

## NO COWS AT SEA: A PROPOSAL FOR A BAN ON LIVE EXPORT FROM THE UNITED STATES

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### ABSTRACT

The United States, as a member of the World Organization for Animal Health, should abide by the international standards for animal welfare. The US is circumventing these guidelines when it practices live export. In light of recent and continuing abuses, the US should ban live export before preferential trade agreements and other trading trends can open the door to further abuses.

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### INTRODUCTION

There are more than 1.4 billion cattle living on the planet today.<sup>1</sup> That means there are more than four head of cattle for every person in the United States. Cattle include cows, bulls, and calves. Their main purpose, of course, is to provide food. Humans consume cows—lots of them—and now more than ever. Both the Food and Agricultural

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<sup>1</sup> FOOD & AGRIC. ORG. OF THE U.N., FAO STATISTICAL YEARBOOK 2012: EUROPE AND CENTRAL ASIA FOOD AND AGRICULTURE, at 46, <http://www.fao.org/docrep/017/i3138e/i3138e07.pdf> (2012).

Organization of the United Nations and the Organization for Economic Co-operation and Development expect meat consumption to rise in the coming decade on a global scale, mostly in developing countries where “growing populations, rising affluence and urbanization are translating into increased demand for livestock products.”<sup>2</sup> This article will focus on cattle, but it is relevant to all agricultural animals that move about in the system of global trade. Of the 1.4 billion cattle around the world, some will graze green pastures before their eventual slaughter. Many will not. Some will be rendered senseless to pain before they are butchered for their meat. Some will not be so fortunate (if one can use the word “fortunate” at all).

Paul McCartney said that “if slaughterhouses had glass walls, everyone would be vegetarian.” The obvious idea is that being able to see the horror of what goes on behind slaughterhouse walls would make people change their habits. Similarly, if we all watched this video,<sup>3</sup> everyone would demand higher welfare standards in the international trade of animals. And for those who prefer not to watch this nightmare of a reality for the cows in the video, the following description will give you an idea. The cows are tied up against the wall in a bloody Southeast Asian slaughterhouse. Cows watch in noticeable distress as their companions are brutally bashed over the head with sledgehammers. It takes multiple blows to bring the cows down, more before they are finally dead.

While the spotlight has never been on the US live export industry the way it has been on Australia’s huge live export industry,<sup>4</sup> Australia’s experience should be a strong signal for the US to ban its export of live cattle. Some of Australia’s recent live cattle exports have faced horrific slaughter after arriving in their destination countries.<sup>5</sup> Even

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<sup>2</sup> *Livestock and the Environment*, FOOD & AGRIC. ORG. OF THE U.N., <http://www.fao.org/livestock-environment/en/> (last visited Apr. 23, 2018); see also ORG. FOR ECON. CO-OPERATION & DEV. & FOOD & AGRIC. ORG. OF THE U.N., OECD-FAO AGRICULTURAL OUTLOOK 2016–2025 107–09, <http://www.oecd-ilibrary.org/docserver/download/5116021ec010.pdf?expires=1488157344&id=id&accname=guest&checksum=9FA7CFBC2BB98B5D88EF44C4406F1A9A> (2016).

<sup>3</sup> James Thomas, Lesley Robinson, & Rebecca Armitage, ‘Australian Cattle’ Being Bludgeoned to Death in Vietnam Sparks Government Investigation, ABC NEWS (June 16, 2016) (Austl.), <http://www.abc.net.au/news/2016-06-16/australian-cattle-bludgeoned-with-sledgehammer-in-vietnam/7516326>.

<sup>4</sup> See generally Marie T. Hastreiter, *Animal Welfare Standards and Australia’s Live Exports Industry to Indonesia: Creating an Opportunity out of a Crisis*, 12 WASH. U. GLOB. STUD. L. REV. 181 (2013).

<sup>5</sup> *Id.*; see also Thomas, Robinson, & Armitage, *supra* note 3.

after Australia initiated the Export Supply Chain Assurance System (ESCAS)—its export supply chain assurance system<sup>6</sup>—horrendous abuses are being documented by surveillance video.<sup>7</sup> New trade agreements, alternatives to the Trans-Pacific Partnership (TPP), could increase trade with countries where these abuses have occurred. Other countries that import live US cattle<sup>8</sup> also have egregious records of animal welfare.<sup>9</sup> The United States, as a member of the World Organization for Animal Health, should abide by the international guidelines for animal welfare. The US is circumventing these guidelines<sup>10</sup> when it practices live export. In light of recent and continuing abuses, the US should ban live export before preferential trade agreements and other trading trends can open the door to further abuses.

This article will evaluate the animal welfare protections in global trade and propose that a ban on live exports is the best way for the United States to prevent derogations from international standards in animal welfare. Part I of this article will explore the animal welfare framework within the global trading system as created by the World Trade Organization (WTO), and then look at Australia's export supply chain assurance system (ESCAS), which was designed to prevent the abuses described above. Part II will analyze the United States' live export industry, the achievements of Australia's ESCAS, and WTO jurisprudence concerning animal welfare. Part III concludes that a ban is preferable to an assurance system and that such a ban is likely justifiable to protect public morals under WTO rules.

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<sup>6</sup> Australia implemented ESCAS after Indonesian abuses occurred in 2011, but new documentations of abuse show that the system does not provide adequate protection of animal welfare.

<sup>7</sup> See Thomas, Robinson, & Armitage, *supra* note 3.

<sup>8</sup> See generally ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., CATTLE: MONTHLY US TRADE - ALL MONTHS AND COUNTRIES, <https://www.ers.usda.gov/data-products/livestock-and-meat-international-trade-data/livestock-and-meat-international-trade-data/> (last updated Apr. 6, 2018) [hereinafter ECON. RESEARCH SERV.].

<sup>9</sup> One such country, Russia, imports live cattle from the U.S by the thousands yet cannot find a humane solution to its stray dog problem. See Tony Manfred, *Sochi has been Poisoning Stray Dogs Before the Olympics*, BUS. INSIDER (Feb. 2, 2014, 11:34 AM), <http://www.businessinsider.com/sochi-poisons-stray-dogs-2014-2>.

<sup>10</sup> See generally David N. Cassuto & Cayleigh Eckhardt, *Don't Be Cruel (Anymore): A Look at the Animal Cruelty Regimes of the United States and Brazil with a Call for a New Animal Welfare Agency*, 43 B.C. ENVTL. AFF. L. REV. 1 (2016).

## I. BACKGROUND

As the international trade in animals and animal products is likely to increase with far-reaching preferential trade agreements like the Trans-Pacific Partnership,<sup>11</sup> there is greater scrutiny of the limited legal framework protecting animal welfare.<sup>12</sup> Although the United States no longer intends to be a party to the TPP, the TPP's lack of protection for agricultural animals is still relevant because any bilateral agreements that substitute for the TPP are likely to reflect its absence of animal welfare provisions.<sup>13</sup> Animal welfare is not the primary concern of the World Trade Organization (WTO).<sup>14</sup> The WTO's primary concern is to facilitate trade by reducing trade barriers.<sup>15</sup> Currently there are no binding international laws that aim to protect agricultural animals in international trade. While the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES) has helped to curb the illicit trade of endangered species, CITES does not protect agricultural animals.<sup>16</sup> With little or no protection from the international legal system, and the limited reach of domestic legal systems, agricultural animals are left in a state of legal limbo when they leave one jurisdiction destined for another.

