

Boston College Environmental Affairs Law Review

Volume 34

Issue 3 *Smart Brownfield Redevelopment for the 21st Century*


Article 8

1-1-2007

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Recommended Citation

Edward M. Thomas, *Playing Chicken at the WTO: Defending an Animal Welfare-Based Trade Restriction Under GATT's Moral Exception*, 34 B.C. Env'tl. Aff. L. Rev. 605 (2007), <http://lawdigitalcommons.bc.edu/ealr/vol34/iss3/8>

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PLAYING CHICKEN AT THE WTO: DEFENDING AN ANIMAL WELFARE-BASED TRADE RESTRICTION UNDER GATT'S MORAL EXCEPTION

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Abstract: The European Parliament recently adopted a proposal mandating higher welfare standards for chicken used in meat production, including a provision that would regulate or prohibit the importation of chicken not produced with the same high standards. Final passage of such a law would likely raise a World Trade Organization (WTO) complaint by a chicken-exporting nation. This Note argues that under WTO precedent, a carefully crafted import ban could survive such a challenge by invoking the moral exception to the General Agreement on Tariffs and Trade (GATT). In order to defend its regulation, however, the European Union must first attempt to negotiate a resolution with its trading partners, allow a flexible timeframe for nations to comply, provide exceptions for producers who abide by high standards, and mandate the same standards for both domestic and foreign producers. This Note argues that the European Union should follow these steps, and not back down from passing a much-needed law to improve animal welfare.

INTRODUCTION

On February 14, 2006, the European Parliament officially adopted a proposal mandating higher welfare standards for broiler chicken, the type used in meat production.¹ The proposal, if approved by the Council of Ministers, would establish more humane standards on sanitation, stocking densities, ventilation, and surgical procedures such as de-beaking and castration.² This mandate would be the first E.U. regula-

* Editor in Chief, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2006–07. The author thanks Brenda Withers for her thoughtful advocacy of the issues underlying this Note.

¹ Legislative Resolution on the Proposal for a Council Directive Laying Down Minimum Rules for the Protection of Chickens Kept for Meat Production, EUR. PARL. DOC. P6_TA (2006), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0053+0+DOC+XML+V0//EN> [hereinafter EP Resolution on Broiler Chicken]; *EP Calls for Stricter Welfare Criteria for Broiler Hens*, EUR. REP., Feb. 15, 2006, at 1.

² *EP Calls for Stricter Criteria for Broiler Hens*, *supra* note 1, at 1.

tion aimed explicitly at improving the welfare of broiler chicken, five million of which are slaughtered in the European Union each year.³

The passage of this proposed regulation followed a recent poll showing that a majority of Europeans—fifty-five percent—now agree that not enough importance is given to animal welfare in agricultural policy.⁴ In Greece, three quarters of respondents agreed with this view.⁵ Even in Finland, which had the least concern for this issue, forty percent of respondents said animal welfare should be accorded more attention.⁶ Furthermore, forty-two percent of E.U. respondents stated that any new animal welfare law should give priority to broiler chicken, while forty-four percent favored protecting egg-producing battery hens.⁷

The inhumane living conditions of broiler chicken are well-documented.⁸ In most factory farms, chicken are kept in tightly packed sheds, unable even to spread their wings.⁹ Rapid weight gain, caused by overfeeding during the chickens' six-week lifespan, leads to high occurrences of shattered bones and heart failure.¹⁰ Forced to live atop piles of their own excrement, up to eighty percent of chicken in the United Kingdom have open lesions and hock burns caused by the build-up of ammonia.¹¹ Constant lighting, used to encourage perpetual feeding, denies regular rest.¹² Awareness of these conditions in the European Union may explain the call for higher welfare standards.¹³ In Holland and Denmark, which have the most intensive farms in the European Union for the production of laying hens, a large percentage of citi-

³ *Id.*

⁴ SPECIAL EUROBAROMETER 229, EUROPEAN COMMISSION, ATTITUDES OF CONSUMERS TOWARDS THE WELFARE OF FARMED ANIMALS 64 (2005), available at http://europa.eu.int/comm/food/animal/welfare/euro_barometer25_en.pdf.

⁵ *Id.* at 65.

⁶ *Animal Welfare: Most Shoppers Willing to Pay More for Animal-Friendly Products, Says Poll*, EUR. REP., June 11, 2005, at 1 [hereinafter *Animal Welfare: Shoppers*].

⁷ *Id.*

⁸ See Royal Society for the Prevention of Cruelty to Animals, Campaign Facts—The True Cost of Cheap Chicken, <http://chickens.rspca.org.uk> (follow “Campaign Facts” hyperlink, then follow “The True Cost of Cheap Chicken” hyperlink) (last visited Mar. 22, 2007); Vegetarian Society, Broiler Chickens Information Sheet, <http://www.vegsoc.org/info/broiler.html> (last visited Mar. 22, 2007); *EP Calls for Stricter Criteria for Broiler Hens*, *supra* note 1, at 1.

⁹ See Vegetarian Society, *supra* note 8.

¹⁰ *Id.*

¹¹ Royal Society for the Prevention of Cruelty to Animals, *supra* note 8.

¹² *Id.*

¹³ See *Animal Welfare: Shoppers*, *supra* note 6, at 1.

zens—seventy-seven percent in both countries—are critical of current welfare standards.¹⁴

Given this public support, the European Parliament included in their proposal an amendment regarding the importation of broiler chicken from non-E.U. countries.¹⁵ Realizing that the benefits of this regulation would be undercut if non-E.U. producers continued to supply the European Union with chicken produced according to lower welfare standards, the amendment states: “Imports of chicken from third countries, which come from holdings that do not observe rules on the welfare of chickens for meat production equivalent to those effective in the E.U., should also be regulated and, where appropriate, *prohibited*.”¹⁶

If made law, this amendment could present a landmark case on the rarely invoked “moral exception” to free trade measures, codified under article XX(a) of the General Agreement on Tariffs and Trade (GATT).¹⁷ As a member of the World Trade Organization (WTO) and a major economic power, the European Union’s passage of such an import ban would likely raise the ire of exporting nations that do not have similar welfare standards in place.¹⁸ As the European Union is on the forefront of animal welfare laws, this would include most nations that exports chicken to the European Union.¹⁹ Furthermore, nations that pay scant attention to animal welfare would be more likely to challenge this particular moral exception than other morally based, and politically sensitive, import restrictions (such as banning products made by child labor). How the WTO would rule on such a complaint by an exporting nation would define the current scope of free trade exceptions not only for animal welfare laws, but other morally based trade bans, as well.²⁰

The likelihood of such an import restriction surviving challenge at the WTO depends on how the restriction is specifically drafted if and

¹⁴ *Id.*

¹⁵ EP Resolution on Broiler Chicken, *supra* note 1, amend. 8.

¹⁶ *Id.* (emphasis added).

¹⁷ See generally Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT’L L. 689 (1998); Peter Stevenson, *The World Trade Organisation Rules: A Legal Analysis of Their Adverse Impact on Animal Welfare*, 8 ANIMAL L. 107 (2002).

¹⁸ See, e.g., Andre Nollkaemper, *Introduction to TRAPPED BY FURS? THE LEGALITY OF THE EUROPEAN COMMUNITY’S FUR IMPORT BAN IN EC AND INTERNATIONAL LAW 1–2* (Andre Nollkaemper ed., 1997) (discussing Canada, the United States, and Russia’s opposition to a proposed 1991 E.U. import ban on pelts of animals caught with leghold traps); Charnovitz, *supra* note 17, at 736.

¹⁹ See Nollkaemper, *supra* note 18, at 1–2.

²⁰ See Charnovitz, *supra* note 17, at 744.

when it becomes law, and how a WTO arbitral panel, or the Appellate Body, interprets several key cases on trade discrimination.²¹ Given recent holdings adopted by the WTO, however, it is possible that a carefully drafted E.U. import restriction on broiler hens—predicated on the moral exception codified under GATT’s article XX(a)—could survive challenge, and open the door to more national import restrictions aimed at improving animal welfare.²²

Part I of this Note provides an introduction to the issues of free trade and animal welfare, highlighting the relevance of “process and production method” (PPM) distinctions. Part II provides an overview of the GATT articles relevant to this proposed import ban, and outlines the three-prong analysis for a morally based trade ban. Part III applies the current analysis to the European Union’s proposed broiler chicken import ban, and illustrates how the European Union can craft the regulation to increase the likelihood it will prevail in a trade dispute. Part IV provides several criticisms of the current analysis, and discusses appropriate changes necessary to safeguard morally based import restrictions.

I. ANIMAL WELFARE-BASED IMPORT RESTRICTIONS: AN OVERVIEW

Validly enacted import restrictions that promote the humane treatment of animals have long been undermined by international free trade agreements.²³ While regulations such as banning cosmetics tested on animals, or prohibiting the use of cruel leg-hold traps in the fur trade, can take effect within domestic jurisdictions, they are difficult to enforce on imported products from foreign nations.²⁴ This difficulty is the result of a global free trade regime that, in general, treats all products equally, regardless of their process and production methods (PPMs).²⁵ When PPMs are not taken into consideration, nations cannot give preferential treatment to a product produced according to higher welfare standards.²⁶ Consequently, domestic policy-makers—

²¹ See *id.* at 736–40.

²² *Id.*

²³ MATTHEW SCULLY, *DOMINION: THE POWER OF MAN, THE SUFFERING OF ANIMALS, AND THE CALL TO MERCY* 183–84 (2002); Stevenson, *supra* note 17, at 108–09.

²⁴ See Stevenson, *supra* note 17, at 108–09.

²⁵ Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 541 (2004); Laura Yavitz, *The WTO and the Environment: The Shrimp Case That Created a New World Order*, 16 J. NAT. RESOURCES & ENVTL. L. 203, 209 (2002).

