the relevant paragraph of Article III (with particular attention to *EC-Asbestos* and *Japan-Alcoholic Beverages*) will be required.

To determine both how the 'accordion' of likeness is aligned and which paragraphs and sentences of Article III apply, the analysis examines the different provisions of Article III:2, first sentence; Article III:4; and the manner in which Article III:1 colors the interpretation of the other relevant paragraphs. The analysis concludes with an overview of AB jurisprudence on the acceptability of product-process distinctions in the determination of "likeness".

If the products in question are deemed "like", and if discrimination is deemed to have taken place, the analysis moves to the relevant subparagraphs of Article XX, in this case XX(a) and multiple provisions of XX(b). If such measures pass the "necessity" test obligated by the stringent language of subparagraphs (a) and (b), the analysis proceeds to the chapeau of Article XX, which can be read as a general good faith obligation in its requirements that measures avoid "arbitrary and unjustifiable discrimination" and "disguised restriction[s] on international trade."

A critical reading of *US-Shrimp* and *Brazil-Retreaded Tyres* informs the measures necessary to bolster the likelihood of compliance under the chapeau to Article XX, with a specific focus on the necessity to pursue a range of alternative policy measures prior to enacting a trade restrictive measure, and to ensure that the measure imposed is the least trade restrictive alternative reasonably available.

Whereas the above analysis pertains to any trade restrictive measures taken to promote FAW, measures which are specifically "necessary to protect animal health" or as labeling schemes may be alternatively defensible under the SPS or TBT agreements. Part III therefore also provides an outline of relevant AB jurisprudence on the requirements of WTO-compliant labeling under the TBT (*EC-Sardines*) and health-protective measures under the SPS (*EC-Hormones*).

Finally, part III concludes with an analysis of "green box" measures taken pursuant to Annex II of the Agreement on Agriculture (AoA) and Special and Differential Treatment measures taken under the Enabling Clause. Since the decoupling of Common Agricultural Policy payments in June of 2003, the legality of the EU's green box payments needs to be assessed both in light of the AoA and the Subsidies and Countervailing Measures Agreement (SCM Agreement). In the case of special and differential treatment, certain cooperative actions between the EC and land-rich African countries is assessed in light of the *EC-Tariff Preferences* interpretation of the Enabling Clause and the potential for win-win outcomes for FAW between more and less developed countries.

Part IV recapitulates the policy measures and legal reasoning of parts II and III and weighs the merits of GATT-compliant measures against the policy goals and measures identified in Part II. However, instead of weighing each policy action on its merits, this analysis focuses on whether potential FAW measures will be deemed legal or illegal given the lay of the legal terrain and the allocation of interpretive authority granted by the AB to competing views.

It is up to policymakers to balance this information about FAW measures' likely legality against the strengths and weaknesses of the measures themselves, and to determine whether or not a breach of law would be efficient or undesirable in each particular case. In addition to determining which measures would be legal under WTO law, one of the purposes of this paper is to demonstrate that the WTO legal system is not necessarily as opposed to FAW measures as some advocates seem to think.[11]

I determine that a combination of labeling, differentiated tariffs, decoupled green box supports, and carefully planned partnerships with land-abundant developing countries are—given the current legal and statutory situation at the WTO and the OIE—the legally optimal basket of policy measures for a FAW-concerned country or group of countries to endorse and apply.

While understanding the limits of scientifically-based FAW assessments, this concluding section recommends that animal advocates—whether as private citizens or governmental agencies—invest their relevant resources in strengthening the OIE code-adoption process, and in planning and implementing comprehensive policy measures intended to protect FAW and to secure compliance with the relevant WTO law generally and the chapeau of Article XX in particular.

II. The Policy Template: Measures Available

> Ladies and Gentlemen, the significance of this conference should not be underestimated. It marks the very first opportunity for stakeholders, scientists and governments to debate animal welfare issues in a worldwide perspective.

[11] See, for example, Peter Stevenson, "The World Trade Organization Rules: A Legal Analysis of their Adverse Impact on Animal Welfare", *Animal Law*, Vol. 8, 2002.

. . .

> It is of obvious importance that markets evolve and adapt in response to consumer demands. It is encouraging in this regard to see, for example, the shift towards the use of free range eggs by some of the international fast food chains. I would accept however that there is still a considerable way to go as regards consumers translating their opinions on welfare issues into positive food choices, and I recognize that this represents a challenge to the food industry.

-David Byrne, EU Health and Consumer Protection Commissioner, speaking to the 1st OIE Global Conference on Animal Welfare, 23 February, 2004

The general lessons from recent AB jurisprudence are that, in order to pass WTO review, a FAW measure must be for a legitimate purpose, must be realistically and effectively taken, and must constitute the least trade-restrictive alternative reasonably available. Before examining the relevant jurisprudence, I identify the range of measures available—to the EU in particular, and to similarly situated countries in general.

The range of potential policy measures includes:

- labeling schemes
- differentiated tariffs
- differentiated taxes
- "Green box" domestic support programs
- import bans or quotas
- special and differential treatment for developing countries

While keeping in mind that some of these measures would be required in conjunction with each other—and with other governmental and intergovernmental measures—in order to satisfy the various iterations of "necessity" under a WTO balancing test, these measures would primarily[12] fall, respectively, under the purview of the

- TBT agreement (labeling)
- GATT Article III:4 (differentiated tariffs)
- GATT Article III:2 (differentiated taxes)
- The SCM Agreement and the Agreement on Agriculture ("Green box" measures)
- GATT Article XI (import bans or quotas)

[12] Under the principle of cumulative interpretation, many of these measures would be subject to multiple of the listed WTO provisions.

- The Enabling Cause and GATT Article I.1. (special treatment for developing countries)

Tariffs, taxes, import bans, and quotas would all proceed to review under GATT Article XX (near automatically in the case of bans and quotas, and if they are found violative in the case of tariffs and taxes).

From a WTO compliance perspective, the type of measure being used is central in determining how the measure will be treated in terms of GATT-compliance. Article XI refers to the broad category of "measures", while Article III limits itself to internal taxes, laws, and regulations; it follows that the scope of XI is broader than that of III, a fact that—given the more prohibitive nature of Article XI—creates an incentive for respondent Members to be judged under Article III, on the grounds that arguing consistency under both III and XX is a richer legal argument than only having recourse to the exceptions under XX.

This section proceeds by identifying the range of policy measures available, which, again, include: labeling schemes, tariffs, taxes, "green box" measures, import bans and quotas, and special tariff treatment for developing countries. First, however, it is necessary to properly define and explain the parameters of animal welfare.

II. A. Defining and Assessing FAW

Following David Fraser, a noted animal welfare specialist and one of the lead science representatives on the OIE Permanent Group for Animal Welfare, animal welfare requirements can be classified in four broad categories:[13]

[13] Many such classificatory schemes exist: I choose Fraser's because it captures a hierarchy of needs—similar to Maslow's hierarchy for humans—that allows us as viewers to rank the performance of industry actors according to a set of agreed upon standards. For another point of reference, a second frequently used

- Type I: to maintain basic health and bodily function
- Type II: as responsive to animals' 'affective states'[14]
- Type III: to provide elements of animals' natural behavior[15]
- Type IV: to provide access to light, fresh air and the outdoors[16] (Fraser, 2006)

To provide a contrast: European regulations are often broad in scope, encompassing welfare requirements type I through III. US regulations, on the other hand, tend to support only type I requirements, the one category that is directly related to profit maximization.

Of the four welfare categories, type IV is the most difficult to connect to a minimalist definition of health; a controlled environment (indoors) is, by definition, safer than one that is semi-controlled (outdoors). That type IV welfare requirements also

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system is the Animal Needs Index (ANI-35L) governing animal welfare in Austria, which bases its assessment index on five category scores: 1) locomotion, 2) social interaction, 3) flooring, 4) light, air and noise, and 5) stockmanship. The sum of these numbers, each of which is given a numerical value, totals to equal the ANI score. (Zaludik et al, 2007)

[14] Type II requirements—which include anaesthetics for branding, a ban on forced moulting, and the reduced use of electric prods—focus on the scientific study of behavioral and physiological pain and stress indicators. Temple Grandin's insightful *Animals in Translation* notes how profit and welfare can both benefit from type II requirements: "Prods always stress an animal, and when an animal is stressed his immune system goes down and he starts getting sick, which means higher veterinary bills. Plus stressed animals gain less weight, which means less meat to sell. Dairy cattle who've been handled with prods give less milk." (Grandin and Johnson, 20-21) Grandin also cautions that behavioral studies have mixed success in interpreting pain; as prey animals, livestock species are adept at masking discomfort from would-be predators. Similarly, seemingly innocuous conditions of sound and lighting can be particularly stressful to some farm animals.

[15] Type III requirements, such as facilitating hens' ability to perch, dust-bathe and enter a nest box, are growing more common in EU Directives but are only present in the US as label-based, organic and free-range alternatives. Significantly, ignoring type III requirements has health as well as welfare repercussions: hens show behavioral signs of frustration when prevented from laying in a nest, allowing perching improves hens' leg bone strength, and letting sows walk reduces lameness. Although industry implementation of type III requirements would require a substantial conversion cost, Fraser notes that subsequent health benefits should mitigate the expenditure. (Fraser, 100) However, it is unlikely that Type III requirements can be met without addressing the prevailing US conditions of extremely high stocking density.

[16] Type IV requirements mandating access to fresh air and natural daylight, also widely-used in alternative production systems, are rare in regulatory design. Type IV requirements enjoy considerable public support on ethical grounds, and could provide a solution to the health problems inherent in restrictive environments: respiratory illness, lameness, aggression, and self-mutilation. On the other hand, while pasture cows have a lower incidence of mastitis than confined cows, they are also exposed to the ravages of weather, predators and various pathogens. (Fraser, 101) Because type IV requirements are virtually impossible to incorporate fully in existing intensive systems, type IV-related production tends toward free-range and organic production.

receive the strongest support from conscientious consumers indicates the independent grounds upon which a defense under GATT Article XX(a) rests.

II. A. 1. Species-Specific Welfare Considerations

The husbandry practices to which different livestock in intensive systems are subjected have various species-specific deleterious effects, so I will briefly address each of the major industries in turn;[17] although the focus of this work is on the GATT-legality of certain governmental measures, a brief overview of some of the more egregious welfare-reducing effects that confined animal feeding operation (CAFO) systems and current slaughter procedures[18] can have on animals clarifies the ethical underpinnings of such policy considerations, and, more generally, the purpose for engaging this material.

Broilers. The welfare-damaging husbandry practices to which poultry are subjected include: debeaking, forced moulting (forced starvation to speed up the laying cycle), live disposal of male chicks, and intensive stocking. Indicators of pain and stress on enclosed poultry include: injury caused by pecking, space constraints on preening, bone and muscle weakness, stereotypic repeated behavior, abnormal behavior due to impaired access to litter for dust-bathing and to nest sites for laying, and feather loss. (Bennett et al, 2003) Modern breeding programs have also developed breeds that grow faster to yield maximum chicken weight in minimum time, which itself causes severe muscle strain and abnormal leg conditions as chickens' bodies outgrow their legs' carrying capacity. (Olsson et al, 2006)

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[17] For a more comprehensive overview, see Bernard E. Rollin, *Farm Animal Welfare: Social, Bioethical, and Research Issues*. Iowa State University Press: Ames, Iowa, 1995.

[18] For a US example, see Gail A. Eisnitz, *Slaughterhouse: the Shocking Story of Greed, Neglect, and Inhumane Treatment Inside the U.S. Meat Industry*. Prometheus Books: New York, 1997.