Because there are no binding agreements for the protection of agricultural animals' welfare, the legal protection of these animals in trade is quite weak, and there have been egregious violations of animal welfare standards.<sup>17</sup> The protection is limited to non-binding international standards and provisions within the WTO treaties that allow exceptions to the general rule of eliminating non-tariff barriers. The WTO, through

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<sup>11</sup> Scott D. Anderson et al., *TPP Sanitary Measures Open Up Agricultural Exports*, LAW 360 (Feb. 29, 2016, 11:45 AM), <https://www.law360.com/articles/764380/tpp-sanitary-measures-open-up-agricultural-exports> ("Businesses that trade in agricultural products will find plenty of reasons to support the sanitary and phytosanitary provisions of the Trans-Pacific Partnership Agreement.")

<sup>12</sup> See generally Hastreiter, *supra* note 4; Andrew Lurié & Maria Kalinina, *Protecting Animals in International Trade: A Study of the Recent Successes at the WTO and in Free Trade Agreements*, 30 AM. U. INT'L L. REV. 431 (2015).

<sup>13</sup> One need only consider the reasons for the US rejection of the TPP. Animal welfare was certainly not one of Donald Trump's concerns.

<sup>14</sup> David S. Favre, *An International Treaty for Animal Welfare*, 18 ANIMAL L. REV. 237, 250 (2012) (stating that the phrase "animal welfare" is not found in the WTO and its associated treaties).

<sup>15</sup> See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

<sup>16</sup> See generally *What is CITES?*, CITES, <https://www.cites.org/eng/disc/what.php> (last visited Apr. 23, 2018).

<sup>17</sup> Thomas, Robinson, & Armitage, *supra* note 3.

its GATT Article XX exceptions and its Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), has created pathways for nations to protect live animals in international trade, but these pathways are often overlooked. The practice of live export—the export of live cattle, swine, and sheep to foreign countries—has serious implications for animal welfare. While American or Australian cattle may have legal protection in their home countries (laws prohibiting inhumane slaughter, for example), they often lose that protection when they are shipped overseas. Often, the importing country lacks the domestic legislation or enforcement to provide protection.<sup>18</sup> Thus, the non-binding standards are often not enough to afford a real measure of protection. Moreover, if exporting countries do not realize the lack of protection and do not take measures to limit the export, the non-binding standards are the only means of protection. Therefore, the lack of binding standards and the lack of restrictions imposed by exporting countries have created a situation in which there is virtually no protection and violations can occur without consequence.

The SPS Agreement is the WTO's agreement regulating food safety and plant and animal health.<sup>19</sup> The SPS Agreement recognizes governments' right to take sanitary and phytosanitary measures to ensure food safety and protect human, animal, and plant health, but provides that those measures should be necessary, justified, and nondiscriminatory.<sup>20</sup> The SPS Agreement aims to harmonize measures taken by WTO Members and states that "Members shall base their sanitary and phytosanitary measures on international standards, guidelines and recommendations where they exist."<sup>21</sup> Notably, the focus of the SPS Agreement is on importing countries' acceptance of exporting countries' standards.<sup>22</sup> That is to say that importers should not restrict

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<sup>18</sup> See, e.g., Hastreiter, *supra* note 4, at 190.

<sup>19</sup> A Summary of the Final Act of the Uruguay Round, Agreement on Sanitary and Phytosanitary Measures, WORLD TRADE ORG., [https://www.wto.org/english/docs\\_e/legal\\_e/ursum\\_e.htm#bAgreement](https://www.wto.org/english/docs_e/legal_e/ursum_e.htm#bAgreement) (last visited Apr. 23, 2018).

<sup>20</sup> *Id.*

<sup>21</sup> Agreement on the Application of Sanitary and Phytosanitary Measures, art. 3, ¶ 1, Apr. 14, 1994 (entered into force Jan. 1, 1998), [https://www.wto.org/english/docs\\_e/legal\\_e/15-sps.pdf](https://www.wto.org/english/docs_e/legal_e/15-sps.pdf) [hereinafter Agreement on the Application of Sanitary and Phytosanitary Measures].

<sup>22</sup> WORLD TRADE ORG., *supra* note 19 ("It is expected that Members would accept the sanitary and phytosanitary measures of others as equivalent if the *exporting country demonstrates to the importing country* that its measures achieve the importing country's appropriate level of health protection.") (emphasis added). The SPS Agreement is silent on measures taken by the exporting country in response to a lack of standards in the importing country.

imports as long as the exporting country demonstrates it has followed international standards. There is no attention given to an exporter's potential concern about whether the importer follows the relevant standards. This follows from the fact that the SPS Agreement's aim is to promote food safety in the importing country while discouraging unnecessary barriers. Thus, the sanitary and phytosanitary measures a Member takes can only apply to protect health within their territory; the agreement cannot be used for extraterritorial animal protection.<sup>23</sup> The SPS Agreement is still important in that it names the World Organization for Animal Health (OIE)<sup>24</sup> as the relevant organization for setting international standards in animal health.<sup>25</sup>

The OIE is thus the organization that sets the standards of animal welfare in international trade. Although the OIE sets these standards in animal welfare, the organization's priority is food safety through the prevention and control of animal diseases.<sup>26</sup> The OIE's animal welfare standards are found in the *Terrestrial Animal Health Code* and the *Aquatic Animal Health Code*. Because the original purpose of the OIE was to prevent the spread of animal diseases, the original codes did not address animal welfare; only in recent years were the codes "expanded to cover animal welfare, animal production food safety, consistent with the expanded mandate of the OIE which is 'to improve animal health worldwide.'"<sup>27</sup> Like the SPS Agreement, the OIE codes are focused on harmonizing standards and mitigating risk of animal disease in the *importing country*, i.e., verifying that the exporting country satisfies a

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<sup>23</sup> Agreement on the Application of Sanitary and Phytosanitary Measures, *supra* note 21, at Annex A, definitions.

<sup>24</sup> The World Organization for Animal Health goes by the acronym OIE, from the organization's former French name, *Office International des Epizooties*.

<sup>25</sup> Agreement on the Application of Sanitary and Phytosanitary Measures, *supra* note 21, art. 3, 12.

<sup>26</sup> Office International des Epizooties, *Organic Statutes of the Office International des Epizooties*, art. 4 (appendix to the International Agreement for the Creation of an Office International des Epizooties in Paris, Jan. 25, 1924).

The main objects of the Office are: a. To promote and co-ordinate all experimental and other research work concerning the pathology or prophylaxis of contagious diseases of livestock for which international collaboration is deemed desirable. b. To collect and bring to the attention of the Governments or their sanitary services, all facts and documents of general interest concerning the spread of epizootic diseases and the means used to control them. c. To examine international draft agreements regarding animal sanitary measures and to provide signatory Governments with the means of supervising their enforcement.

*Id.*

<sup>27</sup> *International Standards*, WORLD ORG. FOR ANIMAL HEALTH, <http://www.oie.int/en/international-standard-setting/overview/> (last visited Apr. 20, 2018).

given safety standard.<sup>28</sup> But unlike the SPS Agreement, the OIE animal welfare codes are not part of a binding treaty; they are merely international *standards, guidelines, and recommendations* referenced in the SPS Agreement. So while an exporting country may have its own humane slaughter laws, that protection from suffering is lost when cattle are exported to a country with no domestic implementation of OIE codes.

The OIE's *Terrestrial Animal Health Code* now contains twelve chapters on animal welfare, including chapters on transport of animals by sea, land, and air, as well as a chapter on the slaughter of animals. The *Code* says that:

Animal welfare means how an animal is coping with the conditions in which it lives. An animal is in a good state of welfare if (as indicated by scientific evidence) it is healthy, comfortable, well nourished, safe, able to express innate behaviour, and if it is not suffering from unpleasant states such as pain, fear, and distress.<sup>29</sup>

Furthermore, the *Code* provides “[t]hat 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.”<sup>30</sup>

The immediately preceding excerpts of the code do indeed provide *valuable guidance* in animal welfare, especially with respect to live export. But is guidance enough?