²⁶ Kysar, *supra* note 25, at 542–43; Stevenson, *supra* note 17, at 125–26.

both in the European Union and elsewhere—are discouraged from passing even baseline animal welfare laws, knowing that foreign producers will maintain access to their markets without conforming to such regulations.²⁷ If an animal welfare law is passed, foreign products will likely be more competitive than their domestic counterparts, as domestic producers must abide by higher, and often more costly, production standards.²⁸

For these reasons, proposed animal welfare laws are unlikely to survive domestic industry opposition.²⁹ This is the case despite the fact that a plurality of lawmakers, with the backing of their constituents, may agree that a practice such as testing cosmetics on animals is unacceptable.³⁰ Even if a nation manages to pass an animal welfare measure—as is possible with the E.U. regulation on broiler chicken—trade laws that treat products equally can step in to prevent the tax, regulation, or import ban of the foreign goods.³¹ In this case, consumers are supplied with the very products they charged their government with regulating.

Animal welfare advocates view global free trade agreements as a major reason for the lack of progress on welfare issues to date.³² The most important trade pact affecting animal welfare is GATT and its progeny, the WTO.³³ Advocates argue that the WTO's apparent unwillingness to distinguish between products on the basis of PPMs means that standards on animal welfare are ignored in favor of commercial interests, and that nations with the lowest standards end up setting the bar for others.³⁴ Similar arguments are made in regards to the treatment of environmental, human rights, and labor standards under the WTO.³⁵

Many free trade advocates, however, seek to prevent one nation from imposing its own animal welfare, environmental, or any other standard on other nations.³⁶ Such advocates, including many develop-

²⁷ Stevenson, *supra* note 17, at 109; see SCULLY, *supra* note 23, at 184.

²⁸ Stevenson, *supra* note 17, at 109.

²⁹ See SCULLY, *supra* note 23, at 184.

³⁰ See, e.g., Nollkaemper, *supra* note 18, at 3–4 (discussing the successful passage of the E.U. fur import ban, which exporting nations later challenged on free trade grounds).

³¹ *Id.*

³² SCULLY, *supra* note 23, at 184.

³³ *Id.*; see Stevenson, *supra* note 17, at 109–10.

³⁴ See SCULLY, *supra* note 23, at 184.

³⁵ *Id.*

³⁶ Steve Charnovitz, *The Law of Environmental “PPMs” in the WTO: Debunking the Myth of Illegality*, 27 YALE J. INT’L L. 59, 62–63 (2002).

ing world representatives, view the WTO as a bulwark against regulations that curb trade and/or advance protectionist policies.³⁷ Their most compelling argument is that free trade should expand the prosperity of the developed world to poorer nations.³⁸ For such advocates, the argument that PPMs should be taken into account amounts to a defense of expensive and resource-consuming regulations that disfavor developing world producers.³⁹

Attempting to reconcile these two valid objectives has proven highly problematic.⁴⁰ Past GATT panel decisions, handed down before the advent of the WTO, strongly sided with the free trade argument.⁴¹ The panels' interpretations of key GATT provisions generally disallowed consideration of PPM-based trade bans.⁴² Therefore, such rulings have had a chilling effect on nations' attempts to enact animal welfare laws.⁴³ However, more recent rulings of the WTO's dispute panels and Appellate Body suggest that PPMs are not entirely disfavored under international trade law.⁴⁴ In certain circumstances, the WTO has held that PPM-based trade restrictions can be validly considered.⁴⁵ These cases did not explicitly deal with animal welfare regulations, but have the potential to beneficially affect future animal welfare trade restrictions.⁴⁶

Furthermore, past WTO rulings have rarely dealt with a specific GATT exception that permits consideration of morally based regulations.⁴⁷ This moral exception to the general rule against discriminatory

³⁷ *Id.*

³⁸ *Id.*

³⁹ *See id.*

⁴⁰ *See id.* at 59.

⁴¹ *See generally* Report of the Panel, *United States—Restrictions on Imports of Tuna*, DS29/R (May 20, 1994), available at <http://www.worldtradelaw.net/reports/gattpanels/tunadolphinII.pdf> [hereinafter *Tuna-Dolphin II*]; Report of the Panel, *United States—Restrictions on Imports of Tuna*, DS21/R (Aug. 16, 1991), GATT B.I.S.D. (39th Supp.) (1993) [hereinafter *Tuna-Dolphin I*].

⁴² *See* Stevenson, *supra* note 17, at 111.

⁴³ *See id.* at 108–09.

⁴⁴ *See generally* Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/RW (Oct. 22, 2001), reprinted in 8 DISPUTE SETTLEMENT REPORTS 2001, at 6481 (2001) [hereinafter *Shrimp-Turtle II*]; Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001), reprinted in 6 DISPUTE SETTLEMENT REPORTS 2001, at 3239 (2001) [hereinafter *Asbestos*]; Appellate Body Report, *United States—Import Prohibitions of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998), reprinted in 7 DISPUTE SETTLEMENT REPORTS 1998, at 2755 (1998) [hereinafter *Shrimp-Turtle I*].

⁴⁵ *Asbestos*, *supra* note 44, at 3286–87; *Shrimp-Turtle I*, *supra* note 44, at 2792.

⁴⁶ *See generally* *Asbestos*, *supra* note 44; *Shrimp-Turtle I*, *supra* note 44.

⁴⁷ *See* Charnovitz, *supra* note 17, at 731.

trade, like other trade exceptions, is assumed to be tightly construed, and difficult for nations to successfully invoke.⁴⁸ However, recent WTO decisions dealing with various other trade exceptions indicate that the moral exception may be more readily applied today.⁴⁹ This fact is especially true when the law claiming the exception discriminates as minimally as possible, and follows attempts by governments to resolve the issue bilaterally or multilaterally.⁵⁰ A regulation that adheres to these guidelines stands the best chance of validly invoking the moral exception.⁵¹

Understanding how PPM-based import bans are increasingly accepted by the WTO is of primary importance to understanding how animal welfare laws can survive a WTO challenge.⁵² Additionally, understanding how the moral exception can be invoked to protect such PPM-based regulations becomes central to this analysis.⁵³ Taken together, such changes mean that the European Union need not back down from its trade ban in the face of a foreign challenge, but should move forward to open the door to more animal welfare-based trade regulations.⁵⁴

In this Note, PPMs refer to *non-product-related* PPMs, which are the PPMs most relevant to the animal welfare and trade debate.⁵⁵ Such PPMs do not affect the physical characteristics of the final product.⁵⁶ Instead, they define the characteristics of the production process.⁵⁷ For example, nail polish tested on animals and nail polish not tested on animals reach the consumer with the same physical characteristics.⁵⁸ However, the method of production can differ with regard to its testing on animals, which can subsequently affect the preference of regulators and consumers for one product over the other.⁵⁹ An example that does not involve animal welfare, and that is a commonly banned practice, is

⁴⁸ Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268, 273 (1997); Yavitz, *supra* note 25, at 213.

⁴⁹ See generally Charnovitz, *supra* note 17.

⁵⁰ See *Shrimp-Turtle II*, *supra* note 44, at 6514–17 (explaining the requirement that a nation first seek to resolve a trade dispute through bilateral or multilateral negotiation).

⁵¹ *Id.*

⁵² See *Shrimp-Turtle I*, *supra* note 44, at 2792; Charnovitz, *supra* note 17, at 736–40.

⁵³ Charnovitz, *supra* note 17, at 736.

⁵⁴ See generally *Shrimp-Turtle I*, *supra* note 44; Charnovitz, *supra* note 17, at 736–40.

⁵⁵ See Stevenson, *supra* note 17, at 111; Charnovitz, *supra* note 36, at 65–68.

⁵⁶ Stevenson, *supra* note 17, at 111.

⁵⁷ *Id.*

⁵⁸ See *id.*

⁵⁹ See *id.*

trading products made by indentured children.⁶⁰ Certainly, the physical characteristics of the thing produced are no different than a product made from paid adult labor.⁶¹ However, to most policymakers and consumers, the difference in PPMs is highly relevant and factors into their choices regarding the regulation and consumption of such products.⁶²

II. GATT'S RELEVANT ARTICLES AND THE LEGAL TEST

In 1995, the WTO was established by re-enacting GATT, which had served as the primary international trade agreement since World War II.⁶³ The WTO applied GATT's articles to all of its Member States, which today include nearly 150 nations.⁶⁴ Approximately thirty more nations are currently engaged in negotiations to join the WTO, meaning that there are few international trade issues that GATT's articles do not affect.⁶⁵ Disputes over the application of GATT's articles are appealed to the WTO.⁶⁶ When disputes arise, arbitral panels of three individuals—appointed by the WTO's Dispute Settlement Body (DSB)—are formed to hear complaints from the aggrieved Member States.⁶⁷ The losing nation can appeal the panel's decision to the WTO's Appellate Body.⁶⁸ The Appellate Body then makes a final ruling, which will be adopted by the DSB unless a full consensus of the DSB chooses not to adopt it.⁶⁹ Both panel decisions and Appellate Body decisions are bind-

⁶⁰ See Charnovitz, *supra* note 17, at 740–42.

⁶¹ See *id.*

⁶² See *id.* Product-related PPMs also exist and are the subject of their own controversies in trade law. See Charnovitz, *supra* note 36, at 65–66. These include production characteristics that affect the physical characteristics of the final product. *Id.* Examples include the manufacture of goods with recycled material, or the manufacture of goods that may result in dangerous side effects—the inclusion of a cancer-causing ingredient, for example. *Id.* The distinction between non-product-related and product-related PPMs is not always clear, and subject to some debate. *Id.* However, welfare standards in the broiler chicken industry, in the context of this Note, are analyzed as *non-product related* PPMs. See *id.*

⁶³ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]; WORLD TRADE ORG., THE WORLD TRADE ORGANIZATION . . . IN BRIEF 8 (2005), available at http://www.wto.org/english/res_e/doload_e/inbr_e.pdf.

⁶⁴ WORLD TRADE ORG., *supra* note 63, at 7.