Layers. Layer hens in battery cages suffer primarily from problems related to stocking density. Whereas UK producers, for a point of reference, often stock between 34 and 40 kg/m², standard US densities are generally twice the UK standard. As a study conducted by A.L. Hall and the Oxford School of Zoology illuminates, the link between welfare and stocking density is incontrovertible. The higher density resulted in: increased mortality, a greater incidence of leg problems, increased contact dermatitis and carcase bruising, increasingly disturbed resting behavior, decreased pecking and locomotion, and altered lying and preening patterns. (Hall, 2001) Another study, documenting feeder space allowance and agonistic behavior, showed similar results: as feeder space increases, the mean agonistic acts per bird per hour during feeding decreases. Significantly, however, feeder space had no effect on growth rates. (Olukosi et al, 2001)

Hogs. A quote from one unpleasant account encapsulates the hog industry's most problematic practices: "pigs are castrated and have their tails removed without anaesthetic. Moreover, gestating (pregnant) sows and farrowing (birthing) sows are housed in stalls where they are unable to turn around. Such intensive farming practices result in health problems, including lameness or high death rates, which are aggravated by uncontrolled genetic selection for production traits such as rapid growth" (Wolfson, 1996)

Cattle. Similarly with beef and dairy production, "day-old baby calves are transported from the dairy farm before they are able to walk, resulting in calves being thrown, dragged, or trampled. This practice is becoming increasingly accepted . . . Veal calves are housed in stalls where they are unable to turn around. The calves are fed a liquid diet that does not allow the normal function of the calf's rumen. In addition, cattle

are dehorned, castrated and hot-iron branded without anaesthetic." (Wolfson, 1996) High milk yield—whether due to BST or specialized breeding practices—also significantly increases the occurrence of mastitis and reproductive problems in dairy cows. (Olssen et al, 2006)

I. A. 2. Performance and Design Welfare Indicators

In order to overcome the above-mentioned species-specific differences, most FAW measures focus instead on the broader categories of performance and design measures. Whereas performance measures examine the actual welfare state of the animals according to behavioral, physiological, and other ethological indicators, design criteria focus instead on changing the housing and other conditions in which the animals are reared. Performance criteria are generally preferred for their greater reliability in translating animals' affective states, but design indicators are often preferred by livestock owners and operators as being easier and more straightforward to implement. In reality, all FAW measures are a combination of both design and performance criteria, with the real question being one of prioritization and emphasis.

In addition to species-specific factors, performance criteria-based welfare assessments of suffering are made from a combined inspection of physical health, physiological signs, behavior, and design characteristics of housing systems.[19] Once such performance criteria are scientifically established, design criteria are modeled around the performance goals.

[19] Following a battery of tests that approach objectivity in revealing preferences as accurately as is reasonably possible without the direct verbal communication to which human interactions have recourse, Dawkins reaches the following conclusion: "animals suffer if kept in conditions in which they are without something that they will work hard to obtain, given the opportunity, or in conditions that they will work hard to get away from, also given the opportunity." (Dawkins 36, 2006)

Having established the basic parameters of defining and assessing the objectives which FAW measures strive to obtain, I proceed to the array of measures available as means to that end.

II. B. Labeling Schemes

A reasonably comprehensive labeling scheme would be a necessary prerequisite to tariffs, taxes, and import bans, both because tariffs and taxes are predicated upon the ability to differentiate which labeling affords, and because such measures would be an integral part of a good faith argument to defend against being struck down by the chapeau to Article XX. Under the analysis presented in section IV.D (*infra*), the defensibility of a labeling scheme hinges on whether the measure is a "technical regulation" under the three-tiered definition established by the AB, whether the measure is properly taken pursuant to "legitimate objectives".

Especially in the European context, many consumers are well-attuned to region-of-origin labeling. In addition to mandatory labeling covering ingredients, durability, etc. (but excluding the nutritional information that is required in the U.S.), several European countries contain protected designation of origin (PDO), protected geographical indication (PGI) and traditional specialty guaranteed (TSG) voluntary labels. France, for example, contains five food quality labels. Given that such region-of-origin labeling is intended to allow discerning consumers to select products based on the regional air, soil, and other conditions, it follows that a "sustainable agriculture", or "animal friendly", or

"free range" label could become more palatable or more readable for consumers than a label that emphasizes the origin of the product."[20] (Bureau and Valceschini, 7)

It is important to understand that some labeling measures would qualify as "technical regulations", and thus as technical barriers to trade, while others would not. While any effective labeling scheme would conform to the first two defining points of a "technical regulation" (that is, that they must apply to identifiable products and lay down product characteristics), labeling schemes can be either voluntary or mandatory. Only the latter would count as a "technical regulation", although voluntary schemes would still help to establish market demand for products in which consumers perceive a market failure, and would constitute a sign of good faith intentions to promote the desired policy effect. While voluntary standards have the advantage of being exempt from direct TBT jurisdiction, they have correspondingly little direct effect on changing industry standards for anything other than niche markets.

In addition to being voluntary or mandatory, labeling schemes can also be positive or negative, and can be 'baseline' or 'hierarchical'. In other words, labels can: positively identify products that conform to minimum standard, positively identify products that incrementally exceed minimum standards according to a point system, or negatively identify products that fail to meet minimum national or regional standards.

In the EU case, Labeling schemes have the domestic benefit of requiring a more substantial change in foreign FAW standards than in domestic standards, given the higher on-average welfare conditions present in the EU.[21] This distinction is also the reason

[20] For a detailed analysis of FAW labeling measures in Europe, see the Farm Animal Welfare Council's "Report on Farm Welfare: Effectiveness of Labelling". Available at http://www.thefishsite.com/Articles/192/fawc-report-on-farm-welfare-effectiveness-of-labelling.

[21] Tariffs also have the policy advantage of granting a first-mover benefit to domestic producers.

why two types of labeling—baseline and hierarchical—could be beneficial: whereas the baseline labels provide incentives for foreign producers to meet domestic standards and gain access to particular markets, hierarchical point systems provide additional incentives for domestic producers to access further niche markets in which FAW factors heavily into consumer purchases. (Eaton *et al*, 10) In terms of implementation, such schema would require conformity assessments in exporting countries who seek entry under the label's parameters.

Prospective FAW labels also have a number of existing templates from which to draw lessons about the success or failure of various labeling schemes. Prominent examples include: the Marine Stewardship Council's (MSC) seafood labels, the Forest Stewardship Council's (FSC) sustainable lumber labels, and Germany's multi-product Blue Angel seal. The analogy with the MSC label is especially strong, as substitutability of meat and fish products highlights the difficulty of presenting a united front between fish and meat sellers and purchasers and the translation of citizen concern into consumer willingness to pay (WTP).[22]

II. B. 1. The EU Welfare Quality Project

In the domain of product labeling, progress by the EU in developing harmonized voluntary FAW standards has been underway since 2004, when the EU Welfare Quality project began its scientific assessment of welfare standard harmonization. According to the proceedings of the Second Welfare Quality Stakeholder conference (May 2007), the main aims of the project continue to be:

[22] The fine details of labeling strategy needn't be addressed here; it suffices to demonstrate that a rich terrain exists in which to implement proposed labeling projects.

- To develop practical strategies/measures to improve animal welfare
- To develop a European standard for the assessment of animal welfare,
- To develop a European animal welfare information standard, and
- To integrate and interrelate the most appropriate specialist expertise in the multidisciplinary field of animal welfare in Europe (Blokhuis, 13)

The WQ project also prioritizes performance measures over design measures (see *supra*, at I.A.2), although the latter are also considered.

Standards will be implemented by the Comité Européen de Normalisation. According to one group of researchers,

> Comité Européen de Normalisation standards are found in virtually every sphere of economic activity within the EU…As such, they are likely to be required by virtually all large EU retailers. Although they will be officially voluntary [and hence permitted under the rules, and especially the Technical Barriers to Trade agreement, of the World Trade Organization (WTO), they will be de facto mandatory for all EU countries and supplier nations to the EU. (Thompson *et al*)

If Thompson *et al* are correct that such standards would be de jure voluntary but de facto mandatory, their assertion that the proposed standards would not fall afoul of WTO law is probably incorrect. Although the labeling standards would be outside of the purview of the TBT agreement as not being mandatory (the third criterion of a "technical standard"), if such labeling standards have the effect of considerably inhibiting trade flows, they could be deemed a non-tariff barrier to trade under Article III:4 of the GATT 1994.

II. C. Differentiated Tariffs and Taxes

Upon establishment of the EU Welfare Quality project's EU-wide standardization scheme, a range of policy options arise as standard-compliant and non-compliant animal products become more readily distinguishable. (A question remains, however, as to

whether differentiated tariffs and taxes will be viable policy options in the face of only the voluntary labeling schemes which are proposed under the Welfare Quality project.[23])

Chief among those options are differentiated tariffs and taxes, which could take various forms:

> Existing or new taxes and/or tariffs could be differentiated according to PPM standards to compensate for higher production costs associated with improved standards. Differentiating tariffs means either a lower, i.e. preferential, import duty (relative to the current applied rates) for meat imports meeting the EU minimum standard, a higher duty for those not meeting the EU minimum standard, or a combination of both. Similar differentiation is conceivable with a tax-based measure, such as excise taxes. Whereas differentiated tariffs would aim to improve standards in foreign countries (the first situation), a differentiated tax measure could also be used to stimulate improvements in animal welfare in production within the EU. (Eaton *et al*, 10)

A recent study[24] finds that tariffs would be effective in dealing with imports but would necessarily run afoul of WTO rules. I do not entirely agree, although the weight of judicial evidence to date has not tended to favor FAW and other PPM measures; one of the purposes of this paper is to show that tariff policies, if properly argued before the WTO and properly implemented by the respondent state, could be successfully defended.

II. D. "Green Box" Measures

In a recent reform of the European Common Agricultural Policy (CAP), then EU Health Commissioner David Byrne sought to preempt adverse rulings in the *Brazil-Sugar* case by restructuring the CAP before further litigation arose. In June of 2003, the Agricultural Council of Ministers decoupled its CAP payments from production and qualified their receipt by farmers on the implementation of certain food safety,

[23] In one useful study's view, "differentiated tariffs or taxes should really only be contemplated together with the use of mandatory labeling standards." (Eaton *et al*, 57)
[24] Harald Grethe, "High animal welfare standards in the EU and international trade – How to prevent potential 'low animal welfare havens'?", *Food Policy*, Vol. 32, 2007, chart on p. 322.

environmental, animal health and animal welfare standards. (the "Luxembourg CAP Reform Agreement")

On the conditionality requirement, the Belgian foreign affairs office writes

> In the Member States applying the single payment scheme, regulatory management requirements will be gradually integrated into the conditionality framework over a period of three years from 2005. In the new Member States applying the single area payment scheme, these regulations will be integrated into the framework from 2009, with the exception of Bulgaria and Romania which will start in 2012.
>
> A farm advisory system has been set up to help farmers meet these requirements. Implementation of this system by Member States applying the single payment scheme is mandatory from 2007, although participation by farmers will continue to be on a voluntary basis, at least to start with. Mandatory participation by farmers will be agreed upon based on the outcome of a report by the Commission concerning the functioning of the system, to be drawn up in 2010.
>
> . . .
>
> *Aid for protecting the environment, maintaining natural areas and improving the animal welfare are granted to farmers who employ practices that are better than normal good practices for a minimum of five years*. This aid is paid annually and is based on additional costs and loss of income. Annual ceilings vary between EUR 450 and EUR 900/ha depending on land use and are set at EUR 500 per livestock unit. (emphasis added)

The motives for such a shift in European agricultural policy are readily discernible; by decoupling its agricultural payments and changing the recipients of farm subsidies to farmers who are practicing good environmental and animal welfare practices, the EU Agricultural Commission's actions help both to preempt WTO disputes upon the expiry of the Agreement on Agriculture's "peace clause" and to address the growing clamor over environmental and ethical concerns of the European public, all the while ensuring that cooperative farmers aren't left in the lurch.[25]

[25] As the HBS case study, "Brazil Sugar and the WTO: Agricultural Reform in the European Union" (N9-906-408) puts it: "[Agriculture Minister] "Fischler and his colleagues knew they couldn't look to the sugar producers as if they were abandoning ship," one observer noted. "So what they did was say, "We're not going to abandon the ship. We'll just change the ship.'" The proposal allowed member states to choose to maintain a limited link between subsidy and production under well defined conditions and within clear limits. However, these new "single farm payments" would be linked to the respect of environmental, food

II. E. Import Bans or Quotas

Unlike tariff and tax measures covered by GATT Article III, import bans are generally judged to be facially discriminatory. For this reason, the EU has been loath to carry out import bans in the name of animal welfare, as evidenced by its decisions to ignore its own 1991 ban on leghold traps for EC-Marketed fur and to water down a universal ban on animal testing on cosmetics to a purely domestic ban. (Stevenson, 2002) Nonetheless, such measures present viable tools in the policymaker's toolbox of potential policy actions.

Although import bans might appear optimal from a purely domestic policy perspective, they are among the most unlikely measures to pass legal scrutiny at the WTO. Quotas, on the other hand, are generally less trade-restrictive than import bans, but, as quantitative restrictions, they are equally likely to be found in violation of Article XI.

The domain of quantitative restrictions generally presents a case where domestically appealing policies face high legal hurdles and are thus not likely to be worth the costs of their enactment. There are certainly cases where the policy benefit of imposing an import ban would outweigh the harm of legal breach, but this paper focuses specifically on the legality, leaving policy cost-benefit analysis to the relevant policymakers.