Australia is a leading exporter of live cattle.<sup>31</sup> It exports hundreds of thousands of live cattle annually, mostly to the Southeast Asia.<sup>32</sup> In 2011, Australia's live export industry faced intense scrutiny after an Australian media outlet released footage of Australian cattle being subjected to horrific animal cruelty similar to what was described in this article's introduction.<sup>33</sup> Australia's live export industry had seen its share

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<sup>28</sup> See Office International des Epizooties, *Terrestrial Animal Health Code*, ch. 5.3, art. 5.3.2 (“The importation of *animals* and animal products involves a degree of *risk* to the animal health status of an *importing country*.”) (original emphasis).

<sup>29</sup> *Id.* ch. 7, art. 7.1.1.

<sup>30</sup> *Id.* art. 7.1.2 (2).

<sup>31</sup> See ROGER FARRELL, FOREIGN AGRIC. SERV., U.S. DEP'T OF AGRIC., AUSTRALIA LIVE CATTLE EXPORTS, (July 30, 2015), [http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Live%20Cattle%20Exports\\_Canberra\\_Australia\\_7-30-2015.pdf](http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Live%20Cattle%20Exports_Canberra_Australia_7-30-2015.pdf).

<sup>32</sup> *Id.*

<sup>33</sup> Hastreiter, *supra* note 4, at 181 (explaining that an Australian television broadcast showed footage of cattle being dismembered while they were still conscious).

of problems before the release of this footage,<sup>34</sup> and finally the Australian Government took action to create better oversight of Australia's live export industry. In response to public outrage, the Australian Government banned exports to Indonesia, where the abuses had occurred, and developed the Export Supply Chain Assurance System ("ESCAS").<sup>35</sup>

ESCAS is an assurance system designed to advance four basic principles: (1) animal welfare—the importing country conforms to OIE standards for humane animal treatment and slaughter; (2) control—the exporter can control the transport, management, and slaughter arrangements for all animals in the supply chain, and can be sure that all animals remain in the supply chain; (3) traceability—all animals can be traced through all points in the supply chain; and (4) independent audits—the supply chain can be independently audited in the importing country.<sup>36</sup> Australia first implemented ESCAS with Indonesian importers in order to lift the ban on exports to Indonesia.<sup>37</sup> In 2012, Australia expanded ESCAS to all its other export markets.<sup>38</sup>

That same year, new evidence of abuse at Indonesian slaughterhouses was documented by Animals Australia, an animal activist group. The group acquired video of Indonesian slaughterhouses—ESCAS-certified as humane—that did not actually comply with ESCAS regulations.<sup>39</sup> In spite of continued abuses, the Australian Government concluded in a 2015 report reviewing the effectiveness of ESCAS that “the system has been effective in delivering improved animal welfare outcomes.”<sup>40</sup> But the abuse continues.

The abuse described in the introduction of this article was documented in 2016—five years after the implementation of ESCAS.<sup>41</sup> Critics have pointed to the failures of ESCAS and called for a suspension

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<sup>34</sup> *Id.* at 184 (providing an account of previous suspensions on live export imposed by the Australian Government after sheep and cattle died in transport to Saudi Arabia and after revelations of inhumane treatment in Egypt).

<sup>35</sup> COMMONWEALTH OF AUSTRALIA, EXPORTER SUPPLY CHAIN ASSURANCE SYSTEM REPORT 2 (2015), <http://www.agriculture.gov.au/SiteCollectionDocuments/biosecurity/export/live-animals/livestock/escas/escas-report.pdf> (hereinafter ESCAS REPORT).

<sup>36</sup> *Id.* at 6.

<sup>37</sup> *Id.* at 2.

<sup>38</sup> *Id.*

<sup>39</sup> Hastreiter, *supra* note 4, at 189.

<sup>40</sup> ESCAS REPORT, *supra* note 35, at 42.

<sup>41</sup> See Thomas, Robinson, & Armitage, *supra* note 3.

of export to Vietnam, the location of the most recent abuse.<sup>42</sup> Vietnam does not have any domestic legislation for animal welfare standards and has not universally implemented OIE standards.<sup>43</sup> Vietnam increased the number of cattle it imported in recent years,<sup>44</sup> and those imports could increase more with the entry into force of the TPP or similarly-focused bilateral agreements.

The TPP is likely to be replaced by a number of bilateral agreements.<sup>45</sup> These agreements will increase trade between the US and the trading partners, and live cattle exports could be included in that trade. From 2000 through 2014, Vietnam only imported 304 head of cattle from the US.<sup>46</sup> In 2015 that number jumped to 1,553.<sup>47</sup> Thus, trade has increased even in the absence of a trade agreement. Since the TPP can serve as a model for future trade treaties implicating animal welfare, an analysis of the current TTP protections—and lack thereof—is required.

Although the TPP has various provisions aimed at protecting the environment and wild animals,<sup>48</sup> agricultural animals are again left unprotected. The SPS chapter of the TPP reaffirms the SPS Agreement of the WTO: the first-listed objectives of the chapter are to “protect human, animal or plant life or health in the territories of the Parties while facilitating and expanding trade by utilising a variety of means to address

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<sup>42</sup> Colin Bettles, *No Vietnam Live Export Ban Despite Talks*, THE LAND (Mar. 11, 2015), <http://www.theland.com.au/story/3379720/no-vietnam-live-ex-ban-despite-talks/?cs=4933>.

<sup>43</sup> *Animal Protection Index: Vietnam*, WORLD ANIMAL PROT. (Nov. 11, 2014), [http://api.worldanimalprotection.org/country/vietnam#\\_ftn1](http://api.worldanimalprotection.org/country/vietnam#_ftn1).

<sup>44</sup> Lee Adendorff & Jens Kastner, *Live Exports from Australia to Vietnam Skyrocket, but Supply Chain Doubts Remain*, GLOBALMEATNEWS.COM (Feb. 25, 2015), <http://www.globalmeatnews.com/Industry-Markets/Live-cattle-exports-from-Australia-to-Vietnam-skyrocket> (stating that live cattle exports from Australia to Vietnam increased by 171% from 2013 to 2014, according to figures released by Meat and Livestock Australia).

<sup>45</sup> Trump has said publicly that he favors bilateral deals. See, e.g., Jordan Weissmann, *Trump has One Big Idea to Fix America's Trade Deals. It's not very Good*, SLATE (Feb. 7, 2017), [http://www.slate.com/blogs/moneybox/2017/02/07/the\\_big\\_problem\\_with\\_trump\\_s\\_trade\\_strategy.html](http://www.slate.com/blogs/moneybox/2017/02/07/the_big_problem_with_trump_s_trade_strategy.html) (“Believe me, we’re going to have a lot of trade deals. But they’ll be one-on-one. They won’t be a whole big mash pot.”).

<sup>46</sup> ECON. RESEARCH SERV., *supra* note 8.

<sup>47</sup> *Id.*

<sup>48</sup> See, e.g., OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, TTP FINAL TABLE OF CONTENTS, art. 20.6 (1) (“The Parties recognize the importance of protecting and preserving the marine environment.”), 20.16 (4) (“Each Party shall promote the long-term conservation of sharks, marine turtles, seabirds, and marine mammals, through the implementation and effective enforcement of conservation and management measures.”), <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.

and seek to resolve sanitary and phytosanitary issues,”<sup>49</sup> and to “reinforce and build on the SPS Agreement.”<sup>50</sup> Thus, the animal welfare standards of the OIE are incorporated into the TPP through its incorporation of the SPS Agreement. As documented, those non-binding standards are frequently derogated from, so agricultural animals have no protection.