⁶⁵ *Id.*

⁶⁶ RAJ BHALA, INTERNATIONAL TRADE LAW: THEORY AND PRACTICE 217 (2d. ed. 2001) (providing a comprehensive overview of the formation of the Dispute Settlement Body (DSB) during the Uruguay Round of trade negotiations); see WORLD TRADE ORG., *supra* note 63, at 7.

⁶⁷ BHALA, *supra* note 66, at 216; see Yavitz, *supra* note 25, at 211.

⁶⁸ BHALA, *supra* note 66, at 217.

⁶⁹ *Id.* at 215. This system guarantees that a ruling will be adopted even if only one nation votes in favor of adoption. *Id.*

ing on the parties to the specific dispute⁷⁰ and increasingly inform future decisions, though are not binding precedent.⁷¹

The WTO contains strong enforcement mechanisms in its dispute settlement procedures.⁷² Once a final panel or Appellate Body report is made, nations found in violation of GATT articles must either change their trade practices, pay fees to keep the existing trade measure in place, or face trade retaliation, sanctioned by the WTO, from other WTO Member States.⁷³ Therefore, violations of GATT articles carry real consequences, and nations must often modify their domestic and import-based regulations so as not to face fines or trade sanctions on their own exports.⁷⁴

A. *The Three GATT Articles on Anti-Discrimination*

Three of GATT's articles have direct bearing on the European Union's proposed animal welfare law, but article XI is the most relevant, and problematic, to the analysis.⁷⁵ Article I provides that a nation must treat the "like" products of another nation as favorably as it treats the products of any WTO Member State.⁷⁶ This is the "General Most-Favored Nation" provision and ensures that no nation grant preference or discrimination to any "like product" of another nation, beyond what is granted to all nations party to the trade agreement.⁷⁷

Article III also uses the term "like product," and ensures that nations do not grant their own domestic producers favorable treatment over foreign producers.⁷⁸ Article III:4 states:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to *like products* of national origin in respect of all laws, regulations and requirements affecting their internal sale⁷⁹

⁷⁰ *Id.*

⁷¹ *Id.* at 214; Yavitz, *supra* note 25, at 211–12.

⁷² BHALA, *supra* note 66, at 214.

⁷³ *Id.* at 215.

⁷⁴ *Id.* at 217–18; *see* Yavitz, *supra* note 25, at 212.

⁷⁵ GATT, *supra* note 63, arts. I, III, XI; *see* Stevenson, *supra* note 17, at 109.

⁷⁶ GATT, *supra* note 63, art. I.

⁷⁷ *Id.*

⁷⁸ *Id.* art. III.

⁷⁹ *Id.* art. III, para. 4 (emphasis added).

A finding of “like product” under article III means that a WTO member cannot regulate, tax, or otherwise impede the internal sale of a foreign product, beyond how its domestic counterpart is treated.⁸⁰ For instance, if cosmetics tested on animals and cosmetics not tested on animals satisfy the definition of “like products,” then nations may not pass regulations regarding the importation of the former under article III.⁸¹ Alternatively, if the two products are not “like,” then nations may treat the importation of cosmetics tested on animals differently from domestic cosmetics not tested on animals.⁸² In this case, the importing nation may tax, label or otherwise regulate the product, as long as domestic cosmetics tested on animals are similarly taxed or regulated.⁸³

Article XI adds one relevant, and very powerful, provision to articles I and III by eliminating quantitative restrictions on imports.⁸⁴ While articles I and III bar nations from employing discriminatory regulations, such as labeling or taxes, article XI bars nations from setting quotas, including complete embargoes, on foreign products.⁸⁵ Unlike articles I and III, article XI can be contravened even if no domestic “like product” is produced.⁸⁶ An outright ban on certain goods can violate article XI, even if those goods are not produced domestically or imported from any country besides the one in question.⁸⁷ While the question of whether products are “like” is necessary to the analysis of whether articles I or III is contravened, the same is not true for article XI.⁸⁸ Instead, under article XI analysis, the issue becomes only whether a certain GATT exemption can protect the embargo.⁸⁹

The importance of PPM distinctions to the interplay between articles I and III, on the one hand, and article XI on the other, is critical.⁹⁰ Animal welfare advocates prefer to have regulations analyzed under articles I or III, because under these articles nations can argue

⁸⁰ *Id.*; see Schoenbaum, *supra* note 48, at 272; Yavitz, *supra* note 25, at 209.

⁸¹ See Yavitz, *supra* note 25, at 209.

⁸² See, e.g., *Asbestos*, *supra* note 44, at 3286–89 (finding that imported cement products containing cancer-causing chrysotile fibres are not “like” domestic cement products that do not contain such fibres, and that regulating the import of the chrysotile-based products does not violate GATT article III.4).

⁸³ See *id.*

⁸⁴ GATT, *supra* note 63, art. XI.

⁸⁵ See GATT, *supra* note 63, arts. I, III, XI.

⁸⁶ Stevenson, *supra* note 17, at 112–13; see GATT, *supra* note 63, arts. I, III, XI.

⁸⁷ Stevenson, *supra* note 17, at 112–13; see GATT, *supra* note 63, art. XI.

⁸⁸ See GATT, *supra* note 63, arts. I, III, XI; Stevenson, *supra* note 17, at 112–13.

⁸⁹ See GATT, *supra* note 63, art. XI; Charnovitz, *supra* note 17, at 737.

⁹⁰ See GATT, *supra* note 63, arts. I, III, XI; Stevenson, *supra* note 17, at 112–13.

that the imported products are not “like” the domestic products, and can therefore be regulated or restricted differently.⁹¹ However, according to a note to GATT annex I, regulations that apply to a product itself are analyzed as a potential article III violation, whereas PPM regulations are treated as potential article XI violations.⁹² Thus, a nation’s attempt to prevent the importation of a good based on a PPM standard will be analyzed as a potential violation of the rule against setting embargoes or quotas.⁹³

In effect, this interpretation of the annex I note means that a nation attempting to condition access to its markets by requiring other nations to subscribe to a similar production standard bans the import of that product, rather than regulating different products differently.⁹⁴ Therefore, any regulation that seeks to restrict imports of products that do not meet the same animal welfare standards as the domestic product are treated as quantitative restrictions, and it is not necessary to differentiate that product from any “like” domestic product.⁹⁵ Again, the only way to defend a regulation that violates article XI’s rule against quantitative restrictions is to invoke one of the GATT exceptions.⁹⁶

⁹¹ See GATT, *supra* note 63, arts. I, III, XI; Stevenson, *supra* note 17, at 112–13. However, making a successful argument that products with different PPMs are not “like” products under article I or III analyses is also difficult under current Appellate Body jurisprudence. See generally Charnovitz, *supra* note 36; Kysar, *supra* note 25. While this Note focuses on whether an animal welfare-based import ban can survive challenge at the WTO, the question of whether, and to what extent, it is permitted to tax, label, or otherwise regulate products resulting from low welfare standards remains open. See generally Charnovitz, *supra* note 36. This area of the law is changing quickly, and considerations such as consumer preferences are increasingly taken into account by the WTO in deciding whether two products are “like” each other. See *Asbestos*, *supra* note 44, at 3275–89. These changes have profound effects on how animal products produced with low welfare standards can be taxed or labeled differently, but are not relevant to the discussion of an import ban on such a product. See *id.*; Kysar, *supra* note 25, at 541.

⁹² GATT, *supra* note 63, annex I, ad art. III, para. 2. While not the topic of this Note, a strong argument could be made that PPM regulations should be analyzed under GATT articles I and III instead of article XI because consumer preferences substantively differentiate products, and therefore justify nations in taxing, labeling and regulating products made with lower welfare standards. See Stevenson, *supra* note 17, at 134–35.

⁹³ GATT, *supra* note 63, annex I, ad art. III.

⁹⁴ See Stevenson, *supra* note 17, at 112–13.

⁹⁵ *Id.*

⁹⁶ See Charnovitz, *supra* note 17, at 737. This Note assumes that the European Parliament’s resolution, if and when it becomes law, will mandate a quantitative restriction on the importation of broiler chicken, rather than a tax, labeling or other non-quantitative requirement. This assumption is based on the text of the resolution as it now reads. See EP Resolution on Broiler Chicken, *supra* note 1, amend. 8.

B. *The Exceptions to GATT's Anti-Discrimination Articles*

If a nation breaches any of the above articles, it may defend itself under one or more GATT exceptions, codified in article XX.⁹⁷ Article XX, including the subsections relevant to the animal welfare debate, states:

Subject to the requirement that such measures 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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) *necessary to protect public morals*; (b) *necessary to protect human, animal or plant life or health*; . . . [or] (g) *relating to the conservation of exhaustible natural resources* if such measures are made effective in conjunction with restrictions on domestic production or consumption⁹⁸

As Peter Stevenson and other animal welfare advocates have pointed out, these exceptions are not as favorable to environmental or animal welfare laws as they might seem to indicate.⁹⁹ XX(a), XX(b), and XX(g) are significantly restricted in several ways, including limitations set out in the chapeau of article XX, deference to articles I, II, and XI, and uncertainty about the applicability of articles XX(b) and article XX(g).¹⁰⁰

1. The Chapeau's Limiting Scope

The first restriction is that the three exceptions must be read in conjunction with the introductory language of article XX, termed the "chapeau," which states that a regulation predicated on an exception must not constitute "arbitrary or unjustifiable discrimination," or a "disguised restriction on international trade."¹⁰¹ While GATT panels and the Appellate Body previously avoided applying the chapeau in article XX disputes, today the reviewing body looks to factors such as

⁹⁷ GATT, *supra* note 63, art. XX.

⁹⁸ *Id.* art. XX(a)–(b), (g) (emphasis added).

⁹⁹ Stevenson, *supra* note 17, at 122; Yavitz, *supra* note 25, at 213.