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safety and animal welfare standards. Severing the link between subsidies and production, Fischler proposed, would make the EU farmers more competitive and market oriented, while providing necessary income stability. More money would be available to farmers for environmental, quality or animal welfare programs by reducing direct payments for bigger farms."

II. F. Special Treatment for Developing Countries

In many respects, a natural partnership exists between land-rich pastoral developing nations and developed nations reluctant to accelerate the intensification of livestock production systems.[26] And, in fact, the EU-Africa partnership contains some trade agreements for sub-Saharan African nations to export livestock to the EU, conditioned upon certain FAW requirements. Pairing FAW-concerned consumers in developed countries with pastoral farmers using extensive production methods in developing countries has the potential to create a new and viable market by connecting otherwise discrete suppliers and consumers.

In addition to considering the legal hurdles discussed below, North-South cooperative ventures of this nature are likely to incense animal welfare advocates who are strongly opposed to the lengthy and unregulated transport of live animals, and to benefit large producers in the developing world rather than the rural smallholders who most need assistance;[27] further cooperation at a multilateral level with the OIE, and bilaterally between specific interested countries, will be necessary to assuage the concerns of all stakeholders involved.

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[26] For an analysis of the welfare assessment of extensive systems, see S.P. Turner and C.M. Dwyer, "Welfare assessment in extensive animal production systems: challenges and opportunities", *Animal Welfare*, Vol. 16, 2007, pp. 189-192.

[27] A recent *Economist* piece, "the new face of hunger", tackles this issue obliquely when discussing rural smallholders in crop commodity production: "Ideally, a big part of the supply response would come from the world's 450m smallholders in developing countries, people who farm just a few acres. There are three reasons why this would be desirable. First, it would reduce poverty: three-quarters of those making do on $1 a day live in the countryside and depend on the health of smallholder farming. Next, it might help the environment: those smallholders manage a disproportionate share of the world's water and vegetation cover, so raising their productivity on existing land would be environmentally friendlier than cutting down the rainforest. And it should be efficient…" Unfortunately, however, if the products in question—in this case, meat, are destined for developed country supermarkets, "supermarkets need uniform quality, minimum large quantities and high standards of hygiene, which the average smallholder in a poor country is ill equipped to provide. So traders and supermarkets may benefit commercial farmers more than smallholders." (*The Economist*, April 19th-25th, Vol. 387, no. 8576, 2008) These factors will necessitate a particularly careful planning process to avoid findings of discriminatory behavior under the Enabling Clause (*infra*, at III.G.).

III. The Legal Template: Assessing the Legality of FAW Measures

Because any governmental measure intended to promote FAW that has trade-restrictive effects will likely be challenged by complaining WTO Member states, it is useful to analyze the relevant AB jurisprudence regarding all of the potentially apposite Articles and agreements. Depending on the action at hand, some among the following provisions and key Appellate Body rulings will apply:

- Pursuant to national treatment, product "likeness", and discriminatory treatment: Article III, paragraphs 1, 2: first sentence, and 4 (*Japan-Alcoholic Beverages*, *EC-Asbestos*, *US-Shrimp*)
- Pursuant to public policy exceptions: Article XX, subparagraphs (a) and (b), and Article XX, chapeau (*Shrimp*, *Retreaded Tyres*)
- If "necessary to protect animal health": the SPS Agreement (*EC-Hormones*)
- If part of a labeling scheme, the TBT Agreement (*EC-Sardines*)
- If a "green box" measure, the AoA Agreement and the SCM Agreement
- If special and differential treatment, the Enabling Clause (*EC-Tariff Preferences*)

This section identifies the potentially applicable provisions and their interpretive history to date, matching each potential policy action with its respective battery of relevant legal provisions.

III. A. Labeling: Compliance with the TBT Agreement

Beginning with labeling, the first likely policy measure upon which other measures would be based, directs the analysis to the Agreement on Technical Barriers to Trade (TBT Agreement). Whereas a FAW measure's invocation under the SPS Agreement would be made specifically in connection with measures taken pursuant to the

argument laid out in XX(b), the TBT Agreement would be applicable to labeling measures more broadly. A labeling scheme would be a necessary but not sufficient component to any FAW policy measures undertaken to achieve the desired effects, especially when considering the centrality of consumer right to know models of food knowledge in the EC.

As with the SPS and the GATT more generally, the TBT presents a balancing test between a Member's right to regulate and the rights of other Members to market access and good faith treatment in legal and regulatory policy.[28] The TBT Agreement defines a "technical regulation" as a

> Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method. (TBT, Annex 1, 1)

Accordingly, the AB in the *EC-Sardines* case reads a three-tiered definition of "technical regulation" in the TBT. "First, the document must apply to an identifiable product or group of products…Second, the document must lay down one or more characteristics of the product…Third, compliance with the product characteristics must be mandatory." (*EC-Sardines*, para. 176, citing *EC-Asbestos* panel, para. 61)

Once a determination of whether or not a measure is a "technical regulation" is made, the measure must be found compliant with the key provisions regulating the

[28] The preambular language to the TBT Agreement states, "*Recognizing* that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this agreement".

"preparation, adoption and application of Technical Regulations by Central Government Bodies" under Article 2,[29] especially Articles 2:2, and 2:4[30], which state

> 2.2. Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, *inter alia*: national security requirements; *the prevention of deceptive practices*; *protection of human health or safety, animal or plant life or health, or the environment*. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products. (italics added)
>
> 2.4. Where technical regulations are required and relevant international standards exist or their completion is imminent, *Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued.* (emphasis added)

Thus, in order to be accepted as "technical regulations", labeling requirements must: be the least trade restrictive measure necessary to fulfill a legitimate objective; adhere to specified risk assessment measures; and only deviate from existing international standards where such standards "would be ineffective or inappropriate" in light of the legitimate objective at hand.

Assessing whether or not a FAW measure is defensible under the TBT Agreement, then, entails two primary questions: first, does the measure fall within the three-tiered definition of "technical regulation"? If so, does the measure conform to requirements of 2.2 and, if part of a regulation enacted unilaterally, 2.4? I address both questions in turn.

[29] Adoption of technical regulations by non-governmental bodies, addressed in Article 3, must be made compliant with the requirements of Article 2. (TBT, 3:5)

[30] Other relevant subparagraphs include 2.1 (a general MFN and National Treatment provision), 2.3 (an elucidation of the general principle of *rebus sic stantibus*), and 2.7 (a provision encouraging equivalency agreements).

III. A. 1. Is the FAW Measure a "Technical Regulation"?

A FAW labeling measure would probably apply to food and fiber products derivative of livestock production. Such measures would likely be de facto mandatory, although II.B.1. indicates that the WQ standards would be de jure voluntary and thus not coverable under TBT review. A second ambiguity is whether or not FAW measures would 'qualify' with the second question raised by the *EC-Sardines* AB, as to whether or not such labeling requirements would be "lay[ing] down one or more characteristics of the product", insofar as FAW PPMs are process rather than product characteristics. However, as long as "product characteristics" can reasonably be said to include PPM measures in which the consumers have professed an interest, than such measures would be categorized as "technical regulations".

III. A. 2. Is the FAW Measure Properly Taken Pursuant to a Legitimate Objective?

Whether the measure taken is appropriate or not has generally been interpreted by asking the question: is it the "least trade restrictive alternative reasonably available"? Additionally, a labeling measure could also be subject to review under Article III.4 as a "law, regulation, or requirement" with trade disruptive effects, with subsequent potential recourse to Article XX in case of failure to satisfy a "likeness" analysis. In both cases, see the analysis under Article XX at III.D. (*infra*)

III. B. Measures "Necessary to Protect Human or Animal Health": the SPS Agreement and the OIE Code

Measures "necessary to protect human or animal health" will fall under the more stringent judicial review of the Sanitary and Phytosanitary Measures Agreement. SPS

review raises questions about the scientific process of risk assessment and the potential scope of the precautionary principle in SPS measures; the latter question is relevant to FAW measures insofar as CAFO livestock housing contributes to the spread of antibiotic-resistant pathogens and zoonotic disease transference (see *infra*, at III.E.2). Section III.B.1. examines the Appellate Body's *EC-Hormones* ruling to better understand the likely hurdles facing a FAW measure's scientific assessment.

Whereas the SPS Agreement applies broadly to measures "necessary to protect human or animal health", the Agreement explicitly deems measures taken in compliance with the codes and guidelines of Codex Alimentarius, the World Organization for Animal Health (the OIE), and the International Plant Protection Commission to be deemed compliant with the SPS Agreement. Section III.B.2. therefore examines the role of the OIE in determining what constitutes scientific assessment and which practices are currently codified under the Terrestrial Animal Health Code.

III. B. 1. The Sanitary and Phytosanitary Measures Agreement

As a treaty of cumulative application, the Agreement on the Application of Sanitary and Phytosanitary Measures—included, like the TBT, in the WTO Treaty—applies with equal force as do the provisions of the GATT 1994. As with the III-XI-XX nexus, however, if a measure is deemed to fall under the SPS Agreement, it is not reviewable under the TBT agreement. In effect, the SPS Agreement is a thorough explication of the justifiability of measures taken pursuant to XX(b) and the chapeau to Article XX, and which imposes extra measures on countries desiring to go beyond internationally recognized standards.

Within the SPS Agreement, Articles 2-5 have potentially significant applications regarding FAW measures. These Articles cover: "basic rights and obligations" (Article 2), "harmonization" (Article 3), "Equivalence" (Article 4), and "assessment of risk and determination of the appropriate level of sanitary and phytosanitary protection" (Article 5). At it's core, the SPS allocates the proper balancing of a Member's right to invoke higher than internationally agreed upon SPS standards against the other Members' right to be free from "arbitrarily or unjustifiably discriminat[ory]" measures (SPS Article 2:3).

The 1998 *EC-Hormones* case was the first case in which an SPS-applicable measure reached AB review, and its ruling had important implications for the interpretation of the precautionary principle and the right of nations to set higher than internationally agreed upon SPS standards in WTO case law. While the AB in *EC-Hormones* rules that the precautionary principle is visible in various parts of the SPS text, its invocation must be applied equally to all relevant categories of hormones. In relevant part, the AB states

> Articles 5.1 and 5.2 do not prescribe a particular type of risk assessment and do not prevent members from being cautious in their risk assessment exercise (*EC-Hormones*, para. 121)
>
> There is no need to assume that Article 5.7 exhausts the relevance of the precautionary principle. It is reflected also in the sixth paragraph of the preamble and in Article 3.3 (*EC-Hormones*, para. 124)
>
> In most cases, responsible and representative governments tend to base their legislative and administrative measures on "mainstream" scientific opinion. In other cases, equally responsible and representative governments may act in good faith on the basis of what, at a given time, may be a divergent opinion coming from qualified and respected sources. By itself, this does not necessarily signal the absence of a reasonable relationship between the SPS measure and the risk assessment, especially where the risk involved is life-threatening in character and is perceived to constitute a clear and imminent threat to public health and safety. Determination of the presence or absence of that relationship can only be done on a case-to-case basis, after account is taken of all considerations rationally bearing upon the issue of potential adverse health effects (*EC-Hormones*, para. 194)

> The panel finds that, assuming these factors could be taken into account in a risk assessment, the European Communities has not provided convincing evidence that the control or prevention of abuse of the hormones here involved is more difficult than the control of other veterinary drugs, the use of which is allowed in the European Communities. (*EC-Hormones*, para. 203)

The AB's ruling on the precautionary principle and its application thus allow for Members to base their SPS measures on standards above those of international bodies, but only so long as the level of appropriate risk assessment is applied across the board to all relevant types of potential risks.