With no domestic implementation or enforcement of OIE standards in many developing countries, it is incumbent upon the exporter to take measures to ensure live exports are treated humanely upon arrival in the importing country. In the case of the US—which does not have an assurance system like Australia’s ESCAS<sup>51</sup>—there are thousands of cattle exported every year without any sort of assurance that they are treated humanely by the importer.<sup>52</sup> Since these animals are losing the protection that they *would have* if they were consumed domestically, it is apropos to review those protections in the US

While animals have various levels of protections in different states, only two laws provide for agricultural animal welfare at the federal level in the US<sup>53</sup>: the Humane Slaughter Act and the Twenty-Eight Hour Law. The Humane Slaughter Act requires that all methods of slaughter and handling in connection with slaughter be humane.<sup>54</sup> It provides two methods of humane slaughter.<sup>55</sup> The Twenty-Eight Hour Law limits the time an animal can be confined in a vehicle or vessel to no more than twenty-eight consecutive hours without unloading for feeding, water, and rest.<sup>56</sup> But this law does not cover common carriers

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<sup>49</sup> *Id.* art. 7.2(a).

<sup>50</sup> *Id.* art. 7.2(b).

<sup>51</sup> *Live Animal Export Trade*, DEP’T OF AGRIC. & WATER RES., AUSTRAL. GOV’T (Nov. 4, 2015), <http://www.agriculture.gov.au/animal/welfare/export-trade/> (“Australia is the only country that requires specific animal welfare outcomes for livestock exports.”).

<sup>52</sup> See ECON. RESEARCH SERV., *supra* note 8.

<sup>53</sup> Lurić & Kalinina, *supra* note 12, at 481.

<sup>54</sup> Humane Slaughter Act, 7 U.S.C. § 1902.

<sup>55</sup> *Id.* The two methods are:

(a) in the case of cattle, calves, horses, mules, sheep, swine, and other livestock, all animals are rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut; or

(b) by slaughtering in accordance with the ritual requirements of the Jewish faith or any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument and handling in connection with such slaughtering.

*Id.*

<sup>56</sup> Twenty-Eight Hour Law, 49 U.S.C. § 80502 (2012).

by air or water. And of course, while these laws are helpful to cattle within US borders, cattle exported overseas are at the mercy of their importers.

If those importers don't provide protection or implement OIE standards, exporting countries that seek to protect their cattle from abuse have several options within the WTO system. Exporting countries could simply ban live export, as Australia has done on several occasions—much to the chagrin of Australia's huge live export industry. Exporting countries could also condition live export on a system like Australia's ESCAS. Or exporting countries could tax the export to raise funds for an assurance system. Some of these measures would potentially conflict with WTO provisions, which would likely not be of a great concern to an exporter because of the unlikelihood that one of the importers would make a complaint to the WTO's Dispute Settlement Body. Nonetheless, in the event of a complaint, the possible conflicts need to be considered.

Article XI of the General Agreement on Tariffs and Trade (GATT), which is part of the WTO system of treaties, is a general prohibition on quantitative restrictions. Unlike Article II of GATT, which addresses tariff barriers only on imports, Article XI addresses non-tariff barriers on both imports and exports.<sup>57</sup> Thus, while a tax on live cattle export could not conflict with WTO obligations, a ban on live export would be a quantitative restriction subject to a possible challenge on the basis of Article XI.

Article XI's general prohibitions, however, are subject to exceptions under Article XX.<sup>58</sup> Article XX provides that measures necessary to protect public morals or to protect human, animal, or plant life or health can be taken as long as they do not constitute a means of arbitrary or unjustifiable discrimination between parties where similar conditions prevail.<sup>59</sup> Recent WTO Appellate Body jurisprudence has been favorable to the attempts to protect animals in trade.<sup>60</sup> These cases will be discussed in the Analysis, along with a further discussion of U.S exports and an ESCAS-like assurance system.

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<sup>57</sup> General Agreement on Tariffs and Trade, art. XI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

<sup>58</sup> *Id.* art. XX.

<sup>59</sup> *Id.*

<sup>60</sup> See Lurié & Kalinina, *supra* note 12, at 451 (analyzing the WTO cases of *US – Tuna* and *EC – Seals*; finding that while the animal-protective measures have not always passed muster, they nonetheless “give animal advocates good reason to believe that the WTO will continue to recognize that seeking to improve animal welfare, whether to protect animal life or health or to safeguard public morals, is a legitimate objective that justifies restricting trade”).

## II. ANALYSIS

### A. LIVE EXPORT FROM THE UNITED STATES

The United States produces and consumes a lot of beef. It also exports a lot of beef. The significance and scale of the beef industry's domestic production, importation, and exportation overshadow live export. Although the United States is the world's largest producer of beef, and the world's fourth largest beef exporter, it is nonetheless a net importer of beef.<sup>61</sup> It is also—by a far greater margin—a net importer of live cattle.<sup>62</sup> While the US imports nearly all of its live cattle from Canada and Mexico (within the last five years, nearly 100%, with the exception of three head from Ecuador in 2016), it exports live cattle to countries all around the world, including in 2015, Iran, Russia, and Vietnam.<sup>63</sup> These exports “account for a fractional percentage of total supplies.”<sup>64</sup> In 2015, the US was home to 89.14 million head of cattle.<sup>65</sup> That same year, the US imported another 1.98 million head.<sup>66</sup> In contrast, only 73,000 head were exported.<sup>67</sup> This data shows that exported cattle constitute just a tiny fraction of the US supply. If the imports are added to the domestic herd, the total supply is 91.12 million. When the 73,000 exported animals are divided by the total herd, the export percentage is established: 0.08%. In other words, less than one-tenth of one percent of the American live cattle supply was exported in 2015.

If one excludes the exports to Canada and Mexico, the number is significantly smaller. Because exports to Canada and Mexico make up the majority of live cattle exports, the cattle exported to countries beyond Canada and Mexico constitute just a fraction of the fraction mentioned before: just over one one-hundredth of one percent.<sup>68</sup> Perhaps these

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<sup>61</sup> FOREIGN RES. SERV., U.S. DEP'T OF AGRIC., LIVESTOCK AND POULTRY: WORLD MARKETS AND TRADE (Oct. 2016), <http://usda.mannlib.cornell.edu/usda/fas/livestock-poultry-ma/2010s/2016/livestock-poultry-ma-10-12-2016.pdf> [hereinafter LIVESTOCK AND POULTRY: WORLD MARKETS AND TRADE].

<sup>62</sup> *Id.*

<sup>63</sup> ECON. RESEARCH SERV., *supra* note 8.

<sup>64</sup> LIVESTOCK AND POULTRY: WORLD MARKETS AND TRADE, *supra* note 61.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> ECON. RESEARCH SERV., *supra* note 8. 38,588 head were exported to Canada in 2015. 20,271 head were exported to Mexico in 2015. Of the 72,559 total cattle exported, the remaining 13,700 were exported to other countries. It follows that of a herd of 91.12 million, 0.015% of the herd were exported to countries beyond Canada and Mexico. The USDA Economic Research Service

seemingly insignificant fractions are one of the reasons these cattle are being overlooked. While countries with large live export industries have faced considerable scrutiny, the US has faced little to none.