¹⁰⁰ See Stevenson, *supra* note 17, at 122; Yavitz, *supra* note 25, at 213. Two of these exceptions are not relevant to this Note's narrow focus on laws explicitly aimed at animal welfare, discussed *infra* Part II.B.3.

¹⁰¹ GATT, *supra* note 63, art. XX.

whether claiming the article XX exception is merely a pretext for a trade restriction that contravenes GATT's other articles.¹⁰² Specifically, a reviewing body will want to be assured that foreign and domestic producers are being held to precisely the same standard, and that claiming the exemption is the result of identifiable policies.¹⁰³

In *United States—Standards for Reformulated and Conventional Gasoline (U.S. Gasoline)*, the WTO Appellate Body found that the terms “arbitrary discrimination,” “unjustifiable discrimination,” and “disguised restriction” give meaning to each other.¹⁰⁴ In that case, the Appellate Body found that a law that regulated foreign gasoline more closely than domestic gasoline—with regard to gasoline content under the Clean Air Act requirements—was a disguised restriction, because it assessed flexible baseline standards for domestic producers, while giving foreigners a strict statutory baseline.¹⁰⁵ The Appellate Body held that less discriminatory options to achieve the same standard were more justifiable, such as providing the same flexible baseline standards to all producers—a suggestion the United States countered as too costly and cumbersome to implement.¹⁰⁶ Therefore, nations claiming an article XX exception must conform to the chapeau by justifying their regulation as the least discriminatory option possible, and by treating all producers equally.¹⁰⁷

2. Article XX's Deference to Articles I, III, and XI

The next restriction on article XX exceptions comes from GATT and WTO rulings that articles I, III, and XI constitute “substantive” rights under GATT, while article XX rights are accorded less deference.¹⁰⁸ In the landmark case of *United States—Import Prohibitions of Certain Shrimp and Shrimp Products (Shrimp-Turtle I)*, the United States had attempted to block imports from foreign shrimp producers who refused to certify the use of a device to protect sea turtles.¹⁰⁹ In its analysis, the Appellate Body stated that the right of nations to be free from

¹⁰² See Schoenbaum, *supra* note 48, at 274–76.

¹⁰³ See *id.*

¹⁰⁴ Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (May 20, 1996), reprinted in 1 DISPUTE SETTLEMENT REPORTS 1996, at 3, 22–23 (1996) [hereinafter *U.S. Gasoline*]; Schoenbaum, *supra* note 48, at 275.

¹⁰⁵ *U.S. Gasoline*, *supra* note 104, at 27–28.

¹⁰⁶ *Id.* at 25–28.

¹⁰⁷ See *id.*; Schoenbaum, *supra* note 48, at 275.

¹⁰⁸ Charnovitz, *supra* note 36, at 82; see, e.g., *Shrimp-Turtle I*, *supra* note 44, at 2757.

¹⁰⁹ *Shrimp-Turtle I*, *supra* note 44, at 2757.

trade discrimination was a “substantive right,” and that invoking one of the article XX exceptions—in this case, article XX(g)—could “erode or render naught” that substantive right.¹¹⁰ The ruling referred to the ability of a nation to invoke an article XX exception merely as a right, but not a substantive right.¹¹¹ Two years earlier, in *Japan—Taxes on Alcoholic Beverages*, a similar distinction was made.¹¹² In striking down a Japanese law attempting to tax various types of alcohol at different levels, the Appellate Body described article III as providing a “sheltering scope” against any of the article XX exceptions invoked by Japan.¹¹³ In effect, WTO arbitral panels and the Appellate Body’s interpretations of GATT elevate the substantive rights of articles I, III, and XI, protecting them at the expense of the article XX exceptions.¹¹⁴

3. The Inapplicability of Articles XX(b) and XX(g)

The final limitation is that articles XX(b) and XX(g) cannot necessarily be invoked to protect solely welfare-based regulations.¹¹⁵ Article XX(b) allows for exceptions to free trade law to protect animal life and health, but it remains unclear whether this exception can be interpreted to apply to welfare-based regulations, as well.¹¹⁶ This uncertainty is due to the fact that measures necessary to protect animal life or health are typically confined to preventing the spread of diseases or to ensure the safety of food products for humans.¹¹⁷ Therefore, the article XX(a) moral exception should be used to determine whether welfare-based laws can withstand scrutiny under international trade law on their own merits, without connection to their effect on public health.¹¹⁸

¹¹⁰ *Id.* at 2805. In this case, the United States attempted to apply the article XX(g) exception because its regulation was aimed at protecting endangered turtles, an exhaustible natural resource. *Id.* at 2757.

¹¹¹ *Id.* at 2805.

¹¹² Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996), reprinted in 1 DISPUTE SETTLEMENT REPORTS 1996, at 97, 110 (1996) [hereinafter *Japanese Taxes*].

¹¹³ *Id.*

¹¹⁴ See *id.* at 109–10.

¹¹⁵ See Charnovitz, *supra* note 17, at 737.

¹¹⁶ See Stevenson, *supra* note 17, at 135–36.

¹¹⁷ *Id.*; see, e.g., Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R (Jan. 16, 1998) [hereinafter *Hormones*] (ruling on a European Communities law restricting imports of meat containing growth hormones to prevent certain human illnesses).

¹¹⁸ See Charnovitz, *supra* note 17, at 737; Stevenson, *supra* note 17, at 135–36.

The article XX(g) exception on exhaustible natural resources is also inapplicable to the animal welfare analysis.¹¹⁹ While laws that fall under this exception often relate favorably to the protection of animals—limiting the incidental taking of turtles during shrimp trawling, for instance—this exception is not relevant to solely welfare-based regulations.¹²⁰ This is a separate analysis from assessing whether regulations with the singular purpose to lessen animal suffering can survive scrutiny at the WTO.

Consequently, the exception most relevant to this discussion is XX(a), which provides for exceptions “necessary to protect public morals.”¹²¹ Laws that would likely fall under XX(a), but neither XX(b) nor XX(g), include the banning of leg-hold traps in the fur trade and outlawing cosmetics tested on animals.¹²² These laws are not proposed in order to protect food safety or prevent the extinction of a certain species, and therefore, neither XX(b) nor XX(g) would apply.¹²³ To date, the WTO has not ruled on the application of the moral exception to animal welfare, though it has ruled on articles XX(b) and XX(g).¹²⁴

Notably, many laws that have potentially beneficial effects on animal well-being are indeed analyzed under XX(b) and XX(g) exceptions, such as regulations on hormone levels in dairy cows or laws to protect endangered species.¹²⁵ In fact, animal welfare advocates are arguing for the inclusion of the term “animal welfare” in article XX(b) in order to make it more feasible to enact laws that lessen animal suffering using this exception.¹²⁶ In addition, some advocates argue for a more expansive definition of “animal health” under XX(b), which would define an animal’s health by how much pain it suffers.¹²⁷ This definition follows from the premise that protecting the health of an animal should include all aspects of its well-being, including its level of suffering.¹²⁸ Although these are important and evolving areas of the law affecting animals,¹²⁹ the underlying assumption in this analysis is that ar-

¹¹⁹ See GATT, *supra* note 63, art. XX(g).

¹²⁰ See generally *Shrimp-Turtle I*, *supra* note 44.

¹²¹ GATT, *supra* note 63, art. XX(a).

¹²² See Stevenson, *supra* note 17, at 108–09.

¹²³ See *id.*

¹²⁴ See Charnovitz, *supra* note 17, at 690.

¹²⁵ See generally *Hormones*, *supra* note 117; *Shrimp-Turtle I*, *supra* note 44.

¹²⁶ Stevenson, *supra* note 17, at 135–36.

¹²⁷ Peter V. Michaud, *Caught in a Trap: The European Union Leghold Trap Debate*, 6 MINN. J. GLOBAL TRADE 355, 372–73 (1997).

¹²⁸ *Id.*

¹²⁹ See *id.*

articles XX(b) and XX(g) are generally inapplicable to solely welfare-based import bans, and an animal welfare law would instead be analyzed under article XX(a).¹³⁰

C. *The Legal Test*

A law that conditions market access on the adoption of certain PPM standards by the exporting nation is a violation of article XI's rule against quantitative restrictions.¹³¹ If a law restricts or bans the number of imports of any good, the WTO is not concerned with whether there is a "like" domestic or foreign product to compare it with, as it would with an import tax or labeling requirement under articles I and III.¹³² Instead, such a trade restriction must qualify as an article XX exception in order to survive WTO scrutiny.¹³³

In order for a PPM-based import ban to survive as an article XX(a) moral exception, it must pass a three-prong test.¹³⁴ No such case has yet been reviewed by the WTO, but as Steve Charnovitz argued in his influential article on the moral exception, given the textual similarities between the various article XX exceptions, the test will almost certainly be derived from past GATT and WTO decisions dealing with other exceptions, including XX(b) and XX(g).¹³⁵ The test, which first appeared in *U.S. Gasoline*, determines whether the regulation: (1) advances a policy goal that fits within the scope of a "public moral"; (2) is "necessary" to protect that moral; and (3) is not a violation of the chapeau's ban on trade discrimination or protectionism.¹³⁶ Regulations can be found as

¹³⁰ See Charnovitz, *supra* note 17, at 737 (discussing how a law banning leg-hold traps in the fur trade could not be exempted on XX(b) grounds).

¹³¹ GATT, *supra* note 63, art. XI; see *supra* Part II.A.

¹³² Stevenson, *supra* note 17, at 112–13.

¹³³ *Id.* at 121–22.

¹³⁴ See Charnovitz, *supra* note 17, at 729–30.

¹³⁵ *Id.* at 689, 729.