As relating to FAW measures intended to allay the threat of zoonotic disease transference and antibiotic-resistant pathogens, the "necessary to protect human…life or health" argument raised pursuant to XX(b) are of particular relevance to the standard laid out in the SPS Agreement, insofar as measures found compliant with the SPS are to be deemed compliant with XX(b).[31] (see III.E.1, *infra*, for more on this argument)

In order for a FAW measure "necessary for the protection of human, animal or plant life or health" (SPS Agreement, Article 2:1) that exceeds the relevant provisions of the Codex Alimentarius, the OIE, or another or other international bodies to pass muster under the provisions directly laid out in the SPS Agreement, it must

- Be "applied only to the extent necessary to protect human, animal or plant life or health, [be] based on scientific principles, and [not be] maintained without sufficient scientific evidence" excepting 5:7 (SPS, 2:2)
- Be applied in good faith (as understood in the chapeau to XX) (SPS, 2:3)
- Be in conformity with international standards (SPS, 3:2) except when in possession of a scientific justification or defense under Article 5 (SPS, 3:3)
- Ensure that SPS measures "are based on an assessment, as appropriate to the circumstances, of the risks to human, animal, or plant life or health" (SPS, 5:1)

[31] "Sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)." (SPS Agreement, Article 2:4)

- Be cognizant, in the assessment of risk, of "available scientific evidence; *relevant processes and production methods*…prevalence of specific diseases or pests…relevant ecological and environmental conditions; and quarantine or other treatment" (SPS, 5:2, emphasis added)
- Be balanced against the economic damages of applying or not applying SPS measures, which include "the potential damages in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the cost of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches" (SPS, 5:3)
- Be sure to avoid unnecessary trade restrictiveness, variously defined (SPS, 5:4-5:6)
- Be allowed, "in cases where relevant scientific evidence is insufficient…[to] provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information…In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk…within a reasonable period of time." (SPS, 5.7)

Many of the above requirements can be read as a point by point iteration of the various elements of a good faith test. Additionally, the exceptions carved out for Members to exceed internationally approved SPS measures are specifically meant to be "provisional" and contingent upon scientific verifiability.

However, in all cases concerning vital interests to human life and health, the AB asserts that "the object and purpose of the SPS agreement justif[ies] the examination and evaluation of all such risks for human health *whatever their precise and immediate origin may be*." (*EC-Hormones*, para. 206, emphasis added) Again, the analysis in III.E.1 (*infra*) on antibiotic resistance is potentially relevant under this heading.

In the case of FAW measures intended to protect animal welfare, the analysis in *Hormones*—and the SPS generally—is of limited utility in cases where OIE guidelines do not yet exist, given that any measure intended to use applied science to protect animal welfare would probably not meet the high bar variously laid out in the SPS agreement referring to the "necess[ity] to protect animal health". On the other hand, however, the

ruling in *Hormones* that therapeutic and zootechnical vs. growth-promoting applications of antibiotics are different in scope and duration and that distinguishing between them is "not, in itself, "arbitrary and unjustifiable" (*Hormones*, para. 223) lends credence to the argument restricting CAFO systems under XX(b) (see *infra*, at III.E.1).

III. B. 2. International Regulatory Harmonization: FAW and the OIE

In its opening language, the SPS Agreement states

> *Desiring* to further the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by relevant international organizations, including the Codex Alimentarius Commission, the International Office of Epizootics, and the relevant international and regional organizations operating within the framework of the International Plant Protection Convention, without requiring Members to change their appropriate level of protection of human, animal or plant life or health.

Also called the World Organization for Animal Health, the Office Internationale des Epizooties (OIE) has branched out from its founding mandate to deal with global health pandemics in 1924 to become the leading international body working on the assessment and codification of farm animal welfare regulations.

The OIE's work on animal welfare has picked up speed over the last five years. First identified as a priority in the OIE Strategic Plan 2001-2005, the OIE adopted the FAW mission in 2002, and has subsequently sponsored the first Global Conference on Animal Welfare (which met in Paris from 23-25 February 2004) and is planning a second Global Conference to be held in Cairo in October 2008.

A Permanent Animal Welfare Working Group was established by the Member states at the 70th OIE General Session in May 2002. Five of the animal welfare codes to

be included in the OIE *Terrestrial Animal Health Code* were adopted at the 73rd General Session, in May 2005, which cover conditions pertaining to transport and slaughter.

As Bernard Vallat, OIE Director-General notes in the Foreword to the First Global Conference,

> the OIE's aims in the field of animal welfare consist first and foremost of proposing guidelines for adoption by our International Committee. Member countries wishing to engage in trade in animals or animal products will then be able to use these guidelines on a bilateral basis…Ultimately, these guidelines will also lead to a gradual harmonisation of existing national and regional legislation…

This reading of the OIE's role accords with the SPS's preambular language, with the advisory function of OIE and Codex regulations more generally, and with the EU's gradualist legal and policy strategy.

This section proceeds in two parts. Part A examines the role of science in the codification of FAW norms, pointing out in particular how FAW science is applied rather than basic science and, as such, necessarily involves a balancing of different disciplinary views with and against each other. Part B looks at the Terrestrial Animal Health Code to determine what measures would be justified as OIE-approved (and, by extension, deemed WTO-compliant).

III. B. 2. a. The Role of Science in Assessing FAW

In some respects, the deference to expert authority in the form of scientific validation is the linchpin without which international cooperation in the assessment of FAW and FAW measures would be far less likely to succeed. However, this deference is not without bias. Different stakeholders have different views about which kinds of science should be preferenced.

As David Fraser notes

> Within society, we can discern three different views about what is important for animal welfare. One is a 'biological functioning' view which holds that animal welfare depends on a high level of health, growth, production efficiency and correlated traits; this view is especially common among intensive animal producers and some veterinarians and animal scientists. A second is a 'natural living' view which holds that animals should be free to lead relatively natural lives and to use their species-typical adaptations, often in a relatively natural environment. This view is common among consumers and many critics who object to the industrialisation of animal agriculture. A third view emphasises the 'affective states' of animals and advocates preventing negative states (pain, suffering) and permitting positive states (comfort, contentment). This view is common in humanitarian thinking and among some animal welfare scientists…It would be reassuring to think that science could arbitrate among these views…Instead, we see different scientists incorporating these different views of animal welfare into their scientific work. (Fraser, 2004)

The objective, then, is "to strike a defensible balance among the[se] three elements" of biological functioning, natural living, and affective states.[32]

It follows that different stakeholder groups will have differing views on which element predominates. To take one example,

> Perdue Farms Incorporated states that it abides by "scientifically sound" guidelines based on principles from the American humane Association and the National Chicken Council. Veterinarians, outside experts and Poultry Welfare Officers from the Poultry Welfare Council sign off on the welfare of Perdue's birds. Both drawing selectively from scientific literature and convening expert panels can be flexibly applied. *Value judgments concerning the relative importance of one welfare indicator over another* (e.g., behavioral vs. physiological) or concerning the relative importance of maintaining profitability in certain producer groups…may influence the way that science is used in developing welfare standards (Thompson *et al*, citations omitted, emphasis added)

The same tendency to overemphasize one relevant category—in this case, 'biological functioning'[33]—at the expense of others while maintaining full backing by relevant scientific data is equally true for proponents of 'natural living' and 'affected states'.

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[32] And this is as it should be, because "Animal Welfare is not a term that arose in science to express a scientific concept. Rather it arose in society to express ethical concerns regarding the treatment of animals." (Duncan and Fraser)

[33] Thus do many in the "livestock production advocates" camp tend to view animal welfare through a powerfully human-oriented lens. For one particularly striking case, a 1981 publication by the US Council for Agricultural Science and Technology (1981) entitled *Scientific Aspects of the Welfare of Food Animals* proffered the following definition of welfare: "the principle (sic) criteria used thus far as indexes of the

Animal welfare science is applied rather than basic science, and therefore the three categories in question can each be linked to the relative weight placed upon them by the different scientific subdisciplines that together form the animal welfare scientist's gestalt whole: ethology, veterinary pathology, veterinary epidemiology, and stress physiology. (Sandøe *et al*, 41) To further illustrate the manner in which disciplinary predisposition weights the outcome of stocking density valuation, an ethologist will most likely conclude

> That free range hens have a better life than battery hens in traditional barren cages because they can exercise a number of behaviours that battery hens cannot (e.g. dust bathe, scratch and lay their eggs in a nest). Other applied scientists have based their views on veterinary pathology. They have come to the conclusion that battery hens have the better life because their mortality rates are much lower than those of free range hens. (Sandøe *et al*, 43)

Just as human interests in civil and political rights can clash with human interests in economic and social rights,[34] with the result being a necessary weighing and balancing of rights one against the other, animal welfare scientists must weigh the preponderance of evidence and interests for and against various positions by using the disciplinary optics of basic science to inform their applied decisions.

The role of science at the OIE, then, is the laudable and practical task of balancing different views within compartmentalized areas of the scientific community about what constitutes welfare. Thus, the result is not a basic scientific decision about testing a

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welfare of animals in production systems have been rate of growth or production, efficiency of feed use, efficiency of reproduction, mortality and morbidity." (CAST 1981, from Rollin 2007)

The "livestock production" view of welfare, influenced by public influence over the last two decades, would be unlikely to issue another such bald statement equating the primary parameters of animal unit profitability with animal welfare. Nonetheless, more recent claims, such as Tom Crenshaw's statement in reference to the gestation crate, "it's true that the animals can't turn around, but whether they have a need to do that is difficult to prove" (Jennings 2007) demonstrate the continued prevalence of such views.

[34] While acknowledging the centrality of the basic idea of conflict of rights, this can be analogized in the human context quite easily. Humans have often conflicting interests and preferences, and so too do other animals. For example, I might have an organoleptic interest in eating a hot fudge sundae, but balanced against that is my biological interest in physical health and longevity.

hypothesis, but is rather a value-laden balancing test;[35] as a discipline that grew out of social demand rather than scientific rigor per se, animal welfare science necessarily engages in policy-like decisions of interest- and preference-balancing.

Crucially, however, this is not to say that animal welfare science is non-science; rather, it is fed by the groundwork of basic scientific work in various disciplines that help to reveal animal preferences and explain animal physiology and biology without granting unqualified supremacy to any one discipline of basic scientific work.[36]

III. B. 2. b. Statutory Codification in the OIE Terrestrial Animal Health Code

One of the difficulties of writing a legal and policy advice briefing on FAW measures relates to the rapidly changing terrain in the scientific discovery and regulatory codification of FAW measures at the OIE. Much as the Welfare Quality report is not due to produce end-result EU-wide standards until 2009, the codificatory process at the OIE has so far only addressed transport and slaughter conditions.

In keeping with its origins as an organization created in the interwar period to combat the spread of epidemic zoonoses, the majority of the Terrestrial Animal Health

[35] As Sandøe *et al* put it, "where an applied ethologist might ask 'Do sows need nest building material or not?', a scientist doing basic work in ethology would probably find the question 'Why is the domestic pig one of the few hoof-bearing animals that constructs a nest?' much more interesting. In basic science, questions become more interesting the more generally applicable they are. The first question above is very restricted…It follows that the answers to it will not help us to understand the behaviour of other species." (Sandøe *et al*, 42)

[36] Again, an analogy could be made for the study of human welfare, a domain similarly fraught with claims vying for supremacy; the welfare economist, for example, has a very different idea of what constitutes preference satisfaction than does the anti-globalization neo-luddite, whose preferences for the human 'ideal set' do not themselves line up with those of, say, the religious fundamentalist. Granted, these are not scientific studies and therefore do not fall under the same umbrella as applied FAW science, for the closest analogs to animal welfare science would be behavioral science and human psychology.

Code focuses on disease-preventive measures.[37] Animal Welfare, in the appendices section, is Section 3.7 of the Terrestrial Animal Health Code.

Section 3.7 of the Terrestrial Animal Health Code contains the following guidelines regulating animal welfare.

- Appendix 3.7.1. Introduction to the Guidelines for animal welfare
- Appendix 3.7.2. Guidelines for the transport of animals by sea
- Appendix 3.7.3. Guidelines for the transport of animals by land
- Appendix 3.7.4. Guidelines for the transport of animals by air
- Appendix 3.7.5. Guidelines for the slaughter of animals
- Appendix 3.7.6. Guidelines for the killing of animals for disease control purposes

Most notably, the OIE does not yet address guidelines for housing conditions and permissible stocking densities, so any measure taken pursuant to such factors could legally rely only on the aspirational language of Appendix 3.7.1 and on the work in progress of the Permanent Animal Welfare Working Group.

Unlike the lengthy and detailed guidelines laid out in Appendices 3.7.2 through 3.7.6.,[38] Appendix 3.7.1. is presented in a more hortatory tone. Nonetheless, it contains a number of key provisions that are intended to guide the OIE's interpretation of animal welfare provisions, and which can be highlighted by a European—or other—country seeking to make a legal defense. In its entirety, Appendix 3.7.1 reads as follows:

[37] Part 1 of the Terrestrial Animal Health Code addresses risk analysis, veterinary control of diseases in importing and exporting countries, quarantine procedures, and procedures for measurement of biological animal health. Part 2 outlines response procedures for specific diseases, whether as ailments that strike multiple species (Section 2.2), cattle (Section 2.3), sheep and goats (Section 2.4), equines (Section 2.5), swine (Section 2.6), avian species (Section 2.7), hares and rabbits (Section 2.8), bees (Section 2.9), and other diseases (Section 2.10). Part 3 contains a variety of appendices, and Part 4 includes model international veterinary certificates.