Another reason the US live export industry is often ignored is its relative insignificance when compared to beef exports. In 2015, the US produced more than 10.8 million metric tons of beef; it exported over one million metric tons.<sup>69</sup> The US thus exported nearly 10% of the beef it produced. Even when beef imports are added to the domestic production, the beef exports are still a much higher percentage of supply than are live cattle exports.<sup>70</sup> While live exports made up less than 0.1 % of the cattle supply, beef exports made up 8.3% of the beef supply.<sup>71</sup> The export-to-supply ratio, therefore, is more than one hundred times greater for beef than it is for cattle.<sup>72</sup> In other words, beef export is big business; live cattle export is not.

While the foregoing analysis showed the relatively minor role of live export from the U.S, the point is not that this trade is insignificant, but rather that is overshadowed by trade in the related beef sector. Another fact gleaned from the foregoing analysis is that most US cattle are slaughtered and consumed in the United States. But again, that does not mean that exported cattle should be ignored. Indeed, the USDA predicts cattle exports to increase by 23% in 2017,<sup>73</sup> and they may rise further with trade agreements,<sup>74</sup> or simply because of a growing US herd.<sup>75</sup> Of particular interest—in light of abuses in 2016, a recent uptick in trade, and implications of a potential bilateral agreement—is live export to Vietnam. In 2015, Vietnam was the fifth largest importer of

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data uses the exact number of cattle while the USDA Foreign Agricultural Service Report rounded to the nearest thousand.

<sup>69</sup> LIVESTOCK AND POULTRY: WORLD MARKETS AND TRADE, *supra* note 61.

<sup>70</sup> *Id.* If one adds the 1,529,000 metric tons of beef imports to the 10,817,000 metric tons of domestic production, the supply is 12,346,000 metric tons. Of that supply, the 1,028,000 metric tons exported still constitute 8.3% of the supply.

<sup>71</sup> *See id.*

<sup>72</sup> The export-to-supply ratio for cattle was the number exported divided by the total herd:  $73,000/92,000,000 = 0.00079$  (roughly 0.08%). The export-to-supply ratio for beef was the amount of beef exported divided by the supply in metric tons:  $1,028,000/12,346,000 = 0.08326$  (roughly 8.3%). Therefore, the export-to-supply ratio for beef is 105 times greater than the export-to-supply ratio for live cattle.

<sup>73</sup> LIVESTOCK AND POULTRY: WORLD MARKETS AND TRADE, *supra* note 61.

<sup>74</sup> *Free Trade Agreements and U.S. Agriculture*, FOREIGN AGRIC. SERV., U.S. DEP'T OF AGRIC. (June 24, 2016), <https://www.fas.usda.gov/data/free-trade-agreements-and-us-agriculture>.

<sup>75</sup> LIVESTOCK AND POULTRY: WORLD MARKETS AND TRADE, *supra* note 61.

live cattle from the US, importing 1,553 head.<sup>76</sup> That number represents 1,553 animals that were shipped to a country where there is no law protecting humane slaughter. Thus, while live export is overshadowed by its beef alternative, the actual number of animals concerned is far from inconsequential.

#### B. NO PROTECTION OVERSEAS

One might wonder what happens to these animals after they leave the United States. Wonder is about all one can do. Unlike Australia, the United States does not have an export supply assurance system or an equivalent system. ESCAS—both its successes and its failures—can provide a valuable lesson for the United States. Because the United States and its citizens should not have to “wonder” whether cattle born here are treated humanely at slaughter, a further look at ESCAS is helpful.

ESCAS, as described, was created and implemented in Australia in response to continuing animal welfare abuses in live export. Through a system of reporting and independent auditing, Australian exporters are required to demonstrate that animal handling and slaughter meet OIE standards and that there is control and traceability of the animal through all points in the supply chain, including slaughter.<sup>77</sup> Before the implementation of ESCAS the Australian government “had little knowledge about the fate of animals once they arrived in the importing country.”<sup>78</sup> In 2015, three years after the implementation of ESCAS, the Australian Government concluded in a report that ESCAS—despite its shortcomings—had been effective at improving animal welfare conditions.<sup>79</sup> So while ESCAS addressed animal welfare abuses, it has not eliminated them.<sup>80</sup>

The concerns remain considerable. From the implementation of ESCAS to the writing of the Government’s report,<sup>81</sup> there were at least twenty-two incidents of non-compliance.<sup>82</sup> Most of those instances of

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<sup>76</sup> ECON. RESEARCH SERV., *supra* note 8.

<sup>77</sup> See ESCAS REPORT, *supra* note 35.

<sup>78</sup> *Id.* at 3.

<sup>79</sup> See *id.* at 46.

<sup>80</sup> *Id.*

<sup>81</sup> Recall that the report was published in 2015, *before* the most recent documentation of abuse in Vietnam. See *generally id.*

<sup>82</sup> *Id.* at 17. There were 22 *identified* instances.

non-compliance involved multiple animals, and one of them involved 2,718 sheep outside of the supply chain, raising animal welfare concerns.<sup>83</sup> Other instances included handling and slaughter not in accordance with OIE standards, facilities not up to standards, and missing cattle.<sup>84</sup> Animal welfare concerns can arise at any point in the supply chain, and it is impossible to eliminate all risks to animal welfare.

Not only is eliminating all risks impossible; substantially eliminating them is difficult and expensive.<sup>85</sup> ESCAS, because of its administrative and technical requirements (e.g., export licensing and installation of CCTV cameras in foreign slaughterhouses), is costly to administer for both the live export industry and the Australian Department of Agriculture.<sup>86</sup> The same requirements create a complex system of red tape. “Exporters must provide substantial amounts of paperwork to the Department of Agriculture, including application documents, contracts or control arrangement documents, traceability procedures and audit reports on the proposed supply chain.”<sup>87</sup> There are also significant costs involved in purchasing and installing equipment (such as cameras and cattle stunning equipment), upgrading facilities, and training employees. The costs and difficulties inherent in a system like ESCAS are not to be dismissed.

### C. AN ALTERNATIVE

The costs and difficulties that Australia has been willing to accept would be harder to justify for the United States. Unlike the United States, Australia has a thriving live export industry, exporting 1.3 million head in 2014 and 1.3 million head again in 2015.<sup>88</sup> Comparing those numbers to US exports at just 108,000 head and 73,000 head in the same years, the Australian trade is not only much larger in absolute terms, it also makes up a considerably larger market share in terms of beef and cattle exports as a whole.<sup>89</sup> The Australian Minister for Agriculture noted

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<sup>83</sup> *Id.* at 48.

<sup>84</sup> *Id.* at App. C.

<sup>85</sup> *Id.* at 37.

<sup>86</sup> *Id.*

<sup>87</sup> ESCAS REPORT, *supra* note 35, at 37.

<sup>88</sup> LIVESTOCK AND POULTRY: WORLD MARKETS AND TRADE, *supra* note 61. Exporting 1,297,000 head of the 5,353,000 cattle exported in 2014, Australia was responsible for 24.2% of global exports. Exporting 1,336,000 head of the 4,803,000 cattle exported in 2015, Australia was responsible for 27.8% of global exports.

<sup>89</sup> *See id.*

in the foreword to the 2015 ESCAS Report that “[t]he live animal export trade is essential to the livelihoods of thousands of Australian families and underpins the economies of many communities across the nation.”<sup>90</sup> Live trade in Australia makes up a much larger segment of the cattle/beef industry than US live trade does in the US industry. In other words, Australian live cattle exports are much more important to the Australian economy than US live cattle exports are to the American economy; US exporters and the USDA would likely have a harder time justifying an ESCAS-like system.