¹³⁶ *U.S. Gasoline*, *supra* note 104, at 12–20 (laying out the order of analysis under an article XX(g) review); Charnovitz, *supra* note 17, at 729 (presuming the test for the panel's XX(b) analysis in *U.S. Gasoline* would be applied to an article XX(a) analysis); see also Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (Jan. 17, 1996), reprinted in 1 DISPUTE SETTLEMENT REPORTS 1996, at 29, 48–49 (1996) (describing the order of analysis under article XX(b)). This Note also assumes that the same order of analysis for an XX(b) or XX(g) review will be used in an article XX(a) review.

illegal restraints on trade during any one prong of the analysis.¹³⁷ If an animal welfare law is to survive, it must satisfy each prong of the test.¹³⁸

1. The First Prong: Does the Regulation Protect a Public Moral?

The exception at issue in an animal welfare-based import ban is article XX(a), the moral exception.¹³⁹ Therefore, the first prong is whether the policy rationale for an import ban fits within the scope of protecting “public morals.”¹⁴⁰ This prong is the easiest to satisfy, and simply asks whether the regulated conduct is one typically regulated by governments on a moral basis.¹⁴¹ Examples of conduct regulated on a moral basis likely include the trade in alcohol and drugs, obscene materials, gambling, and the trade in animals.¹⁴² Such actions are ones traditionally regulated by government under the rubric of protecting morals, and their regulation is generally accepted as within the scope of sovereign power.¹⁴³ Precisely which moral a regulation seeks to defend is determinative in this prong.¹⁴⁴

2. The Second Prong: Is the Regulation Necessary?

The second prong asks whether the regulation in question is “necessary” to protect public morals.¹⁴⁵ A trade regulation will be deemed necessary only if (1) it is not outwardly directed, and (2) less trade restrictive alternatives are exhausted.¹⁴⁶ Regulations that are explicitly directed at foreign producers are considered outwardly directed, and thus unnecessary.¹⁴⁷ In addition, if alternative trade measures are available that are more consistent, or less inconsistent, with GATT rules, the

¹³⁷ Yavitz, *supra* note 25, at 210; *see* Schoenbaum, *supra* note 48, at 276.

¹³⁸ *U.S. Gasoline*, *supra* note 104, at 20–27 (holding that the U.S. import restriction on foreign gasoline failed the third prong of the analysis, and therefore did not qualify under the exception).

¹³⁹ *See* Charnovitz, *supra* note 17, at 737.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 706, 729–30.

¹⁴³ *See, e.g.*, Farm Animal Stewardship Purchasing Act, H.R. 5557, 109th Cong. (2d Sess. 2006) (proposing a law to ensure “humane” factory conditions in the United States). For an overview of how nations have traditionally regulated these concerns, and provided for their exception in trade law, *see* Charnovitz, *supra* note 17, at 694–728.

¹⁴⁴ *See* Charnovitz, *supra* note 17, at 737.

¹⁴⁵ *Asbestos*, *supra* note 44, at 3242; *Shrimp-Turtle I*, *supra* note 44, at 2792.

¹⁴⁶ *See Asbestos*, *supra* note 44, at 3242; *Shrimp-Turtle I*, *supra* note 44, at 2792.

¹⁴⁷ *Tuna-Dolphin II*, *supra* note 41, ¶¶ 5.34–.39.

regulation will also be found unnecessary.¹⁴⁸ While this is the current interpretation of the “necessary to” prong, criticism that this reading fundamentally misinterprets the plain language of article XX(a) is persuasive, and is laid out *infra* Part IV.B.

a. *The Outwardly Directed Nature of the Regulation*

The first factor to be assessed under the “necessary” prong is the outwardly directed nature of the regulation.¹⁴⁹ Laws that seek to protect human or animal health, or morals, will often compel producers in other nations to adjust their PPMs in order to comply.¹⁵⁰ Therefore, outwardly directed regulations, also known as extraterritorial regulations, will receive close scrutiny under this requirement, and be deemed unnecessary if they impermissibly regulate conduct beyond their borders.¹⁵¹ In the context of animal welfare, this situation is problematic because a ban on a certain PPM inherently affects foreign producers who utilize that PPM and then want to export to the nation in question.¹⁵² Those foreign producers are then compelled to change their production methods in order to comply with another nation’s standards.¹⁵³ This ban is precisely the type of regulation that might be problematic under the second prong, because it unnecessarily mandates changes in foreign nations.¹⁵⁴ However, PPM-based trade bans with outward effects have recently survived WTO scrutiny, and may open the door to animal welfare trade bans being found valid under the “necessary” requirement, as well.¹⁵⁵

b. *Less Trade-Restrictive Alternatives*

A second factor to assess under this prong is whether trade regulations besides an outright trade ban would be more consistent, or less inconsistent, with GATT rules.¹⁵⁶ This is a highly fact-intensive prong,

¹⁴⁸ See Report of the Panel, *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶¶ 78–81, DS10/R (Sept. 21, 1990), GATT B.I.S.D. (37th Supp.) at 200, 224–26 (1990) [hereinafter *Thai-Cigarettes*]; Schoenbaum, *supra* note 48, at 276.

¹⁴⁹ *Tuna-Dolphin II*, *supra* note 41, ¶ 5.38.

¹⁵⁰ See *id.* ¶¶ 2.1–3, 5.38–39 (discussing the outward effects of a U.S. ban on foreign tuna caught without certification of low dolphin kill ratios, and why such effects make the ban unnecessary).

¹⁵¹ See *id.*

¹⁵² *Id.* ¶¶ 5.34–39.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ See generally *Asbestos*, *supra* note 44; *Shrimp-Turtle I*, *supra* note 44.

¹⁵⁶ *Thai-Cigarettes*, *supra* note 148, ¶¶ 72–77.

and nations utilizing an import ban must put forth evidence to an arbitral panel or the Appellate Body explaining why such a measure is as minimally trade-restrictive as possible in order to be “necessary.”¹⁵⁷ One way for a nation to show that no measure exists that is more consistent with GATT is to put forth evidence that it attempted to negotiate, on a bilateral or multilateral basis, with its trading partners on the desired change.¹⁵⁸ In fact, the WTO will likely find that an import ban or restriction is not “necessary” unless the regulating nation has first made an effort to resolve the issue through diplomacy and trade agreement.¹⁵⁹ However, these efforts alone are not enough to satisfy the “necessary” prong.¹⁶⁰

3. The Third Prong: Does the Regulation Violate the Chapeau?

The third prong of the analysis is whether the regulation “constitute[s] a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”¹⁶¹ This language comes directly from the chapeau of article XX.¹⁶² One anomaly of this analysis is that because of the interpretation of “necessary” under the second prong, both the second and third prongs pertain to anti-discrimination and least trade-restrictive characteristics.¹⁶³

Under the third prong, if the purpose of the regulation in question is to confer a competitive advantage on the domestic industry, or to generally restrict trade, rather than to legitimately protect the morals of society, then the WTO will find the regulation does not merit exception.¹⁶⁴ While it is true that a regulation can at once protect morals while also conferring a competitive advantage, the question under this prong is whether the regulation is a “disguised” attempt to confer the advantage.¹⁶⁵ Therefore, a regulation explicitly aimed at domestic producers, not just at foreigner producers, is more likely to satisfy this prong.¹⁶⁶

¹⁵⁷ *Id.*; Charnovitz, *supra* note 17, at 733.

¹⁵⁸ See Stevenson, *supra* note 17, at 122–23.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ GATT, *supra* note 63, art. XX; see Charnovitz, *supra* note 17, at 739–40.

¹⁶² GATT, *supra* note 63, art. XX.

¹⁶³ Schoenbaum, *supra* note 48, at 276–77.

¹⁶⁴ Charnovitz, *supra* note 17, at 739–40.

¹⁶⁵ See *id.*

¹⁶⁶ See *id.*

III. ANALYSIS OF THE EUROPEAN UNION'S BROILER CHICKEN IMPORT BAN UNDER GATT

To apply the above analysis to the European Union's proposed trade restriction on broiler chicken, it is first important to note that this regulation would only be reviewed by the WTO should another Member State file a complaint.¹⁶⁷ Absent such a complaint, the European Union is free to pass any type of import restriction it wants.¹⁶⁸ However, as the European Union is a major economic market and this law represents a significant barrier to chicken exporters, the regulation is likely to prompt a complaint.¹⁶⁹ Therefore, this analysis is predicated on the European Union approving a quantitative import ban on broiler chicken that do not meet certain PPM welfare standards, and a complaint being filed at the WTO by an exporting nation.

Secondly, the European Union may very well be persuaded not to pass such an import restriction, as was the case in the 1990s with a proposed law on leg-hold traps in the fur industry.¹⁷⁰ In that case, before the European Union approved the import regulation, the U.S. and Canadian governments threatened to bring suit in the WTO should such a law go into effect.¹⁷¹ The European Union backed down, never passed the regulation, and instead opted to negotiate several weaker treaties on fur imports with its trading partners.¹⁷² However, given the broiler chicken import ban's prospects for satisfying the modern, three-pronged analysis, the European Union should not back down in the face of such threats.

A. *The First Prong: Does the E.U. Broiler Chicken Regulation Protect a Public Moral?*

The first prong of the analysis is whether raising welfare standards for broiler chicken is within the scope of the "public morals" exception.¹⁷³ The rationale behind the law is to prevent the cruel treatment

¹⁶⁷ See, e.g., Bernard H. Oxman, *International Decisions*, AM. J. INT'L L. 435, 435 (2002).

¹⁶⁸ See *id.*

¹⁶⁹ Cf. Nollkaemper, *supra* note 18, at 1-2 (discussing how a previous attempt by the European Union to ban imports on the basis of animal welfare—i.e., fur pelts obtained from leg-hold traps—met with threats of a trade complaint).

¹⁷⁰ See Friedl Weiss, *The Consistency of the Fur Import Ban with WTO Law*, in TRAPPED BY FURS?, *supra* note 18, at 57-60.

¹⁷¹ *Id.* at 58.