[38] Any measure taken pursuant to the parameters established for animal transport and slaughter in appendices 3.7.2 through 3.7.6. will be deemed to comply with the Agreement on Sanitary and Phytosanitary Measures. The specific details and procedures of each appendix are too lengthy and particular to address here, but should be examined in the case of a measure concerning transport or slaughter.

Guiding principles for animal welfare (Article 3.7.1.1.)

1. That there is a critical relationship between animal health and animal welfare.
2. That the internationally recognised '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) provide valuable guidance in animal welfare.
3. That the internationally recognised 'three Rs' (reduction in numbers of animals, refinement of experimental methods and replacement of animals with non-animal techniques) provide valuable guidance for the use of animals in science.
4. That the scientific assessment of animal welfare involves diverse elements which need to be considered together, and that selecting and weighing these elements often involves value-based assumptions which should be made as explicit as possible.
5. That the use of animals in agriculture and science, and for companionship, recreation and entertainment, makes a major contribution to the wellbeing of people.
6. That the use of animals carries with it an ethical responsibility to ensure the welfare of such animals to the greatest extent practicable.
7. That improvements in farm animal welfare can often improve productivity and food safety, and hence lead to economic benefits.
8. That equivalent outcomes based on performance criteria, rather than identical systems based on design criteria, be the basis for comparison of animal welfare standards and guidelines.

Scientific basis for guidelines (Article 3.7.1.2.)

1. Welfare is a broad term which includes the many elements that contribute to an animal's quality of life, including those referred to in the 'five freedoms' listed above.
2. The scientific assessment of animal welfare has progressed rapidly in recent years and forms the basis of these guidelines.
3. Some measures of animal welfare involve assessing the degree of impaired functioning associated with injury, disease, and malnutrition. Other measures provide information on animals' needs and affective states such as hunger, pain and fear, often by measuring the strength of animals' preferences, motivations and aversions. Others assess the physiological, behavioural and immunological changes or effects that animals show in response to various challenges.
4. Such measures can lead to criteria and indicators that help to evaluate how different methods of managing animals influence their welfare.

The list of elements addressed in 3.7.1. reflects both the likely negotiating history of the animal welfare provisions of the Terrestrial Animal Health Code and the extent to which the "five freedoms" and the "3Rs"[39] have become accepted criteria. More broadly, appendix 3.7.1. reflects the OIE working group's realization both that animal welfare science is applied science, and that its mediation in society involves engaging all affected stakeholders.

III. C. Tariffs and Taxes: Article III

Article III of the GATT, which lays out provisions on national treatment and the imposition of internal measures applied equally to what are deemed to be "like" domestic and foreign products, is the primary provision against which the key FAW measures of differential tariffs and taxes must justify themselves.[40] The paragraphs of Article III can be read as a paired general (III:1) and specific (III:2 or III:4) obligation, with III:1 acting as a good faith obligation that "informs" the reading of the subparagraphs of specific relevance. A FAW measure then, would be deemed applicable either to III:2, in the case of taxes, which applies in cases where "like" foreign products are "taxed in excess of" domestic products—or to III:4, in the case of tariffs, which applies to the broader categories of "laws, regulations, and requirements" and "treatment no less favorable". Because most FAW measures intended to manage imports rather than support domestic

[39] This paper, however, is focused specifically on farm animal welfare and thus does not address the welfare of animals used for behavioral and toxicological research.

[40] It is possible that FAW measures could be deemed in conflict with Article XI, which prohibits quantitative restrictions (for which see III.D, *infra*). However, reading the *Ad* Article III note in light of the object and purpose of FAW measures indicates a greater likelihood of treatment under Article III. (Van den Bossche, 329)

producers would fall under III:4, I explain the relevant provisions of III:2 but focus on III:4 both in the determination of product and treatment consideration.

The relevant paragraphs of Article III read as follows

> 1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.
>
> 2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.
>
> 4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

This section identifies two elements of Article III consideration that are relevant to FAW measures: considerations of "likeness" in III:2 as against III:4, and the determination of whether a measure falls under the former or the latter paragraph.

III. C. 1. Product Consideration: Determining "Likeness"

Much of the fracas of FAW-type trade disputes concerns the question of process and production methods (PPMs), or the extent to which (mostly) negative externalities in the form of social, environmental, or—in this case—FAW harm should be considered along with physical characteristics of the final product in the determination of product "likeness". Peter van den Bossche, former Acting Director of the Appellate Body

Secretariat, states that "the prevailing view is that the PPM is not relevant". (Van den Bossche, 316)[41]

The AB has repeatedly stated, however, that the "accordion" of likeness must be played differently in different contexts. Specifically, in *EC-Asbestos*, the AB states that

> in each of the provisions where the term "like products" is used, the term must be interpreted in light of the context, and of the object and purpose, of the provision at issue, and of the object and purpose of the covered agreement in which the provision appears. (*Asbestos*, para. 88)

Similarly, in *Japan—Alcoholic Beverages*, the AB emphasizes that "the concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the WTO agreement are applied." (*Japan—Alcoholic Beverages*, para. 114)

Just as likeness cannot be regarded equally in different WTO provisions and contextual settings, the AB in *EC-Asbestos* notes that the

> dictionary definition of "like" does not indicate which characteristics or qualities are important in assessing the "likeness" of products under Article III:4…[it] provides no guidance in determining the degree or extent to which products must share qualities or characteristics…[and it] does not indicate from whose perspective "likeness" should be judged. (*EC—Asbestos*, para. 92)

In other words, even if Van den Bossche is correct in stating that "the prevailing view is that the PPM is not relevant", the ambiguity left both by the situation-specific context and by the necessary ambiguity of the language in the Shorter OED necessarily leaves room for Panel and AB discretion in the consideration of which attributes of likeness apply.

[41] Although the AB in the *US-Shrimp* case implicitly accepted PPM distinctions by ruling provisionally in favor of the US action regulating turtle excluder devices (TEDs)—the measure was found to comply with XX(g) but to violate the chapeau—the weight of jurisdictional evidence tends, at least until recently, to rule against PPM distinctions.

Drawing originally, in *Japan-Alcoholic Beverages*, from the Report of the Working Party on Border Tax Adjustments, (BISD 18S/97)[42] the Appellate Body in *EC-Asbestos* points to four criteria that can be used to determine product likeness:

> (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) *consumers' tastes and habits—more comprehensively termed consumers' perceptions and behavior—in respect of the products*; and (iv) the tariff classification of the products. We note that these four criteria comprise four categories of "characteristics" that the product involved might share: (i) the physical properties of the product; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) *the extent to which consumers perceive and treat the product as alternative means of performing particular functions in order to satisfy a particular want or demand*; and (iv) the internal classification of the products for tariff purposes. (*EC-Asbestos,* para. 101, emphasis added)

Although the Appellate Body specifically noted that their definition lacks *stare decisis* power, it nonetheless corresponds in the acknowledgement of consumer taste with the AB's interpretation in *Japan-Alcoholic Beverages* and the Border Tax Adjustment measures.

The following paragraph cautions future panels against interpreting these four attributes as a closed list, indicating that they are merely meant as guiding indicia.[43] As the AB notes, "consumer perceptions may similarly influence—modify or even render obsolete—traditional uses of the product", (*EC-Asbestos*, para. 102) and "ultimate consumers may have a view about the 'likeness' of two products that is very different from that of the inventors or producers of those products." (*EC-Asbestos*, para. 92) Thus, while hog farmers might feel that 'a pig is a pig is a pig', consumers may well view the

[42] Stating, in relevant part, that "the interpretation of the term should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a "similar" product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is "similar": 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." (Border Tax Adjustment Factors)

[43] "These criteria are, it is well to bear in mind, simply tools to assist in the task of sorting and examining the relevant evidence. They are neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of products". (*EC-Asbestos*, para. 102)

pig raised in extensive agricultural conditions differently from the pig raised in a Concentrated Animal Feeding Operation (CAFO).

This observation is crucially important when considering FAW measures, as consumer preferences (and, in cases where the levels of hormone and antibiotic residues necessitated by animals close proximity are high enough to distinguish one type of meat from another, physical properties) is the primary indicator that a FAW-measure supporting government can point to as indicators of non-likeness. Thus, although 'consumer preferences', like the "public interest" in Dewey's *Eclipse of the Public*, are often nebulous and difficult to determine, the AB in *Asbestos* forbade panels from "declin[ing] to inquire into relevant evidence simply because it suspects that the evidence may not be "clear"". (*EC-Asbestos*, para. 120)

III. C. 2. Consumer Preferences [44] and Product "Likeness"

In *Asbestos*, the AB rejected the Panel's dismissal of consumer preferences on the grounds that it would not produce clear results. Accordingly, looking at Eurobarometer and privately conducted surveys, there is reason to believe that EU consumers do not consider intensively and humanely farmed livestock to be 'like' according to the relevant section of the Appellate Body's definition. This section presents European consumer

[44] A wide array of literature exists on the depth and orientation of consumer preferences for FAW and the range of consumers willingness to pay (WTP) for increased FAW. See Fredrik Carlsson, Peter Frykblom and Carl Johan Lagerkvist, "Consumer willingness to pay for farm animal welfare: mobile abattoirs versus transportation to slaughter," *European Review of Agricultural Economics*, Vol. 34, no. 3. 2007, pp. 321-344. L. J. Frewer, A. Kole, S. M. A. van de Kroon, and C. de Lauwere, "Consumer Attitudes towards the development of animal-friendly husbandry systems", *Journal of Agricultural and Environmental Ethics*, Vol. 18. 2005, pp. 345-367. C. Hall and V. Sandilands, "Public attitudes to the welfare of broiler chickens", *Animal Welfare*, Vol. 16, 2007, pp. 499-512. F. Napolitano, G. de Rosa, G. Caporale, A. Carlucci, F. Grasso, and E Monteleone, "Bridging consumer perception and on-farm assessment of animal welfare", *Animal Welfare*, Vol. 16, 2007, pp. 249-253. Stefan Mann, "Ethological Farm Programs and the "Market" for Animal Welfare", *Journal of Agricultural and Environmental Ethics*, vol. 18, 2005, pp. 369-382.

preferences in two streams that roughly correspond to the two different manifestations of consumer and citizen preferences: public opinion polling and the European legislative history on FAW law.

It is important to note that the data from this section are also relevant to the review in III.E (*infra*) on the potential applicability of the "necessary to protect public morals" exemption under GATT Article XX(a). Although "public morality" presents a higher legal bar than "consumer preferences", most of the inferences drawn here would be usable in defending a FAW measure under XX(a) as well. Additionally, EU FAW law and European Parliamentary proclamations, can also be used as one set of facts in presenting the argument for a good faith compliance policy 'package' required by the chapeau to Article XX. (*infra,* at III.E.2)

III. C. 2. a. Consumer Preferences and European Public Opinion

In a 2005 speech to the Animal Welfare Intergroup of the European Parliament, E.C. Member Markos Kyprianou asserted the following:

> [The Eurobarometer survey was based on interviews with around 25,000 citizens in 25 member states . . . the results show that European consumers clearly care about animal welfare and want to make informed purchasing choices. However, they feel that this is not always possible due to the absence of information on whether final products have been based on animal welfare and the general lack of clear food labelling in this respect . . . 74% clearly expressed the view that their choice could result in better animal welfare . . . 54% of consumers stated that they would be willing to pay an additional price premium for eggs sourced from more welfare-friendly production systems.

Unified public opinion covering twenty five nation-states, of which many are themselves federal, is difficult to establish. Nonetheless, Kyprianou's speech demonstrates that animal welfare is an area of concern to a majority of European consumers. Although consumer preferences in favor of animal welfare are higher in Northern and Western

Europe than in Southern and Eastern Europe[45]—particularly in the UK, Scandinavia, and Switzerland—the issue grows in importance as Southern and Eastern European affluence rises (and will most likely continue to do so).

In the UK, fully 86% of the respondents to a 1997 survey (Bennett, 1) on battery cage eggs showed concern for animal suffering (41% were 'very concerned' and 45% were 'somewhat concerned'), and over half of the respondents purchased only free-range eggs. 79% supported the now-enacted legislation to phase out cages by 2005. Although the response rate of 30% within a survey group of 2,000 may not be representative of UK opinion at large, the survey—stratified according to geographic location and socio-economic status (Bennett, 3)—represented the consumer preferences of a broad cross-section of British society.