The Australian Government estimated in its 2015 report that ESCAS imposed costs of \$17.6 million (AUD) on government and industry.<sup>91</sup> Because Australia has implemented ESCAS with all of its trading partners, and because of the larger volume of exports, the costs imposed on Australian government and industry would almost certainly be higher than those of a comparable program in the US that is implemented only with certain trading partners on a much smaller scale. Nonetheless, the costs would still be significant and difficult to determine since there are both initial costs as well as ongoing costs:

The initial cost of establishing ESCAS in a country is significant for exporters. Exporters are required to develop supply chains that can meet OIE standards and supply evidence of compliance at each facility to the Department of Agriculture initially and on an ongoing basis. Establishment of a compliant supply chain may require infrastructure improvements overseas as well as training for staff working in facilities.<sup>92</sup>

If one considers only the US cattle exports to Vietnam, the doubts about an ESCAS system are immediately apparent. In 2001, the US exported 304 head of cattle to Vietnam.<sup>93</sup> Then for more than a decade, from 2002 through 2014, not a single head of cattle was exported there.<sup>94</sup> And suddenly the number jumped to 1,553 in 2015, making Vietnam the fifth largest importer of live cattle from the US that year.<sup>95</sup> In 2016, however, the number was back down to only twenty-five head.<sup>96</sup> Since there is no consistent export pattern to Vietnam, it would be

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<sup>90</sup> ESCAS REPORT, *supra* note 35, at Foreword.

<sup>91</sup> *Id.* at 4.

<sup>92</sup> *Id.* at 39.

<sup>93</sup> ECON. RESEARCH SERV., *supra* note 8.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

difficult to make sense of implementing an expensive and complex system like ESCAS. While the 1,553 cows exported in 2015 could have benefitted from the protective regulation, the exporters who would pay for it could hardly justify the costs with only twenty-five head exported the following year.

In that light, justifying a system like ESCAS seems much more difficult than a simple ban on the export of live cattle. While an ESCAS-like system is both costly and difficult to administer, a ban is simple. Although a ban would be more trade-restrictive on its face, an ESCAS-like system applied only to certain non-NAFTA countries would likely have prohibitive effects on that trade anyway (given the cost of the system and the relatively low trade with those countries). Furthermore, a ban is the only way to achieve a certain level of protection. Under GATT/WTO jurisprudence, countries—when invoking an exception under Article XX—are allowed to define their own desired level of protection.<sup>97</sup> With these factors bearing in mind, one might consider a ban easier to justify than a complex system like ESCAS.

A ban is a quantitative restriction on trade, generally prohibited under GATT Article XI,<sup>98</sup> subject to important exceptions. A ban could be justified if it were necessary to achieve an objective specified in GATT Article XX.<sup>99</sup> An analysis of WTO/GATT jurisprudence shows that in the Dispute Settlement Body there is growing acceptance of the use of Article XX.<sup>100</sup> These cases could be used by the US to argue that a ban on live export is: (1) necessary for the protection of either (a) public morals or (b) animal health; and (2) justifiable under the chapeau of Article XX.

#### D. WTO CASES

Export bans and restrictions are less common than import restrictions in WTO jurisprudence.<sup>101</sup> While GATT Article XI calls for a

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<sup>97</sup> See, e.g., Appellate Body Report, *Brazil – Measures Affecting Imports of Retarded Tyres*, ¶ 156, WTO Doc. WT/DS332/AB/R (adopted Dec. 3, 2007).

<sup>98</sup> GATT, *supra* note 57, art. XI.

<sup>99</sup> *Id.* art. XX

<sup>100</sup> See, e.g., Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Docs. WT/DS400/AB/R, WT/DS401/AB/R (May 22, 2014) [hereinafter *EC – Seal Appellate Body Reports*].

<sup>101</sup> See *Index of Dispute Issues*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_subjects\\_index\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm).

general elimination of quantitative restrictions on both imports and exports, the Dispute Settlement Body (DSB) had dealt with only five cases concerning export restrictions as of 2012.<sup>102</sup> Some of the cases concerning import restrictions are still relevant because they nonetheless spring from Article XI's prohibition of quantitative restrictions and also involve Article XX exceptions. Moreover, these cases show the growing acceptance of Article XX exceptions as they may relate to animal welfare. Export restrictions, however, are a more appropriate place to begin given the subject of this article.

A recent complaint against China showcases how an Article XI violation can be demonstrated and how it may be justifiable. In *China—Rare Earths*,<sup>103</sup> the DSB considered complaints by Japan, the US, and the EU that Chinese export restrictions were inconsistent with Article XI. China had imposed export duties, export quotas, and other limitations on the export of rare earth minerals, tungsten, and molybdenum.<sup>104</sup> Article XI only calls for the elimination of “prohibitions or restrictions *other than duties, taxes or other charges*, whether made effective through quotas, import or export licences or other measures.”<sup>105</sup> Thus, export taxes are generally allowed while quotas and bans are not. In this case, however, China had agreed in its Accession Protocol to eliminate export taxes on most products.<sup>106</sup> So while the export taxes could only be a violation of China's Accession Protocol, the export quotas were in violation of Article XI.<sup>107</sup> China acknowledged this but claimed that the measures were nonetheless justifiable under the Article XX(g) exception for “conservation of exhaustible natural resources.”<sup>108</sup> The Panel and the Appellate Body of the DSB rejected China's arguments.<sup>109</sup>

Although China claimed the export quotas were permissible if they were “relating to the conservation of exhaustible natural

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<sup>102</sup> See Baris Karapinar, *Defining the Legal Boundaries of Export Restrictions: A Case Law Analysis*, 15 J. INT'L ECON. L. 443 (2012).

<sup>103</sup> Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WTO Docs. WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (adopted Aug. 7, 2014) [hereinafter *China – Rare Earths Appellate Body Reports*].

<sup>104</sup> *Id.*

<sup>105</sup> GATT, *supra* note 57, art. XI (emphasis added).

<sup>106</sup> *China – Rare Earths Appellate Body Reports*, *supra* note 103 at 54.

<sup>107</sup> Panel Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WTO Docs. WT/DS431/R, WT/DS432/R, WT/DS433/R (adopted Mar. 26, 2014) [hereinafter *China – Rare Earths Panel Reports*].

<sup>108</sup> GATT, *supra* note 57, art. XX(g).

<sup>109</sup> *China – Rare Earth Panel Reports*, *supra* note 107.

resources”<sup>110</sup> and “if such measures are made effective in conjunction with restrictions on domestic production or consumption,”<sup>111</sup> the Panel found that the measures’ design and structure were not “relating to” conservation and that the measures did not work in conjunction with other restrictions.<sup>112</sup> The Panel considered the design and structure of the Chinese measures and came to the conclusion that the measures were intended to control the international market for a natural resource rather than conserve the resource.<sup>113</sup> The Appellate Body agreed with this determination, thus concluding that the Chinese export quotas—in violation of Article XI—could not be justified under Article XX(g).

Article XX(g) is also an unlikely justification for an export restriction on live cattle.<sup>114</sup> WTO jurisprudence has recognized that animals can certainly be “exhaustible natural resources,” and that “renewable” and “exhaustible” are not mutually exclusive.<sup>115</sup> In *US – Shrimp*, sea turtles were recognized as an exhaustible natural resource.<sup>116</sup> No party disputed that fact, which would have been difficult to dispute since the sea turtles in question were listed as endangered species in Appendix 1 of CITES.<sup>117</sup> But cattle, of course, are *not* an endangered species.<sup>118</sup> And even if they were, a restriction on their export would have to be “relating to [their] conservation.” Since the cattle are (probably) going to be slaughtered anyway—in the US instead of abroad—the export restriction would not really “conserve” the cattle. So it seems highly unlikely that Article XX(g) could be used to justify an export restriction on live cattle.

So now a closer look at some other Article XX exceptions—along with their chapeau:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable

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<sup>110</sup> GATT, *supra* note 57, art. XX(g).