¹⁷² *Id.*

¹⁷³ U.S. *Gasoline*, *supra* note 104, at 10; see Charnovitz, *supra* note 17, at 737.

of chicken in meat production.¹⁷⁴ This regulation would likely satisfy the “public moral” requirement.¹⁷⁵ Nations often define and regulate morals with regard to animal welfare.¹⁷⁶ For instance, on June 8, 2006, U.S. Representatives Christopher Shays and Peter DeFazio introduced the Farm Animal Stewardship Purchasing Act to Congress.¹⁷⁷ While the bill has yet to become law, its stated purpose is “to promote the humane treatment of animals” and “minimize[] [the] needless suffering” of pigs, cattle, chicken, and other animals reared for consumption.¹⁷⁸ The bill requires that all suppliers of meat to U.S. government entities comply with minimum standards of animal welfare.¹⁷⁹ The primary purpose of the bill is to improve animal welfare, not to safeguard human health or prevent the extinction of certain species.¹⁸⁰ Such laws illustrate that animal welfare is often regulated as a moral concern, and protecting such a moral falls within the scope of authority and discretion of sovereign nations.¹⁸¹

The language of the proposed E.U. regulation also focuses on improving animal welfare for the animals’ sake.¹⁸² For instance, the Committee on Agriculture and Rural Development stated the following in its Explanatory Note to this resolution:

The new legislative proposal is a response to increasing public concern about animal welfare. The place occupied by animals in our societies has changed. Despite the industrialisation of farming, animals are now seen as sentient beings which have a right to respect. This is a long-overdue victory for Aristotle, who believed that Man (sometimes) differed from animals in his ability to reason, but shared with them a capacity for movement and, above all, feeling.¹⁸³

Therefore, it is evident that the essential impetus for the law is the moral consideration of animal suffering.¹⁸⁴ The WTO will likely de-

¹⁷⁴ *See id.*

¹⁷⁵ *See generally* EP Resolution on Broiler Chicken, *supra* note 1.

¹⁷⁶ Charnovitz, *supra* note 17, at 694–728.

¹⁷⁷ *See generally* H.R. 5557, 109th Cong. (2d Sess. 2006).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* § 3.

¹⁸⁰ *Id.*

¹⁸¹ *See id.*

¹⁸² Report on the Proposal for a Council Directive Laying Down Minimum Rules for the Protection of Chickens Kept for Meat Production, EUR. PARL. DOC. A6-0017 26 (2006), *available at* <http://www.europarl.europa.eu/sides/getDoc.do?objRefId=108854&language=EN>.

¹⁸³ *Id.*

¹⁸⁴ *See id.*

termine that a law aimed at improving welfare standards for broiler chickens falls into the category of a moral exception.¹⁸⁵

B. *The Second Prong: Is the E.U. Broiler Chicken Regulation “Necessary”?*

The second prong of the analysis is whether the proposed broiler chicken regulation is “necessary” to achieve the E.U. goal of promoting higher animal welfare standards.¹⁸⁶ This prong asks whether the regulation is the least trade-restrictive option possible, and whether all other options have been exhausted.¹⁸⁷

1. The Outwardly Directed Nature of the Import Ban

The first factor to consider is the outwardly directed nature of the regulation.¹⁸⁸ The import ban will take effect by conditioning access to the E.U. market on exporting countries’ adoption of welfare standards similar to the proposed E.U. law.¹⁸⁹ The European Union will likely argue that its broiler chicken law is only attempting to regulate the products that are bought and sold within its jurisdiction, and therefore is necessary to safeguard public morals.¹⁹⁰ The argument is that nations should possess the sovereign power to set such standards for the goods consumed internally, regardless of whether such standards also have outward effects.¹⁹¹

Recent WTO Appellate Body ruling supports this argument.¹⁹² Import bans based on PPM standards, which have outward effects, are no longer per se invalid under WTO precedent.¹⁹³ While a GATT panel in *United States—Restrictions on Imports of Tuna (Tuna-Dolphin II)* prohibited a PPM import ban on the grounds of its extrajurisdictional effects, the 1998 and 2001 rulings in *United States—Import Prohibitions of Certain Shrimp and Shrimp Products (Shrimp-Turtle I and Shrimp-Turtle II, respectively)* altered this holding.¹⁹⁴ In the *Shrimp-Turtle* cases, the United

¹⁸⁵ See Charnovitz, *supra* note 17, at 705–10, 737.

¹⁸⁶ See *U.S. Gasoline*, *supra* note 104, at 13 (analyzing the parallel “related to” prong of the article XX(g) analysis).

¹⁸⁷ See *Thai-Cigarettes*, *supra* note 148, ¶¶ 72–77.

¹⁸⁸ See *Shrimp-Turtle I*, *supra* note 44, at 2792.

¹⁸⁹ EP Resolution on Broiler Chicken, *supra* note 1, amend. 8.

¹⁹⁰ See *id.*

¹⁹¹ Stevenson, *supra* note 17, at 126.

¹⁹² See generally *Shrimp-Turtle I*, *supra* note 44.

¹⁹³ *Id.* at 2792; *Tuna-Dolphin II*, *supra* note 41, ¶¶ 5.34–39.

¹⁹⁴ *Shrimp-Turtle II*, *supra* note 44, at 6526–27; *Shrimp-Turtle I*, *supra* note 44, at 2757–58; *Tuna-Dolphin II*, *supra* note 41, ¶ 6.1.

States prohibited the importation of shrimp caught by foreign trawlers that did not certify the use of a turtle-excluder device (TED) to spare the killing of endangered sea turtles.¹⁹⁵ Several countries raised a complaint at the WTO on grounds that this ban violated article XI.¹⁹⁶ The United States sought to defend itself under articles XX(b) and XX(g).¹⁹⁷

In *Shrimp-Turtle I*, the Appellate Body held that the regulation was unfairly discriminatory against foreign nations, but on very narrow grounds.¹⁹⁸ Most importantly, the Appellate Body did not attack the outward effects of the regulation, even though the United States imposed a PPM standard on how shrimp were caught outside of its territorial waters.¹⁹⁹ Instead, the Appellate Body found that the regulation was not crafted as narrowly as possible—it did not allow shrimp exporters enough time to alter their fishing methods, nor did it include alternative methods, besides the TED, to protect turtles.²⁰⁰ Therefore, the Appellate Body found the regulation violated the “unjustifiable” and “arbitrary” requirement of the chapeau, but not the outward-effects test of the necessary prong.²⁰¹ Three years after the first ruling, the Appellate Body in *Shrimp-Turtle II* found that upon subsequent revision of the regulation by the United States—permitting nations more time to comply, and accepting certification of measures that are “comparable in effectiveness” to the TED—the regulation satisfied the “arbitrary discrimination” prong, and thus did not violate GATT.²⁰²

In these landmark rulings, the Appellate Body recognized that article XX exceptions will sometimes permit laws that condition exporters’ access to domestic markets on compliance with certain PPM standards.²⁰³ The Appellate Body in *Shrimp-Turtle II* explicitly adopted the following from the Panel’s report:

It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies . . . renders a measure a priori incapable of justification under article XX. Such an interpretation renders most, if not all, of the specific exceptions of article XX inutile, a result abhor-

¹⁹⁵ *Shrimp-Turtle I*, *supra* note 44, at 2759.

¹⁹⁶ *Id.* at 2756–57, 2766.

¹⁹⁷ *Id.* at 2760.

¹⁹⁸ *Id.* at 2816–19.

¹⁹⁹ *Id.* at 2792.

²⁰⁰ *Id.* at 2813–18.

²⁰¹ *Shrimp-Turtle I*, *supra* note 44, at 2819.

²⁰² *Shrimp-Turtle II*, *supra* note 44, at 6525–27.

²⁰³ *Id.* at 6525–27; *Shrimp-Turtle I*, *supra* note 44, at 2792.

rent to the principles of interpretation we are bound to apply.²⁰⁴

Unlike *Tuna-Dolphin II*, the Appellate Body in *Shrimp-Turtle I* was unwilling to assert that the mere presence of outward effects failed this prong of the analysis.²⁰⁵

Therefore, the broiler chicken regulation will not necessarily fail the second prong, simply because it has outward effects.²⁰⁶ Under *Shrimp-Turtle I* reasoning, an import ban may be required to protect human health, endangered species, or morals, even if the ban affects how products will be caught or produced outside of a nation's jurisdiction.²⁰⁷ The Appellate Body recognized that otherwise, citizens would eventually be supplied with the products it charged its government with prohibiting.²⁰⁸ This belated realization by the Appellate Body in this case is a step forward for animal welfare laws, at least with regard to passing the second prong of the article XX test.²⁰⁹

Although *Shrimp-Turtle I* did not strike down a PPM-based import restriction because of its outward effects, two factors weigh against its direct application to the European Union's broiler chicken law.²¹⁰ First, the Appellate Body in that case analyzed the article XX(g) claim, which states that a regulation must be "relat[ed] to" protecting natural resources, rather than the "necessary to" standard of articles XX(a) and XX(b).²¹¹ Therefore, it is not clear whether an import regulation based on morals, when analyzed under an article XX(a) "necessary to" standard, would face higher, or different, scrutiny with regard to the outward effects of the regulation.²¹² What is clear is that the necessary prong requires a more exacting requirement that no other less inconsistent trade measures exist.²¹³ This requirement does not exist under the "related to" analysis.²¹⁴ Therefore, the *Shrimp-Turtle I* case suggests

²⁰⁴ *Shrimp-Turtle II*, *supra* note 44, at 6521 (quoting Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 121, WT/DS58/RW (June 15, 2001)).

²⁰⁵ *Shrimp-Turtle I*, *supra* note 44, at 2792; *Tuna-Dolphin II*, *supra* note 41, ¶¶ 5.38–6.2.

²⁰⁶ *See Shrimp-Turtle I*, *supra* note 44, at 2792.

²⁰⁷ *Id.*

²⁰⁸ *See id.*

²⁰⁹ *See id.*

²¹⁰ *See id.* at 2798, 2801.

²¹¹ GATT, *supra* note 63, art. XX(b), (g); *Shrimp-Turtle I*, *supra* note 44, at 2801.