Although this work is intended as a guiding policy template for any WTO Member seeking to respond to claims of GATT-inconsistency, the most likely respondent in the domain of FAW measures is the European Union. Determining EU consumer preferences relative to FAW-relevant products, then, helps to guide the interpretation both of product "likeness" under Article III, and, if sufficiently present in *citizen* preferences as reflected in EU and national laws, regulations, and social movements, of "public morality" under Article XX(a). (for which see *infra*, at III.E)

III. C. 2. b. Consumer Preferences and EU Animal Law

Unlike comparable developments in the US,[46] the EU has been very active in codifying farm animal law over the last two decades. The British Brambell Committee

[45] In part, this is due both to the Eastern Europeans' more pressing human needs and to their comparatively extensive agricultural practices.

has had considerable success popularizing the "Five Freedoms" of animal movement. As a direct result of its actions, the UK Parliament[47] banned the veal crate in 1987, enacted the Pig Husbandry Law of 1991, and is planning to phase out intensive battery cage and broiler poultry farming.

Similar national regulations abound throughout Western Europe, particularly in the north. To give just two examples: the Swiss Animal Welfare act of 1981 banned battery cages as of 1991, and, as of May 27, 1988, Swedish law focuses on the centrality of both health and contentedness to good husbandry practices and grants animals the right to an environment supporting their natural behavior. (Wolfson, 1996)

Partially as a response to progressive British and Scandinavian legislation, the E.U. has since adopted controlling directives that must be implemented by all member

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[46] While EU livestock laws have grown progressively more welfare-conscious, American animal law, dominated by livestock producers' interests, has moved to exempt food animals from its otherwise stringent anticruelty statutes. For a telling example: American statutory law allows twenty-eight hours of continuous animal transport by rail, and some states allow thirty-six or even forty-eight, but Britain allows fifteen and the European Community eight. (Wolfson, 1996)

The range of controlling legislation in farm animal welfare is quite thin, with most pertinent laws containing exemptions for agricultural use. The above-mentioned Twenty-Eight Hour Law is among the oldest farm animal welfare law on the books in the United States, dating to 1873 (it was repealed, re-enacted and amended in 1994). Other, more recent, relevant laws include the Humane Slaughter Act of 1958 and the Animal Welfare Act (AWA) of 1966, although the AWA is not truly relevant in the sense that food animals in particular—and avian species more generally—have been exempted by amendment from AWA coverage.

The Humane Slaughter Act includes language indicating that slaughter "be carried out only by humane methods" and without "needless suffering." The act, however, exempts poultry—which constitute the majority of animals slaughtered per year—and ritual slaughter methods like Kosher and Halal practices, both of which raise distinct welfare questions.

Interestingly, most of the progress being made in FAW law in the United States is at the state level, with a 2005 Florida initiative to ban gestation crates for sows having passed and an upcoming voter-driven initiative to ban battery cages for egg-laying hens, veal crates for calves, and gestation crates for sows in California.

[47] In the UK, Farm animal welfare is under the Department for Environment, Food and Rural Affairs' (DEFRA) jurisdiction, and the controlling legislation includes the Agriculture (Miscellaneous Provisions) Act 1968 and the Welfare of Farmed Animals Regulations 2000. (Bennett et al, 2003) The Agriculture Act requires welfare codes for farmed fowls, turkeys, ducks, cattle, sheep, pig, goats and rabbits. The codes require approval from both houses of Parliament, and, although the codes are not mandatory, "unnecessary pain or unnecessary distress" is in violation of the act. Since 1988, however, mandatory regulations require "hens in cages to have a minimum of 450 cm of floor space and 10 cm of feed trough space per bird, [and] a maximum floor slope of 8 degrees." (Fraser, 1996)

states. A first wave of European Council Directives on laying hens, (1988) pigs, and calves (1991) required incremental improvements in space allowance and other welfare indicators, and have been amended (1997-2001) to include: a ban on veal calf crates since 2006, a ban on standard battery cages by 2012 (larger cages will be permissible), and a ban on stalls for pregnant sows by 2013. (Fraser, 1996)

In a nod to the more intangible concerns often voiced by animal advocates, EU protocols have repeatedly made clear the European's moral commitment to address animal sentience. The 1992 Treaty on European Union contains a binding Declaration on the Protection of Animals, and the EU adopted a binding Protocol at the June 1997 Amsterdam Inter-Governmental Conference (EU Treaty, 1997) that recognizes animal sentience and obliges members to 'pay full regard to the welfare requirements of animals' used in agriculture, transport and research. More recently, on October 12, 2006, the European Parliament adopted an Action plan on the Protection and Welfare of Animals 2006-2010, by 565 votes to 29. (Brooman and Legge, 2000)

III. C. 3. Treatment Consideration: III:2 or III:4?

Whether or not two goods are deemed "like" also depends on where they are considered to fit: under Article III.2, first sentence, or III.4? Whereas the national treatment obligations under III:1 are intended to inform the interpretation of the rest of Article III,[48] the distinction between a governmental action that is an internal tax or another internal measure (including tariffs) places it within the ambit of III:2 or III:4, respectively.

[48] "Article III:1 "informs" the rest of Article III and acts "as a guide to interpreting the specific obligations contained" in the other paragraphs of Article III". (*EC-Asbestos*, para. 98, citing *Japan-Alcoholic Beverages*, para. 111)

For the purposes of FAW measures, the government imposing such measures will have an incentive to avoid internal taxes in favor of other internal measures, for two reasons. First, the "taxed in excess" requirement of III:2 is more stringent than the "treatment no less favorable" requirement under III:4. Second, AB jurisprudence since *Japan—Alcoholic Beverages* has held that "in Article III:2, first sentence of the GATT 1994, the accordion of "likeness" is meant to be narrowly squeezed." (*Japan—Alcoholic Beverages*, para. 216) Conversely, "the scope of "like" in Article III.4 is broader than the scope of "like" in Article III:2, first sentence." (*Asbestos*, para. 99)

III. D. Import Bans: Article XI

Because of the nexus between Articles III, XI, and XX, policymakers have been much more willing to look to Article III measures than Article XI measures, insofar as the latter are almost always discriminatory and defensible only under the exception clauses.

Paragraph 1 of Article XI states that "no prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall by instituted or maintained by any contracting party" for sale to another party. Unlike the more complicated—and thus, in a sense, more 'lawyer-friendly'—language in Article III, Article XI permits no exceptions other than those listed in paragraph 2, which, as we shall see, do not cover FAW measures.

Article XI.2 covers export prohibitions in times of food shortages and crises (XI.2(a)), import/export prohibitions necessary to standardize and classify commodity

products (XI.2(b)), and agricultural import restrictions for one of the following three reasons:

- To restrict the quantities of the like domestic product permitted to be marketed or produced" (XI.2(c)(i))
- "To remove a temporary surplus of the like domestic product" (XI.2(c)(ii))
- "To restrict the quantities permitted to be produced of any animal product the production of which is directly dependent…on the imported commodity, if the domestic production of that commodity is relatively negligible" (XI.2(c)(iii))

None of these exceptions, which constitute a positive list approach and thus do not allow for other exceptions, would justify FAW measures, insofar as such measures are not intended to restrict domestic producers or to remove surpluses.

This is not to say that an import ban is not defensible; indeed, Brazil's import ban on retreaded tyres was upheld in principle (but batted down in practice for violating the chapeau to Article XX). Rather, import bans can only be defended with recourse to an exception. In order to pass muster under Article XX, however, the import ban must make "be apt to make a material contribution to the achievement of its objective" (*Brazil-Tyres*, para. 150[49]) and must accordingly pass a higher bar under Article XX review than a tariff, tax, or other measure.

III. E. Measures "Necessary to Protect" "Public Morals" or "Human or Animal" "Life or Health": Article XX

Thus, if a measure is found inconsistent with the relevant provisions of Article III—or if it is deemed to fall under Article XI, in which case facial inconsistency is

[49] "When a measure produces restrictive effects on international trade as severe as those resulting from an import ban, it appears to us that it would be difficult for a panel to find that measure necessary unless it is satisfied that the measure is apt to make a material contribution to the achievement of its objective. Thus, we disagree with Brazil's suggestion that, because it aims to reduce risk exposure to the maximum extent possible, an import ban that brings a marginal or insignificant contribution can nevertheless be considered necessary". (*Brazil-Tyres*, para. 150)

almost definite, and more stringent review under Article XX likely—the analysis proceeds to the relevant exceptions under Article XX; as a result, a number of the measures analyzed elsewhere in section III might find themselves subject to Article XX review, especially taxes, tariffs, and import bans.

The general lessons from recent AB jurisprudence are that, in order to pass general WTO review under Article XX, a FAW measure must be for a legitimate purpose, must be realistically and effectively taken, and must constitute the least trade-restrictive alternative reasonably available. This section fleshes out the analysis of each of these necessary parts for each of the FAW measures available.

Under the jurisprudential interpretation of Article XX that has developed in AB review, if the measure is deemed justified under one of the relevant subparagraphs to Article XX, the analysis closes with an inspection of the general good faith requirements laid out in the chapeau. In the case of FAW measures, the most likely defense would be under two different applications of Article XX(b) ("necessary to protect human, animal or plant life or health"), with recourse to XX(a) ("necessary to protect public morals") as a defense related to the consumer preferences application of non-likeness under Article III.

Under the chapeau, the analysis moves to a broader fair treatment and good faith test, in which the combined requirements to avoid "arbitrary or unjustifiable discrimination" and "disguised restriction[s] on international trade" results in a balancing test to determine if the measure taken is the least trade-restrictive alternative reasonably available.

III. E. 1. Applicable Subparagraphs: XX(b) and XX(a)

Unlike the "relating to" language of subparagraphs (e) and (g), the "necessary to" language in subparagraphs (a) and (b) presents a higher bar to pass in order for a measure to be deemed "necessary". Nonetheless, many of the 'evolutionary' implications of the AB's *US-Shrimp* ruling relating to XX(g) could apply to other subparagraphs of the public policy exceptions. The AB found that the term 'exhaustible natural resources'[50] "must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment" (*US-Shrimp*, para. 129) This kind of general insight may also inform the maturing views of the "community of nations" about the treatment by humans of nonhuman animals used in commercial activities, although such matters have not yet come under review.

Again, however, the "necessity" language of subparagraphs (a) and (b) drives the legal analysis of FAW Measures. In *Korea—Beef*, the AB found that

> determining a measure's necessity "involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports and exports. (*Korea-Beef*, para. 161)

The weighing and balancing process "begins with an assessment of the 'relative importance' of the interests or values furthered by the challenged measure." (*US-Gambling*, para. 306, footnote omitted) Determining the 'relative importance' of the measure requires an assessment both of the measure's support by the imposing country or region's citizenry (*supra*, at III.C.2.b) and of the measure's place within a larger policy framework intended to achieve the desired objectives.

[50] Article XX(g) reads: "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption".

Under **XX(b)**, FAW measures could be justified pursuant either to human *or* animal "life or health." On the former, human, case, the case hinges on the relevance of zoonotic disease transference and acquired antibiotic resistance as a result of growth-promoting antibiotic administration in livestock feed. On the latter, animal, case, the question of whether FAW measures are "necessary to…protect animal…life or health" depends on the extent to which welfare is viewed as a corollary of health, which ties into the scientific assessment of FAW measures. (*supra*, at III.B.2.a)

Regarding the possibility that intensive livestock systems endanger "human…life or health", the primary arguments to which EU (or other) trade lawyers would have recourse relate to the potential of zoonotic disease transference from animals to humans, the use of antibiotics in food animal production, and the resultant likelihood of antibiotic-resistant pathogens affecting human health and disease prevention.