<sup>111</sup> *Id.*

<sup>112</sup> *China – Rare Earths Panel Reports*, *supra* note 107.

<sup>113</sup> *Id.*

<sup>114</sup> For an excellent discussion of live export restrictions and their compatibility with GATT Article XX(g) and other Article XX exceptions, see Radhika Chaudhri, *Animal Welfare and the WTO: The Legality and Implications of Live Export Restrictions Under International Trade Law*, 42 *FED. L. REV.* 279 (2014).

<sup>115</sup> Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 128, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998).

<sup>116</sup> *Id.* ¶ 134.

<sup>117</sup> *Id.* ¶ 132.

<sup>118</sup> See Chaudhri, *supra* note 114, at 283 (cattle are only “theoretically exhaustible”).

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;

....

(d) necessary to secure compliance with laws or regulations which are not inconsistent with this Agreement . . . .<sup>119</sup>

The most exciting case for proponents of animal welfare deals with the first of these exceptions: measures necessary to protect public morals. Although the more obvious fit for a measure intended to protect cattle welfare would be with exception (b), one necessary to protect human, animal, or plant life or health, the public morals exception was given new power in the *EC – Seals* case.<sup>120</sup> While the Appellate Body in the *Seals* case ultimately found that the EU's ban on seal imports was not justified under the chapeau of Article XX, the case nonetheless represents legal recognition of the connection between public morals and animal protection within the WTO. Both the Panel and the AB found that the EU regulations restricting the trade of seal products were necessary to protect public morals under Article XX(a).<sup>121</sup>

The *EC – Seals* case involved challenges by Canada and Norway claiming that EU restrictions on the trade in seal products violated various provisions of GATT 1994 and other WTO treaty obligations.<sup>122</sup> The EU, in response to growing public outcry over the inhumane treatment of seals during seal hunts, had banned the import of seals and certain seal products, while carving out certain exceptions to the general prohibition, for example, exceptions for indigenous communities and marine resource management.<sup>123</sup> These exceptions were ultimately the problem with the EU's restrictions because the exceptions to the ban were found to be in violation of the chapeau of Article XX, which prohibits “arbitrary or unjustifiable discrimination between countries

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<sup>119</sup> GATT, *supra* note 57, art. XX.

<sup>120</sup> See generally Lurié & Kalinina, *supra* note 12, at 480–81.

<sup>121</sup> *EC – Seal Appellate Body Reports*, *supra* note 100, ¶ 5.290.

<sup>122</sup> See generally *id.*

<sup>123</sup> See Lurié & Kalinina, *supra* note 12, at 444, 447.

where the same conditions prevail.”<sup>124</sup> In the end, it seemed that if the EU had done even more to protect seals, like an outright ban, its measures might have been completely justifiable.

First, here is a clarification of the requirements to justify a would-be violation of GATT using the Article XX exceptions: the party invoking the exception must establish

(1) that the *policy* in respect of the measures for which the provision was invoked fell within the range of policies designed to [further that provision];

(2) that the inconsistent measures for which the exception was being invoked were *necessary*<sup>125</sup> to fulfil the policy objective; and

(3) that the measures were applied in conformity with the requirements of the *introductory clause* [the chapeau] of Article XX.<sup>126</sup>

Applying these requirements to the *EC – Seals* case means that the EU, invoking exception XX(a), had to show first that the seal restrictions and the policy behind those restrictions were designed to protect public morals. This part of the case is the most interesting and important from an animal welfare perspective. The EU claimed that protecting seals from cruel, painful, and inhumane slaughter during seal hunts was the objective of the restrictions, and that doing so was protecting public morals.<sup>127</sup> The Panel and the AB both found that the main objective (as opposed to the secondary objectives behind the exceptions to the ban) of the EU was to respond to public concerns on seal welfare.<sup>128</sup> The Panel, upheld by the AB on this point, referred to the preamble of the regulation, its legislative history, and other evidence, including other EU legislation on animal welfare, to determine that the seal regulations were sufficiently related to public morals:

The Panel found that the evidence of the European Union illustrates standards of right and wrong conduct maintained by or on behalf of the European Union concerning seal welfare. Although the Panel did not consider that all evidence makes an explicit link between seal or animal welfare and the morals of the EU public, it nevertheless was

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<sup>124</sup> GATT, *supra* note 57, art. XX.

<sup>125</sup> *Id.* art. XX(g).

<sup>126</sup> Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, ¶ 6.20, WTO Doc. WT/DS2/R (adopted Jan. 29, 1996) [hereinafter *US – Gasoline*].

<sup>127</sup> *EC – Seal Appellate Body Reports*, *supra* note 100, ¶ 2.107.

<sup>128</sup> *Id.* ¶ 5.167.

persuaded that the evidence “as a whole sufficiently demonstrates that animal welfare is an issue of ethical or moral nature in the European Union.”<sup>129</sup>

The very first sentence of the preamble to the EU regulation certainly makes clear that certain moral principles were underlying the ban: “Seals are sentient beings that can experience pain, distress, fear and other forms of suffering.”<sup>130</sup> This connection between the ban and public morals was enough to satisfy the first requirement of an Article XX exception. The next step is to show that the ban was necessary.

Again, both the Panel and the AB found that the EU restrictions were *necessary* to protect public morals.<sup>131</sup> The AB elaborated on the definition of “necessary” that it had formulated in *Brazil – Tyres*. In that case, the AB stated that the meaning of “necessary” exists somewhere on a continuum between “*making a contribution to*” and “*indispensable*.”<sup>132</sup> The case established a balancing test for deciding if a measure is necessary, including a consideration of: (1) the contribution of the measure to the ends pursued, (2) the importance of the common interest or values protected, and (3) the impact of the measure on imports or exports.<sup>133</sup>

If the responding party can show a measure is necessary, the complaining party can identify an alternative. The complaining party must show that the alternative: (1) is less trade restrictive, (2) preserves the respondent’s right to achieve the desired level of protection, and (3) is reasonably available and not unduly burdensome.<sup>134</sup>

In *EC – Seals*, the AB pointed out the importance of weighing and balancing the factors in any particular case, noting that in a specific case, a measure may be “necessary” even if it does not make a “material” contribution to the ends pursued.<sup>135</sup> The AB was clear that no one factor can have a pre-determined weight. All factors must be considered, along

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<sup>129</sup> *Id.* ¶ 5.138.

<sup>130</sup> Commission Regulation 1007/2009 of Sept. 16, 2009, Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on Trade in Seal Products, (L. 286/36).

<sup>131</sup> *EC – Seal Appellate Body Reports*, *supra* note 100, ¶ 5.289.

<sup>132</sup> Appellate Body Report, *Brazil – Measures Affecting Imports of Retarded Tyres*, ¶ 141, WTO Doc. WT/DS332/AB/R (adopted Dec. 3, 2007) (emphasis added).

<sup>133</sup> *Id.* ¶ 143.

<sup>134</sup> *Id.* ¶ 156.

<sup>135</sup> *EC – Seal Appellate Body Reports*, *supra* note 100, ¶ 5.208.

with potential alternative measures, as part of a “holistic weighing and balancing exercise.”<sup>136</sup>

The Seal ban survived this balancing test, thus satisfying the second requirement of an Article XX exception. The AB agreed with the Panel that the seal ban “‘is capable of making and does make some contribution’ to its objective, or that it makes a contribution ‘to a certain extent.’”<sup>137</sup> Moreover, the alternative measure identified by Canada and Norway was found not to be “reasonably available.”<sup>138</sup> The alternative consisted of limiting market access to seal products that were certified and labelled as meeting animal welfare standards. The Panel and AB considered that this alternative “would create significant difficulties in terms of monitoring and compliance.”<sup>139</sup> The need and importance of the ban, along with the lack of a reasonably available alternative, led to the conclusion that the ban was “necessary” for the purposes of Article XX. The EU had succeeded in establishing the first two requirements for invoking Article XX. The next step is to show that the measures are in conformity with the chapeau of Article XX.