²¹² *See Shrimp-Turtle I*, *supra* note 44, at 2801; Stevenson, *supra* note 17, at 135 (recommending the use of "relating to" under articles XX(a) and XX(b) in order to clarify the analysis, and broaden the types of regulations that can pass this prong).

²¹³ Stevenson, *supra* note 17, at 135.

²¹⁴ *Id.*

that PPM-based import restrictions are not per se unnecessary, simply because they have outward effects.²¹⁵ But the analysis from *Shrimp-Turtle I* still requires a showing under a “necessary to” analysis that no less inconsistent trade measures exist.²¹⁶

Second, the Appellate Body in *Shrimp-Turtle I* went on to find that a “nexus” existed between the foreign turtles and the United States.²¹⁷ This finding permitted the Appellate Body to hold that the ban could be justified under article XX(g).²¹⁸ However, it is not clear whether such a nexus would exist between the European Union and broiler chickens in other countries.²¹⁹ In *Shrimp-Turtle I*, the Appellate Body conceded that although the United States does not have jurisdiction to protect foreign turtles, the U.S. regulation protects foreign turtles.²²⁰ It reconciled this discrepancy by pointing to the fact that sea turtles are migratory, and presumed to enter and exit U.S. waters during their lifetimes.²²¹ The Appellate Body used that contention to establish the requisite nexus between the United States and the turtles.²²² This contention, which is contestable, allowed the Appellate Body to find that such a link gives the United States the ability to protect foreign turtles through an import ban on shrimp caught without TEDs.²²³

In order to satisfy this prong, the European Union therefore must argue that its import ban is not regulating the conduct of all foreign chicken producers, but only those that choose to export into the European Union.²²⁴ If import bans based on PPM standards are not per se unenforceable after *Shrimp-Turtle I*, then a law protecting the welfare of animals, as applied to products flowing across E.U. borders, should be enforceable.²²⁵ As for the nexus requirement in *Shrimp-Turtle I*, the European Union should argue that in order for it to mandate higher welfare standards for its own chicken, it must apply that regulation evenly to all chicken imports.²²⁶ Otherwise, the law itself might be sub-

²¹⁵ *Shrimp-Turtle I*, *supra* note 44, at 2792.

²¹⁶ *See, e.g., Asbestos*, *supra* note 44, at 3292 (requiring a showing of no other less inconsistent trade measures for the E.U. import ban to survive scrutiny under the necessary prong).

²¹⁷ *Shrimp-Turtle I*, *supra* note 44, at 2798.

²¹⁸ *Id.*

²¹⁹ *See id.*

²²⁰ *Id.* at 2796–98.

²²¹ *Id.*

²²² *See id.* at 2798.

²²³ *See Shrimp-Turtle I*, *supra* note 44, at 2798.

²²⁴ *See id.*

²²⁵ *See id.*

²²⁶ *See id.*

ject to domestic industry opposition or evasion, and the chances of the European Union's long-term success in raising its own chicken welfare standards could be imperiled.²²⁷ Furthermore, the European Union should emphasize that in *Shrimp-Turtle I*, a very weak nexus was established between the foreign turtles and the ability of the United States to protect them.²²⁸ That nexus was based only on the possibility that turtles caught by other nations *might* migrate inside U.S. waters during their lifetime.²²⁹ However, the Appellate Body did not require proof of this contention, and held that the possibility alone was enough.²³⁰

2. Less Trade-Restrictive Alternatives

Under the second prong, a nation challenging the ban will likely raise the issue that alternative measures to protect the welfare of chicken are less trade-restrictive than an import ban.²³¹ The Appellate Body will then use a fact-based analysis to determine whether such alternatives are feasible.²³² If the reviewing body concludes that less trade-restrictive alternatives are feasible, the article XX(a) exception will be inapplicable.²³³ However, import bans that are as least discriminatory and as flexible as possible will be viewed more favorably by the Appellate Body when compared to alternatives.²³⁴

In *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products (Asbestos)*, France attempted to ban imports of products made with chrysotile asbestos fibers, a known carcinogen.²³⁵ Canada, which exported cement-based products containing asbestos to France, challenged the import ban as a violation of several trade provisions, including article XI.²³⁶ France defended its action by invoking article XX(b), claiming the measure was necessary to protect human health.²³⁷ In its analysis of the “necessary to” requirement, the Appellate Body considered Canada’s argument that a “reasonably available alternative” existed to the import ban, in the form of a “controlled use”

²²⁷ See *supra* Part I.

²²⁸ See *Shrimp-Turtle I*, *supra* note 44, at 2756–60, 2798.

²²⁹ See *id.* at 2797–98.

²³⁰ See *id.*

²³¹ See *Asbestos*, *supra* note 44, at 3242; *Thai-Cigarettes*, *supra* note 148, ¶¶ 75–81.

²³² *Asbestos*, *supra* note 44, at 3242; *Thai-Cigarettes*, *supra* note 148, ¶¶ 75–81.

²³³ *Asbestos*, *supra* note 44, at 3242; *Thai-Cigarettes*, *supra* note 148, ¶¶ 75–81.

²³⁴ See *Asbestos*, *supra* note 44, at 3242; *Thai-Cigarettes*, *supra* note 148, ¶¶ 75–81.

²³⁵ *Asbestos*, *supra* note 44, at 3240–43.

²³⁶ *Id.* at 3242.

²³⁷ See *id.* at 3289.

provision.²³⁸ Such an alternative law would state that imports of asbestos could continue, but that France could control the use of the asbestos through internationally recognized safety precautions, use restrictions, and other methods.²³⁹ The Appellate Body rejected that argument, stating that, “[i]n our view, France could not reasonably be expected to employ any alternative measure if that measure would involve a continuation of the very risk that the [import ban] seeks to ‘halt.’”²⁴⁰ As such, the Appellate Body found that France was within its discretion to set a complete import ban on asbestos, and that the controlled use alternative was not “reasonably available.”²⁴¹

This case suggests a degree of latitude for nations to craft the types of regulations they deem necessary to protect certain policy goals.²⁴² The fact that Canada could allege a less trade-restrictive alternative was not enough to supersede France’s discretion to ban asbestos altogether.²⁴³ The Appellate Body conceded that the alternative was possible, but remained convinced that France’s ban on asbestos was necessary to protect human health.²⁴⁴ The E.U. import ban on broiler chicken may be accorded the same deference, in light of alternatives such as a labeling or taxing scheme.²⁴⁵ The result in *Asbestos* is an encouraging holding for the E.U. law, because less trade-restrictive alternatives to the import ban will always exist, but the feasibility of such alternative will not, per se, invalidate the ban.²⁴⁶

The *Asbestos* case is not entirely favorable to a potential analysis of the necessity of the E.U. broiler chicken regulation, however.²⁴⁷ In its ruling, the Appellate Body relied on language from *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, which held that public policies viewed as “more vital or important” are easier to find necessary to protect.²⁴⁸ Here, the short shrift historically given to animal welfare issues by most nations, and presumably by Appellate Body members, will likely become relevant.²⁴⁹ The importance of protecting French

²³⁸ *Id.* at 3292–93.

²³⁹ *Id.* at 3294–95.

²⁴⁰ *Id.* at 3295.

²⁴¹ *Asbestos*, *supra* note 44, at 3295.

²⁴² *See id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *See id.*

²⁴⁶ *See id.*

²⁴⁷ *See Asbestos*, *supra* note 44, at 3292.

²⁴⁸ *Id.* (quoting Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R (Jan. 10, 2001)).

²⁴⁹ *See id.*

citizens from cancer was central to the analysis of finding the import ban “necessary.”²⁵⁰ The Appellate Body found such protection “vital and important in the highest degree.”²⁵¹ Whether a law protecting the welfare of animals will receive the same deference is not at all clear, and unsettled by Appellate Body precedent.²⁵² However, a fair assumption would be that animal welfare laws would not be deemed as vital and important as laws that seek to prevent cancer in humans.²⁵³

While it makes sense to accord greater deference to laws seeking to protect human health than to animal welfare, the focus of an article XX(a) analysis should remain on balancing a valid moral with restrictions on free trade.²⁵⁴ Under such an analysis, animal welfare laws fall squarely within the purview of moral consideration,²⁵⁵ and an import ban that is as minimally discriminatory and flexible as possible lessens the adverse impact of the trade restriction.²⁵⁶ As such, the European Union should attempt to negotiate bilateral or multilateral agreements with nations that export chicken to the European Union. Under current WTO precedent, this process is an important step toward showing that the import ban is “necessary” due to the exhaustion of other alternatives, and that the ban is not a protectionist measure.²⁵⁷

Another way for the European Union to demonstrate that other less restrictive alternatives do not exist would be to include an exception to the ban for chicken exporters who comply with the same high welfare standards, even if located in nations that do not require those same standards. In *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes (Thai-Cigarettes)*, an import ban on all foreign cigarettes did not satisfy the “necessary” prong because it banned all foreign producers outright, without permitting any producers to qualify for an exemption.²⁵⁸ The Thai government defended its import ban under article XX(b), in order to protect its citizens from the dangers

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *See id.*

²⁵³ *See Asbestos*, *supra* note 44, at 3292.

²⁵⁴ *See generally Shrimp-Turtle I*, *supra* note 44 (balancing the protection of endangered sea turtles with the important aim of free trade).

²⁵⁵ *See supra* Part III.A.

²⁵⁶ *See generally Shrimp-Turtle I*, *supra* note 44.

²⁵⁷ *Shrimp-Turtle II*, *supra* note 44, at 6514–17 (discussing the requirement that the U.S. attempt to negotiate a multilateral agreement on the issue of turtle protection before it can justify its measure); *U.S. Gasoline*, *supra* note 104, at 25–26 (discussing U.S. failure to negotiate with Venezuela and Brazil before imposing trade restrictions).