On the question of zoonotic disease transference, bovine spongiform encephalopathy (BSE)—commonly known as 'mad cow' disease—and avian influenza are the two most frequently discussed zoonotic diseases.[51] Whereas BSE and its human variant—Creutzfeldt-Jakob Disease—are not truly pandemic in nature, recent genetic reconstruction of the 1918 "Spanish influenza" marks the deadly virus as being of avian origin; thus, although the H5N1 strain that has broken out repeatedly in Hong Kong has caused only a few dozen deaths—as opposed to H1N1's 20-40 million killed—the recent discovery of Spanish flu's origin adds to the urgency of regulatory oversight. In the case of zoonotic disease transference, the European trade lawyer's argument would revolve

51 The range of existing zoonotic diseases, however, is visible in the length and breadth of Part 2 of the Terrestrial Animal Health Code.

around high stocking densities and the resultantly increased likelihood of disease mutation and transference.[52]

On the question of antibiotic-resistant pathogens, antibiotics are used in CAFOs and other livestock systems for three main purposes: disease treatment, disease prevention (therapeutic), and growth promotion. A 2001 Union of Concerned Scientists (UCS) report that the latter two categories consumed an average of 24.6 million pounds of antibiotics in the 1990s alone, with seventy percent of the antibiotics used overlapping with the antibiotics most commonly used by humans. (Mellon and Fondriest, 23)

To cite specifically European examines of antibiotic resistance,[53] both particular and general evidence exists. Specifically, in one 1998 example from Denpark, an outbreak of *salmonella* killed one woman and had its source in pork from pigs that had acquired resistance to the *quinolone* antibiotic class. More generally, the rate of antibiotic resistant bacteria in human populations decreased in Denmark and the EC after the use of

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52 Similar examples of the health risks of crowded conditions could even be drawn from human parallels, such as the massively increased prevalence of mutated tuberculosis in the overcrowded Russian prison system.

[53] EU Trade Lawyers could also draw on developments in the US, and would be logical in doing so, insofar as the US is one of the biggest antibiotic users in animal feed for growth-promoting and therapeutic purposes; EU scientists could also look to the results of state legislative activities in the US. As the 2005-2006 *Animal Law* Legislative Summary indicates, "In Maine, Senator Scott Cowger proposed resolution LD 1126 in response to concerns in the medical community over antibiotic-resistant bacteria. Governor John Baldacci (D) signed the Resolution into law on June 3, 2005. The legislation requires the Commissioner of Agriculture, Food, and Rural Resources and the Director of the Bureau of Health to convene a study group to review the use of antibiotics in animal agriculture and report back to the legislature with policy recommendations on how the state should address the impact on humans from such use of antibiotics."

Similarly, "on November 23, 2005, Assembly Bill 837 was introduced in the Wisconsin Legislature by Representative Sondy Pope-Roberts (D). If enacted the bill would require state agencies and school districts to give preference to "suppliers who provide meat from animals that have not been given antibiotics for other than therapeutic reasons." (2005-2006 Legislative Review, 2006, p. 302, footnotes omitted)

A wealth of other research on the problem of antibiotic resistance exists in the US, where such antibiotics are still in widespread use and therefore ripe for scientific study of their externality effects. One recent study indicates that some bacteria actually *thrive* on antibiotics, which is a disturbing find. As reported in the April 12-18 2008 *New Scientist*, "bacteria that are not merely resistant to antibiotics, but feed on them are widespread in soil, say researchers who have discovered them by chance."

growth-promoting antibiotics was banned,[54] (Smith, 731) with a similar result occurring in Germany and the Netherlands after their ban on the agricultural use of the antibiotic avoparcin. (Aarestrup, 2058)

In any case, even if the causal chain connecting the development of antibiotic-resistant bacteria is difficult to quantify, the AB in *Asbestos* highlights that there is "no requirement under Article XX(b) of the GATT 1994 to quantify, as such, the risk to human life or health." (*EC-Asbestos*, para. 167, footnote omitted) In the same paragraph, the AB indicates that

> the results obtained from certain actions—for instance, measures adopted in order to attenuate global warming and climate change, *or certain preventive actions to reduce the incidence of diseases that may manifest themselves only after a period of time*—can only be evaluated with the benefit of time. In order to justify an import ban under Article XX(b), a panel must be satisfied that it brings about a material contribution to the achievement of its objective…This demonstration could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence. (*EC-Asbestos*, para. 167, emphasis added)

Preventive actions taken to prevent the spread of antibiotic-resistant pandemics, if sufficiently researched and defended, could be defensible under the AB's interpretation of XX(b) in *Asbestos.*

Finally, regarding **XX(a)**, very little dispute settlement literature exists regarding any topics other than pornography and gambling. Although it is a clearly viable argument to locate strongly felt 'consumer preferences' (although 'citizen preferences' would be more apposite in this scenario) in keeping with the evolutionary reading of Article XX(g)

[54] Although poultry industry spokespersons and academic researchers have long assumed that the use of growth promoting antibiotics (GPA) in food animal production is economically profitable, a recent report challenges that assumption using in-house data from Perdue to demonstrate that the cost-outlay exceeds the return. See Jay P. Graham, John J. Boland, and Ellen Silbergeld. "Growth Promoting Antibiotics in Food Animal Production: An Economic Analysis", *Public Health Reports*, Vol. 122, January-February 2007.

in *US-Shrimp*, I would recommend that—in the case of a choice of desired legal venue between XX(b) and XX(a), lawyers should opt for XX(b).[55]

If trade lawyers choose to argue both XX(b) and XX(a)—and there is a strong case to be made that they should—the recent developments in the *US-Gambling* case may provide assistance. Although litigated under the exception provisions in Article XIV(a) of the GATS, rather than under XX(a) of the GATT, the AB in *US-Gambling* found that the measures were indeed designed "to protect public morals or to maintain public order" within the meaning of Article XIV(a), and that they were "necessary to" do so. According to the Appellate Body, the measures were deemed necessary because Antigua had not indicated any alternatives that were reasonably available. Ultimately, however, the measures were rejected on the basis that the Interstate Horseracing Act allowed remote betting to take place, and thus constituted "arbitrary or unjustifiable discrimination" under the chapeau of GATS Article XIV.

The upshot for lawyers interested in defending FAW measures under GATT Article XX(a), then, builds on the lesson of *Shrimp* and *Retreaded Tyres*; the measures in question—whether tariffs, taxes, import bans, or quotas—must be demonstrated to be the least trade-restrictive alternative reasonably available to protect the strong citizen preferences manifested as "public morality". Even within this group of four measures, some are more trade restrictive than others and would thus be less likely to pass muster under XX(a): quantitative restrictions, especially import bans, are likely to be more trade-

[55] This recommendation is proffered contingent on the circumstances of the dispute; in certain fact situations, XX(a) may present a stronger argument than XX(b), and in many others there could be viable recourse to both, at least in principle.

restrictive than taxes or tariffs,[56] and thus any litigators arguing this defense under XX(a) should do so only with Article III measures and not with Article XI measures.

III. E. 2. Compliance with the Chapeau to Article XX

The chapeau to Article XX requires that the measures allowed "are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." Together, the dual requirements to avoid "arbitrary or unjustifiable discrimination" and "disguised restriction[s] on international trade" constitute a general requirement similar to the requirement in Article X:3(a) requiring laws, regulations, judicial decisions, and administrative rulings be administered in "a uniform, impartial and reasonable manner".[57]

The analysis under Article XX, then, becomes a balancing test in which, as the AB in *US-Shrimp* stated, Members have

> the delicate [task] of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in this Agreement. (*US-Shrimp*, para. 159)

This balancing test has two stages. First, as with the determination of "legitimate objectives" in the TBT agreement (see *infra*, at III.A), the Panel and AB must determine whether the discrimination is "arbitrary or unjustifiable, a matter involv[ing] an analysis that relates primarily to the cause or the rationale of the discrimination." (*Brazil-*

[56] This should be qualified by the fact that tariffs can be more trade restrictive than quotas if they are prohibitively high, and that quotas can be non trade-distorting if they are set above existing or predicted import levels.

[57] As the AB noted in *US-Shrimp*, the "chapeau of Article XX is, in fact, but one expression of the principle of good faith." (*US-Shrimp*, para. 158)

Retreaded Tyres, para. 225) Second, these legitimate objectives must be weighed against the "the rights of the other Members under varying substantive provisions…of the GATT 1994."

III. E. 2. a. The Balancing Test, Part One: "Legitimate Objectives"

In assessing the legitimacy under WTO law of a governmental FAW measure, many interests arise in the balancing process. Depending upon the specific measure in question, some measures—such as an import ban—will categorically not be the least trade restrictive alternative reasonably available, *unless* no other measure is reasonably available. In the case of tariff and tax protection, green box measures, and measures intended to increase beneficial cooperation with developing countries, such measures are not *prima facie* the most trade-restrictive alternative available, but it is important in each case to examine whether other less trade-restrictive viable alternatives exist.

In determining the various FAW measures' legitimate objectives, one should include:

- Green box environmental protection under the WTO Treaty's preambular "sustainable development" language and the formation of the Committee on Trade and Environment (the "CTE")[58]

[58] The preamble to the Marrakesh Agreement Establishing the World Trade Organization reads, in relevant part, "…expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development." Although the body of this paper does not address the relation of sustainable development to intensive livestock systems, a clear link can be made: A recent FAO report, *Livestock's Long Shadow*, reveals that global livestock production's environmental consequences range from climate change and land degradation to water depletion, air pollution and eutrophication. The present condition of the intensive livestock industry is the end result of a global trend towards increasing intensification of animals per plant and geographical condensation of plant location. In the US, CAFO location, generally determined by land and labor price, creates disproportionate burdens on the rural poor and intensifies the environmental harm from ammonia, hydrogen sulfide, particulate matter, and methane.

By concentrating both the size and the concentration of CAFOs, intensive livestock production compounds the effects of industrial crop agriculture's nitrogen fertilizer runoff. A report from the US-

- The preventive protection of "human…life and health" in the form of avoiding zoonotic disease transference and the development of antibiotic-resistant pathogens
- The protection of "animal…life or health" in the form of the scientifically verifiable link between health and welfare
- The right of European consumers to avoid "deceptive practices" under the TBT Agreement
- Supporting developing countries' needs while improving FAW

On the other hand, as the AB indicated in *US-Shrimp* (para. 159), the affirmative rights of Member states to invoke exceptions must be balanced against the corresponding constraining rights of other Members to expect good faith compliance with the relevant provisions of the GATT 1994. In order to guarantee that the measure imposed is the least trade-restrictive alternative reasonably available, an understanding of the potential alternatives is necessary.

III. E. 2. b. The Balancing Test, Part Two: "Reasonably Available Alternatives"

Simply being established for a "legitimate purpose", however, does not suffice. If the complainant party can point to any less trade-restrictive reasonably available

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Canadian International Air Quality Advisory Board (IAQAB) to the International Joint Commission (IJC) points out that US intensification and concentration of CAFOs has increased NH4 concentrations over the last 20 years; (IAQAB report, 2004) concentrations of NH4 nutrients in CAFO waste and N crop fertilizers alter the global nitrogen cycle, resulting in ecosystem disruption.

Similarly, when manure from intensive hog farms and cattle feedlots stored in open pits spills, the excessive nutrient exposure joins with nitrogen runoff to create algal blooms and, in some cases, lake and ocean dead zones. Precipitation can also carry vaporized NH3 from manure pits to cause eutrophication in lakes and oceans and ecosystem disruption elsewhere. (Donham, 2000)

The answer to the logical follow-up question, whether FAW-friendly livestock production goes hand-in-hand with environmentally friendly livestock production, is mixed, but there are many circumstances in which FAW and environmental well-being do go hand in hand; for a more thorough explication of this topic, see "Food Safety and Environmental Issues in Animal Welfare", *Rev. Sci. Tech. Off. Int. Epiz.* Volume 2, no. 24. 2005. pp. 757-766. To better understand the connection between animal protection and sustainable development, see "The Place of Animal Protection within the EU Sustainable Development Strategy: a Paper by Eurogroup for Animal Welfare", PPEurogroup-SDS-1-2005, March 2005.

alternative that fulfills the objectives in question, the measure will likely fail the alternatives test under the chapeau to Article XX.

Citing *US-Gambling*, the Appellate Body establishes in *Brazil-Tyres* that the complaining party bears the burden of proof in identifying alternatives:

> It rests upon the complaining Member to identify possible alternatives to the measure at issue that the responding Member could have taken . . . in order to qualify as an alternative, a measure proposed by the complaining Member must be not only less trade restrictive than the measure at issue, but should also "preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued". (*Brazil-Tyres*, para. 156, quoting *US-Gambling*, para. 308)

In the same paragraph cited by the *Brazil-Tyres* AB, the *US-Gambling* case states that "an alternative measure may be found not to be 'reasonably available'…where it is merely theoretical in nature . . .or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties."

Therefore, in the case of FAW measures, policymakers need to ensure that the measure in question is the least trade restrictive alternative reasonably available, as defined by the parameters laid out in *US-Gambling* and *Brazil-Tyres*, both in terms of alternatives *between* the measures suggested in this paper and measures beyond the scope of this paper.