The chapeau of Article XX is considered last in the Article XX analysis.<sup>140</sup> It requires that WTO members refrain from “arbitrary or unjustifiable discrimination between countries where the same conditions prevail” in the application of the measures for which Article XX is being invoked.<sup>141</sup> In other words, a measure that is a would-be GATT violation (such as a ban) cannot be justified by Article XX if the measure is applied in a manner that arbitrarily or unjustifiably discriminates between two countries where the same conditions prevail. It was in this regard that the EU’s seal ban failed to pass WTO scrutiny.

To understand why the ban did not pass muster, a closer look at the seal ban and its exceptions is needed. The EU ban on seal products carved out exceptions, for example, seals caught by indigenous communities or for marine resource management.<sup>142</sup> The exception for indigenous communities benefitted mostly Greenlandic seal trade while Norwegian and Canadian seals mostly did not qualify.<sup>143</sup> The exception

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<sup>136</sup> *Id.* ¶ 5.214.

<sup>137</sup> *Id.* ¶ 5.228.

<sup>138</sup> *Id.* ¶ 5.279.

<sup>139</sup> *Id.* ¶ 5.270.

<sup>140</sup> See *US – Gasoline*, *supra* note 126, at 23–24.

<sup>141</sup> GATT, *supra* note 57, art. XX.

<sup>142</sup> *EC – Seal Appellate Body Reports*, *supra* note 100, ¶ 1.4.

<sup>143</sup> *Id.*

for marine resource management benefitted mostly EU seal trade while imported seals were banned.<sup>144</sup> The problem was that this de facto discrimination was not related to the objective of protecting public morals. The AB explained:

One of the most important factors in the assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX.<sup>145</sup>

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We recall that the objective of the EU [regulation] is to address public moral concerns regarding seal welfare. In pursuit of this objective, the EU . . . bans the importation and placing on the market of seal products derived from “commercial” hunts, while it allows the importation of seal products derived from hunts that satisfy certain criteria related to the identity of the hunter, the purpose of the hunt, and the use of by-products from the hunt.<sup>146</sup>

....

. . . [T]he European Union has failed to demonstrate . . . how the discrimination resulting from [the different treatment of seal hunts] can be reconciled with, or is related to, the policy objective of addressing EU public moral concerns regarding seal welfare . . . given that “[indigenous] hunts can cause the very pain and suffering for seals that the EU public is concerned about.”<sup>147</sup>

The EU failed to justify the ban under the chapeau of Article XX since the ban and its exceptions “could be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.”<sup>148</sup>

Because the ban was found to be “necessary to protect public morals,” but the ban’s exceptions did not pass scrutiny under the chapeau of Article XX, it follows that a total ban on seal products would have been completely justified. A total ban would just as easily have been found to be necessary to protect public morals while simultaneously avoiding the problematic discrimination contained in the exceptions.

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.* ¶ 5.306.

<sup>146</sup> *Id.* ¶ 5.319.

<sup>147</sup> *Id.* ¶ 5.320.

<sup>148</sup> *Id.* ¶ 5.328.

## E. A BAN ON LIVE EXPORT

An American ban on live export would be a quantitative restriction on exports, generally prohibited by Article XI. The ban would have to be justified under Article XX. Following the EU's lead, the US could justify the measure under Article XX(a) to protect public morals. The US would have to show that (1) the policy behind the ban is related to public morals; (2) the ban is necessary to protect public morals; and (3) the ban does not constitute a form of unjustifiable discrimination between countries where the same conditions prevail.<sup>149</sup>

The laws of the United States prescribe the humane slaughter of livestock. In its policy declaration in the Humane Slaughter Act, “[t]he Congress finds that the use of humane methods in the slaughter of livestock prevents needless suffering.”<sup>150</sup> The prevention of suffering was the main concern in the *Seals* case, and that case established that the prevention of animal suffering can be legitimately connected to public morals. The existence of the Humane Slaughter Act and other state-level animal welfare legislation can provide evidence of public moral concern about animal welfare.

The necessity of the ban would be established by the weighing and balancing test described above in the *Seals* case. In the case of a ban on live export, the end pursued would be to ensure that cattle are slaughtered humanely. Prohibiting export would contribute to this end. This importance of the common interest or value—animal welfare—is unavoidably subjective, but arguably very important. And finally, the impact on exports would be relatively small given the United States' low volume of live exports—especially if exports were banned only to certain countries. A ban to certain countries, of course, would be facially discriminatory, and could only be justified if the discrimination was not arbitrary.

The US would be able to further show necessity by ruling out alternatives to the ban. Since the US has the benefit of Australia's experience with ESCAS, it could argue that an ESCAS-like alternative is not reasonably available. The *Seals* case would support that argument because an ESCAS-like alternative, just like the alternative certification in *Seals*, “would create significant difficulties in terms of monitoring and

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<sup>149</sup> See, e.g., GATT, *supra* note 57, art. XX(a); *US – Gasoline*, *supra* note 126.

<sup>150</sup> Humane Slaughter Act, 7 U.S.C. § 1901 (2012).

compliance.”<sup>151</sup> Moreover, the failures of ESCAS could be used to show that such an alternative could not provide the desired level of protection.

Having shown the connection to public morals as well as the necessity of the measure, the US would have to show that the ban is in conformity with the chapeau of Article XX. This step would depend on the nature of the ban. An outright ban on live-export would be the least discriminatory, but also the most trade restrictive. Its trade restrictiveness could lead to problems in the necessity analysis, but its non-discriminatory nature would likely pass muster under the chapeau analysis. A selective ban, on the other hand, would be less trade restrictive (helpful under the necessity analysis), but facially discriminatory. The discrimination would have to be justified by showing that the difference in treatment occurs between countries where the same conditions *do not* prevail. A ban to Vietnam, for example, might be justifiable given undeniable evidence that slaughter conditions there are completely different from those in the countries not affected by the ban.

### III. CONCLUSION

Cattle are produced and consumed at growing rates throughout the world. As livestock consumption increases, trade is also increasing, and animals in trade are often without protection. The laws of the United States protect animals from inhumane slaughter. International standards theoretically protect animals from inhumane slaughter. But neither US law nor international standards are enforceable in many of the unregulated slaughterhouses throughout the developing world. Documentation of clear abuse shows that other efforts to ensure animal welfare are difficult to administer and not always effective. A ban on certain animal exports may be the only way to ensure US-born cattle are treated the way US law intended, and the way international science-based standards dictate.

Treating animals humanely at their slaughter is not a radical idea. Indeed, it is the law of the US, the law of many other countries, and part of a consensus and science-based international code for animal health and welfare. The OIE’s codes should set a minimum standard for animal welfare on a global scale. Currently, they are the only mechanism of protection in many countries. Australia’s experience has shown the live exports can result in painful derogations from the code—even when

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<sup>151</sup> *EC – Seal Appellate Body Reports*, *supra* note 100, ¶ 5.270.

a complex system is in place to prevent them. When compliance with the codes is not a certainty in a given country, the US should exercise its trading discretion to ban the export of live cattle. A ban would be justified because the WTO allows trading restrictions when they are necessary to protect public morals, among other justifications. Protecting animals in trade may mean restricting trade, but in this case, not very much of it. The US has a small live export industry but a huge beef industry. So while we may not save the cows, we should at least consume them here and secure their freedom from inhumane pain and suffering.