²⁵⁸ *Thai-Cigarettes*, *supra* note 148, ¶¶ 72–81.

of smoking.²⁵⁹ A GATT panel found that alternatives such as a ban on cigarette advertising could achieve the same goal without being trade restrictive, and deemed the regulation a trade violation.²⁶⁰ Had the Thai government allowed some foreign producers to import into Thailand, such as those that agreed not to advertise, it is more likely the GATT panel would have upheld the regulation.²⁶¹ Therefore, the European Union should allow chicken producers to apply for certification based on their use of the same welfare standards.²⁶²

The European Union should also implement reasonable and flexible guidelines for foreign producers to reach the desired welfare standards.²⁶³ In *Shrimp-Turtle I*, the U.S. regulation was found invalid because it did not provide a reasonable amount of time for foreign producers to comply with the regulation, and the United States did not allow other conservation techniques, besides TEDs, to be used.²⁶⁴ As such, foreign chicken exporters should be given a certain reasonable amount of time to come into compliance with the regulation.²⁶⁵ In addition, various humane methods for housing, feeding, caring for, and slaughtering chickens should be permitted, in order to make the requirement on foreign producers less burdensome.²⁶⁶ This standard is similar to the provision in *Shrimp-Turtle II*, which required the United States to institute a more flexible certification process, rather than mandating only one method of turtle protection.²⁶⁷

All of these factors, taken together, assure that a proposed import ban on broiler chicken is as “necessary” and as least trade-restrictive as possible, thus making it more likely to survive challenge.

C. *The Third Prong: Does the E.U. Broiler Chicken Regulation Violate the Chapeau?*

If the E.U. import regulation passes the second prong, it is unlikely to fail the third prong, because much of the analysis of anti-discrimination and least trade-restrictive alternatives now takes place

²⁵⁹ *Id.* ¶ 21.

²⁶⁰ *Id.* ¶¶ 72–81.

²⁶¹ *See id.* ¶¶ 76–81.

²⁶² *See generally id.*

²⁶³ *See Shrimp-Turtle I, supra* note 44, at 2813–16.

²⁶⁴ *Id.*

²⁶⁵ *See id.* at 2815.

²⁶⁶ *See id.* at 2813–15.

²⁶⁷ *Shrimp-Turtle II, supra* note 44, at 6523–6525.

under the “necessary” requirement.²⁶⁸ Even the *Thai-Cigarettes* case, which banned all foreign cigarette imports while permitting domestic cigarette production, did not reach the third prong analysis, because it failed the second prong.²⁶⁹ This regulation clearly violated the third prong’s chapeau requirement, as the cigarette import ban is a quintessential example of a protectionist measure.²⁷⁰

Therefore, the limited analysis of this prong would focus on whether foreign and domestic producers are being held to the same standard for broiler chicken welfare.²⁷¹ The proposed European Parliament resolution mandates compliance across the European Union, with specific provisions for chicken welfare, such as stocking densities, lighting, and surgical procedures.²⁷² E.U. producers will certainly be the first and primary targets of this regulation, and their compliance is a main goal for the law’s drafters.²⁷³ There seems to be little question about whether the European Union’s own chicken industry will be held to these standards.²⁷⁴ Thus, as long as the welfare standards are equally applied, and not arbitrarily imposed on foreign producers, the third prong will likely be satisfied.²⁷⁵

IV. CRITICISMS OF THE CURRENT ARTICLE XX ANALYSIS

Serious criticism of the current article XX analysis exists, and should be taken into account by the Appellate Body or arbitral panel if it is confronted with a trade dispute on the E.U. broiler chicken law, or any other import regulation premised on the moral exception.²⁷⁶ Remedying the current analysis will make it more likely that the European Union’s import ban will pass scrutiny, and will more effectively balance free trade and protection of public morals.²⁷⁷

²⁶⁸ Schoenbaum, *supra* note 48, at 277.

²⁶⁹ See generally *Thai-Cigarettes*, *supra* note 148.

²⁷⁰ See *id.* ¶ 63.

²⁷¹ See Charnovitz, *supra* note 17, at 737.

²⁷² EP Resolution on Broiler Chicken, *supra* note 1.

²⁷³ See *id.*

²⁷⁴ See *id.* Only two sections of the resolution, amendments 8 and 9, deal with foreign chicken producers. *Id.* amends. 8–9.

²⁷⁵ See Schoenbaum, *supra* note 48, at 277.

²⁷⁶ Charnovitz, *supra* note 36, at 45; Schoenbaum, *supra* note 48, at 45; Stevenson, *supra* note 17, at 39.

²⁷⁷ Charnovitz, *supra* note 36, at 45; Schoenbaum, *supra* note 48, at 45; Stevenson, *supra* note 17, at 39.

A. Deference to Articles I, III, and XI Is Incorrect

The WTO's interpretation of the article XX exceptions has been criticized by some animal welfare advocates and trade scholars.²⁷⁸ First of all, the deference given to articles I, III, and XI is not necessarily consistent with article XX's introductory heading.²⁷⁹ This heading explicitly states that when certain factors are met, "nothing" shall prevent the passage of regulations seeking to invoke the exception.²⁸⁰ Furthermore, the plain language of article XX reads more like "substantive rights" than articles I, III, and XI, which merely establish general principles against trade discrimination and quotas.²⁸¹ The exceptions exist precisely to give nations the essential "right" to protect their own morals, human and animal life, and threatened natural resources.²⁸² Nevertheless, current Appellate Body rulings have interpreted the relationship of the GATT articles by giving greater deference to the principle of non-discriminatory trade, rather than the right of nations to protect certain moral.²⁸³ Doing away with this deference would make it more likely that morally based import regulations, including the European Union's proposed import ban, would satisfy the three-pronged test by lessening the presumption that the exception cannot be invoked.²⁸⁴

B. Misinterpretation of "Necessary to"

The current Appellate Body analysis of the "necessary to" prong is also erroneous.²⁸⁵ There is no reason to interpret the phrase "necessary to" as stating that a regulation must be as least trade-restrictive as any alternative, or that all alternatives need be exhausted.²⁸⁶ This interpretation is a fundamental misreading of the text.²⁸⁷ The plain meaning of the language states that the regulation must be necessary in order protect the specific policy goal in question.²⁸⁸ Therefore, in

²⁷⁸ Charnovitz, *supra* note 36, at 45; Schoenbaum, *supra* note 48, at 45; Stevenson, *supra* note 17, at 39.

²⁷⁹ Charnovitz, *supra* note 36, at 82.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *See id.*

²⁸³ *Id.* at 82.

²⁸⁴ *See id.*

²⁸⁵ Schoenbaum, *supra* note 48, at 276–77.

²⁸⁶ *Id.*

²⁸⁷ *Id.*; *see* GATT, *supra* note 63, art. XX.

²⁸⁸ Schoenbaum, *supra* note 48, at 276–77; *see* GATT, *supra* note 63, art. XX.

the second prong of an article XX(a) analysis, the question should be whether the regulation is reasonably capable of protecting the moral in question, or whether the moral would be protected without the regulation.²⁸⁹ The analysis should not focus on whether it is less trade-restrictive than other measures.²⁹⁰

This alternate interpretation is supported by the fact that the current interpretation makes the third prong of the analysis redundant.²⁹¹ The third prong's chapeau analysis already takes into account whether a restriction is too trade-restrictive, because it focuses on whether a measure is "unjustified" in light of other alternatives.²⁹² Such an assessment inherently involves consideration of whether alternative measures are more feasible.²⁹³ Therefore, the current interpretation of the second prong analysis forces an unnecessary analysis of alternative trade measures and consistency with other GATT standards.²⁹⁴

In addition, if the drafters had meant "necessary to" to be interpreted as a "least trade-restrictive" requirement, they would have made such a requirement more explicit.²⁹⁵ The chapeau is explicit on evaluating a regulation based on protectionist and discriminatory concerns, but the "necessary to" prong is not.²⁹⁶ Therefore, the plain meaning of the text should control, and the plain meaning is that the regulation must only be "necessary to protect public morals."²⁹⁷ Under this revised analysis, a minimally discriminatory, flexible E.U. import ban on broiler chicken would be more likely to satisfy the "necessary to" requirement.²⁹⁸

CONCLUSION

The European Union should not back down from its attempt to improve the welfare of broiler chicken. Regulating imports from nations that do not meet the same welfare standards is the an effective method to ensure the humane treatment of chicken. Furthermore, such an import ban does not mandate that other nations accept the

²⁸⁹ See Schoenbaum, *supra* note 48, at 276–77; GATT, *supra* note 63, art. XX.

²⁹⁰ Schoenbaum, *supra* note 48, at 276–77.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ See Stevenson, *supra* note 17, at 130.

²⁹⁴ *Id.*

²⁹⁵ See *id.*

²⁹⁶ See *id.*

²⁹⁷ See *id.*

²⁹⁸ See *supra* Part III.B.

European Union's standards on animal welfare. It only mandates that if foreign nations want to bring their goods into the European Union, they must comply with the same standards as E.U. producers.

While it is uncertain whether such an import ban would survive a challenge at the WTO, several factors make it more likely that it will. First, the European Union should pursue a good faith effort to negotiate international agreements on this issue with its chief chicken exporters. Second, the European Union should allow nations a flexible timeframe to comply with the new standards. Third, the European Union should provide an exception for chicken producers who abide by the European Union's high standards, even if located in nations that do not mandate those standards. Finally, the European Union should ensure that this regulation applies identically to all E.U. and foreign producers.

In addition, the Appellate Body should re-evaluate its interpretation of several key components of GATT. First, there is no reason to presume article XX's broad deference to articles I, III, and XI. Article XX rights are "substantive" as well. Second, "necessary to" should be interpreted to relate only to the regulation's efficacy in protecting the moral in question, not to whether other alternatives are less trade-restrictive. Such changes in interpretation, coupled with an E.U. law as non-protectionist, non-discriminatory and flexible as possible, make it likely that the E.U. broiler chicken regulation, or similar animal welfare-based import restrictions, will be upheld at the WTO.