In choosing between labels, taxes, tariffs, import bans, quotas, green box supports, and SDT measures, it should also be kept in mind that measures "must be viewed in the broader context of the comprehensive strategy designed and implemented…to deal with [the problem]". (*Brazil-Tyres*, para. 154, discussing the import ban on waste tires) If measures can reasonably be viewed as necessary complements—such as the pairing of labeling schemes and tariffs—few problems should

arise. If, on the other hand, measures perform redundant or unnecessary functions, policymakers should examine which measure should be imposed, and how.

Choosing among and between the proposed measures is reasonably straightforward, but the more difficult action for policymakers is to predict the range of likely alternatives that a complainant party will present. The most prominent measure not mentioned as a specific policy alternative in this paper is that of international harmonization through bilateral or multilateral treaties. On this point, the OIE Terrestrial Animal Health Code is itself the product of an international harmonization effort through a multilateral lawmaking process in which the European Community was—and is—involved as a leading member. This avenue of pursuit by a complainant party therefore does not seem especially likely, unless the specific measure at issue is well beyond even the OIE's proposed scope.

However, given the rulings in *Shrimp* and *Tyres* that have struck down otherwise defensible measures on the basis of a measure's application rather than the merits of the measure itself, European policymakers in this domain would be wise to scour relevant documents for potential alternatives that could be used by complainant parties, and either to integrate those alternatives into their action plan or to thoroughly demonstrate why they are either not less trade restrictive or not reasonably available.

III. F. Green Box Measures: The AoA and the SCM Agreement

Much of the analysis up to this point has focused on restrictive FAW measures that limit imports. Another category of potentially trade-distorting protections that could come under attack at the WTO exists, however, and it is one that has a special notoriety

in the agricultural domain: subsidies, or domestic supports. Under great pressure from European animal advocacy groups, the EU has begun to implement FAW standards and supports into "green box" subsidies intended to improve FAW and land management practices. The central question regarding environmental and FAW green box measures is whether or not such measures are indeed non trade distorting, a key qualification of green box measures under Annex 2 of the Agreement on Agriculture (AoA).

The Agreement on Subsidies and Countervailing Measures (SCM Agreement) defines a subsidy as "a financial contribution by a government body" involving "a direct transfer of funds" which provides "goods or services other than general infrastructure" (Article 1.1(a)(1)(i-iii) and which thereby confers a benefit (Article 1.1(b). Subsidies must also be "explicitly limit[ed]…to certain enterprises" and thereby deemed specific (Article 2.1(a)), and are either categorized as prohibited (Article 3), actionable (Part III, Articles 5-7), or non-actionable (Part IV, Articles 8 and 9).

In a telling report from a 2003 WTO Public Symposium on Sustainable Agriculture and Animal Welfare, European Commission representative

> Bob Norris responded that Europe sees a need for subsidies only in the more intensive production sectors like poultry, dairy and eggs. The EU's preferred condition is to have a multilateral framework for ensuring animal welfare. This may be far off, but as we move towards it, perhaps more countries will sign on to improve standards, and we can ultimately stop paying Green-box payments once the field is leveled. In the meantime, however, the nature of these payments would guarantee that they would be monitored with diligence. (WTO, 2003)

Noriss's report from five years ago reflects the EU strategy of FAW measures; to seek long-term codification of FAW norms and guidelines in the OIE Terrestrial Animal Health Code, but to support green box measures in the interim.

In principle, the green box is an optimal place to allocate decoupled non trade-distorting payments to farmers for FAW Measures; indeed, this is the argument put forth

to the EU and the WTO by the World Society for the Protection of Animals (WSPCA). Whether such measures are in fact not trade-distorting, however, is disputed. In the same WTO symposium cited above, Paul Martin, Agricultural counselor at the Canadian Mission to the WTO, stated that

> Canada, a member of the Cairns Group, is skeptical of whether subsidies paid to farmers to compensate for particular costs can at the same time be called "non-trade distorting." In economic studies, costs are aggregated, and the prices of feed and other inputs are constantly changing. It is very difficult, therefore, to measure and separate out exactly what contributes to particular costs in any economic exercise, and we would ultimately have to rely upon some study to estimate the amount of subsidization to provide as compensation for added costs due to animal welfare standards. (WTO, 2003)

The upshot of this argument, then, is that the EU would be wise to put in place measures to ensure that the moneys provided to farmers are truly decoupled from commodity prices and go towards fixing environmental and animal welfare externalities that are not being properly priced in the current market setting.

III. G. Special Treatment for Developing Countries: The Enabling Clause

Although mentioned in the 2003 Luxembourg Reform of the Common Agricultural Policy, measures intended to capitalize on land-rich developing countries' interest in exporting livestock products to European markets have received less attention than the Single Payment Plan laid out in the same reform. Notwithstanding issues about FAW and livestock transport by sea—a policy domain that now has internationally accepted guidelines regulating its use under the OIE Terrestrial Animal Health Code—the general question of affording specific countries special and differential treatment requires an analysis under the Enabling Clause, the Generalized System of Preferences,

and the relevant AB ruling in *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries.*

Generally, any measure intended to give special treatment to specific foreign nations runs immediately up against the Most Favored Nation (MFN) provisions of GATT Article I.1. However, the Decision on Differential and more Favorable Treatment and Fuller Participation of Developing Countries, also called the Enabling Clause, is a 1979 decision by which member states may derogate from MFN responsibilities to grant preferential treatment to developing countries, subject to specific limitations. In *EC-Tariff Preferences*, the AB finds that the Enabling Cause is an exception to GATT Article I.1, and that "challenges to [relevant] measures, brought under Article 1:1, cannot succeed where such measures are in accordance with the terms of the Enabling Clause." (*EC-Tariff Preferences*, para. 101)

Of particular relevance to FAW cooperative measures are paragraphs 2(a) and 3(c) of the Enabling Clause, which state, respectively,

> [the provisions of Article 1 apply to] Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences.
>
> [Any differential or more favorable treatment under this clause] shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

In *EC-Tariff Preferences*, the EC was found in violation of the Enabling Clause for not allowing any developing countries where similar conditions apply[59] to reap the "development, financial or trade" benefits of the developed countries preferential action.

[59] In *EC Tariff Preferences*, the AB, citing the panel, states: "Having found that the text of paragraph 3(c) "does not reveal whether the 'needs of developing countries' refers to the needs of all developing countries or to the needs of individual developing countries", the panel proceeded to examine "the drafting history in

The lesson for FAW measures is that any agreement which affords preferential tariff treatment or other preferential non-tariff treatment (under Enabling Clause Article 2(b)) must ensure that all countries that are similarly situated—in this case, land-abundant developing countries[60]—are afforded similar treatment. This analysis derives from the AB's interpretation of the words "non-discriminatory" in footnote 3 to paragraph 2(a), where they state that "distinguishing among similarly-situated beneficiaries is discriminatory" and that "preference-granting countries must make available identical tariff preferences to all similarly-situated beneficiaries." (*EC-Tariff Preferences*, paras. 153 and 154) The challenge for FAW policymakers, then, is to determine to what extent differences in land endowment factors and other conditions beneficial to FAW-friendly livestock husbandry practices constitute dissimilarity in a how a country is situated.

The EU, however, should be wary of using SDT measures too extensively if based solely on this provision, for the "needs" in question should be those of the developing country, not those of the developed country to afford high FAW standards. As the AB writes in *EC-Tariff Preferences*,

> Paragraph 3(c) does not authorize any kind of response to any claimed need of developing countries. First, we observe that the types of needs to which a response is envisaged are limited to "development, financial and trade needs". In our view, *a "need" cannot be characterized as one of the specific "needs of developing countries" in the sense of paragraph 3(c) based merely on an assertion to that effect by, for instance, a preference-granting country or a beneficiary country*. Rather, when a claim of inconsistency with paragraph 3(c) is made, *the existence of a "development, financial [or] trade need" must be*

UNCTAD … to identify the intentions of the drafters on issues relating to the GSP arrangements." The Panel concluded that paragraph 3(c) allows for differentiation among beneficiaries for the purposes of granting preferential treatment to least-developed countries and setting a priori import limitations *of products originating in particularly competitive developing countries*." (*EC-Tariff Preferences*, para. 134, emphasis added)

[60] Such countries needn't be geographically large per se; rather, there must be a relative abundance of pastoral land upon which livestock can graze within the territory of the country, whatever its absolute size.

> *assessed according to* an objective standard. Broad-based recognition of a particular need, set out in the WTO Agreement or in *multilateral instruments adopted by international organizations*, could serve as such a standard. (*EC-Tariff Preferences*, para. 163, emphasis added)

The AB specifically states that European "assertion[s]" of developing countries' "needs" would not be sufficient to establish legality under 3(c); in light of this fact, FAW policymakers would be wise to seek to cooperate with the OIE—through the assistance of international farm animal welfare advocacy and other governmental and non-governmental organizations—to ensure a measure's legitimacy when judged according to the *Tariff Preferences* standard.

IV. Conclusion and Recommendations

The primary goal of this paper has been to map out the applicable WTO provisions, jurisprudential interpretations, and relevant international regulations against which a defendant Member state will have to justify FAW measures that have an adverse effect on international trade flows in animals and animal products. I have sought to identify potential measures available to governments seeking to improve FAW (primarily domestically, but potentially abroad as well), and to examine the available measures in light of existing WTO treaty law and Dispute Settlement Body jurisprudence.

Among the array of potential policy options available, some seem considerably more appealing than others when judged by the likely results of WTO scrutiny. Judging from the facial violation of Article XI, import bans appear to be a poor mechanism relative to differentiated tariffs and taxes, which have a chance of passing muster under a "likeness" analysis. Since the "likeness" analysis performed will be somewhat more lax

for tariffs (III.4 measures) than for taxes (III.2 measures), tariffs are—*ceteris paribus*—to be considered preferable to taxes. As has already been mentioned, these differential tariffs will need to be paired with a labeling scheme that, if mandatory, is acceptable under the TBT Agreement.

Whereas tariffs, taxes, and import bans are generally (but not always) viewed as alternative rather than complementary trade-restrictive policy options, certain domestic support options are also available to WTO Member States under the SCM Agreement; this paper has not addressed export subsidies and other forms of domestic support, it is possible that non trade-distorting "green box" FAW measures in the form of domestic supports could complement both differential tariffs and labeling schemes.

The optimal policy measure when viewed from the perspective of trade-legality, then, appears to be a combination of labeling, tariffs, "green box" domestic supports, and nondiscriminatory cooperation with land-abundant less developed countries. Each of these measures has the added benefit of being independently defensible on its own merits, and thus able to compartmentalize scrutiny—to some degree—and continue labeling in the face of challenged tariffs, or imposing tariffs in the face of challenged "green box" measures, and so forth.

Cooperation with land-rich developing countries is an especially appealing policy measure which should be given special weight and attention, but which should also be carefully navigated to avoid allegations of a new eco-imperialism and illegality under the Enabling Clause. If properly carried out, however, FAW measures authorized pursuant to the Enabling Clause would, to use a topically awkward idiom, kill two birds with one stone. Increased cooperation with developing countries on building FAW-friendly export

markets for potentially PPM value-added markets in the EU creates a Pareto improving situation under which Enabling Clause measures create positive externalities in the form of improved FAW in the developing countries in question.

It is important to keep in mind, however, that this analysis has focused specifically on the WTO-legality of FAW policy measures and not on their efficacy on other grounds. It may be possible that a FAW measure—quotas or import bans, for example—that appears thoroughly undesirable from a trade legality perspective may have benefits that outweigh its less favorable legal prospects. The purpose of this work has simply been to demonstrate which policy options are best suited to withstand an attack at the WTO Dispute Settlement Body.

Additionally, this paper has sought to emphasize the "necessary to protect human…life or health" argument under Article XX(b) through the risk assessment of zoonotic disease transference and the growth in antibiotic-resistant bacteria; rather than having recourse only to "animal…life or health" under XX(b), trade lawyers interested in defending FAW measures should utilize the AB literature on causality to make a strong case connecting high stocking densities to the overuse of therapeutic and growth-promoting antibiotics.

Finally, any EU (or other interested) policymakers should be especially careful to study and abide by the AB interpretation of the chapeau to GATT Article XX. In both the *US-Shrimp* and the more recent *Brazil-Retreaded Tyres* cases, measures that were deemed permissible under relevant subparagraphs to Article XX were invalidated due to a failure to comply with the good faith requirements of the chapeau. It follows that any FAW measures undertaken by the EU or another country or region should carefully

prepare an action plan to implement the least trade-restrictive alternative reasonably available, to ensure that policy actions are undertaken as part of a uniform and comprehensive planning process, and to treat all similarly situated foreign trading partners similarly.

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