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A Wild Goose Chase: California's Attempt to Regulate Morality by Banning the Sale of One Food Product

MAX SHAPIRO*

In 2004, California passed S.B. 1520, making it illegal to produce or sell foie gras as of July 1, 2012.[1] In doing so, the California legislature joined a growing number of governments around the globe who have taken to banning the delicacy.[2] This ban will have an immediate effect on national production of foie gras, but, more importantly, it will have devastating implications for food production worldwide.

This Note will articulate the legal implications of the ban both domestically and abroad. Section I will objectively frame the ongoing debate about the merits of foie gras farming. Section II will analyze the California ban and discuss how it fits within the American legal system. Section III will predict what would happen if a country that produced and exported foie gras was to challenge California's ban through the World Trade Organization's ("WTO") judicial remedies. Section IV will discuss the potential worldwide ramifications if the WTO were to either uphold or strike down California's ban. Finally, Section V will discuss what has happened in the short time since the ban has gone into effect.

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* J.D., Loyola Law School, 2013; B.A., University of Pennsylvania, 2006. The author would like to thank his family, especially his parents, Julie and Robert Shapiro, and his grandparents, Arthur Laub, Helene Laub and Ruth Shapiro, for their neverending help and continual support and guidance; his friends for putting up with his curmudgeonly ways during the formulation of this note; and the various professionals in and around the restaurant industry who helped him explore and learn about this and other food- and beverage-related topics.

1. S.B. 1520, 2003–04 Leg., Reg. Sess. (Cal. 2004).

2. *Laws & Policies*, NOFOIGRAS.ORG, http://www.nofoiegras.org/legal.html (last visited Mar. 21, 2013).

I. AN OBJECTIVE LOOK AT THE HISTORY OF FOIE GRAS PRODUCTION AND ITS EFFECT ON DUCKS AND GEESE

The morality of foie gras production is an extremely polarizing issue, with passionate advocates on both sides.[3] Those who oppose foie gras say that the specific process to make foie gras is cruel and amounts to torture.[4] Those in favor of continuing foie gras production say that the process takes advantage of naturally occurring characteristics in ducks and geese to make a product that has no serious moral implications and tastes delicious.[5]

On the worldwide scale of animal farming, the foie gras industry is relatively small. For example, in 1996, fifteen thousand tons of foie gras was produced in the world,[6] compared to 58.3 million tons of chicken in the same year.[7] The vast majority of the world's foie gras is both produced and consumed in France.[8] In 2003 for example, Americans consumed 420 tons of foie gras, compared to 17,500 tons in France.[9] Within the United States, there are four foie gras producers; two in upstate New York, one in Minnesota, and one in California.[10]

Foie gras is French for "fat liver."[11] Producers engorge the livers of the ducks and geese by force-feeding them in the weeks leading up to their slaughter. This process has been in use for over four thousand years.[12] Historically, geese were used for foie gras production.[13] The Moulard duck, however, which is a cross between a female Pekin duck and a male Muscovy,[14] is currently the most commonly used bird

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3. *See* Patrick Battuello, *Foie Gras: Misery Served*, EXAMINER.COM, http://www.examiner.com/animal-rights-in-albany/the-foie-gras-war (last visited Mar. 21, 2013).

4. NOFOIEGRAS.ORG, http://www.nofoiegras.org (last visited Mar. 21, 2013).

5. Daniel David Guémené & G. Guy, *The Past, Present and Future of Force-Feeding and "Foie Gras" Production*, 60 WORLD POULTRY SCI. J. 210, 220-22 (2004).

6. Scientific Comm. on Animal Health and Animal Welfare, *Welfare Aspects of the Production of Foie Gras in Ducks and Geese*, 50 (Dec. 16, 1998) [hereinafter Foie Gras Report].

7. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS ECONOMIC AND SOCIAL DEVELOPMENT DEPARTMENT FOOD OUTLOOK – JANUARY/FEBRUARY 1997 (1997), *available at* http://www.fao.org/docrep/004/w4136e/w4136e08.htm.

8. Guémené & Guy, *supra* note 5, at 215 (stating that 74% of worldwide production took place in France by 1995, which rose to 83% of worldwide production as of 2002).

9. THOMAS J. SHEPSTONE, SHEPSTONE MGMT. CO., THE ECONOMIC IMPORTANCE OF THE NEW YORK STATE FOIE GRAS INDUSTRY 5 (2004).

10. Joshua I. Grant, *Hell to the Sound of Trumpets: Why Chicago's Ban on Foie Gras Was Constitutional and What It Means for the Future of Animal Welfare Laws*, 2 STANFORD J. ANIMAL L. & POL'Y 52, 59 (2009).

11. *Id.* at 54.

12. See Guémené & Guy, *supra* note 5, at 211.

13. *Id.* at 210.

14. *See Hudson Valley Foie Gras & Duck Products*, http://www.hudsonvalleyfoiegras.com/index.php/about-hvfg (last visited Mar. 21, 2013).

because it "has a stronger body and esophagus [and] is more resistant to disease."[15]

The birds' livers are enlarged through a process called *gavage*, which farmers begin ten to fourteen weeks after the ducks are born.[16] During *gavage*, a metal tube is inserted down the duck's esophagus, and the duck is fed pellets of corn mash through a pneumatic dispenser.[17] The duck's diet begins with 0.4 pounds of food in its first feeding, and gradually increases over time.[18] Because the diet is more than the duck would normally consume, the chemical composition and size of the liver changes.[19] The liver undergoes steatosis, which means that it retains increased levels of fat, and grows to become much larger.[20] The average foie gras liver weighs 982 grams, while a normal duck liver weighs seventy-six grams.[21] Then, the ducks are slaughtered, butchered, and sold part by part.[22] Every part of the duck is usable. The liver is the most prized and expensive, but producers such as Hudson Valley Foie Gras in upstate New York sell the duck's feathers, breast and leg meat, and rendered duck fat.[23]

There is debate as to whether the ducks suffer as a result of the forced feeding. Some claim that force-fed ducks suffer pain from the process and become diseased as a result of their enlarged livers.[24] Also, they argue that force-fed birds suffer because of their decreased mobility.[25] Finally, opponents of foie gras production point to a higher mortality rate for ducks and geese that are force-fed than those that are not.[26]

On the other hand, some studies suggest that the ducks' natural physiology allows them to weather the force-feeding process, and that the steatosis in the ducks' liver is fully reversible.[27] Even while the liver

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15. Grant, *supra* note 10, at 60.
16. *See* Guémené & Guy, *supra* note 5, at 214.
17. *Id.* at 213.
18. Grant, *supra* note 10, at 61.
19. *Foie Gras Report, supra* note 6, at 39.
20. *See id.*
21. *Id.*
22. Nick Ravo, *A Cornucopia of Native Foie Gras*, N.Y. TIMES (Sept. 24, 1998), http://www.nytimes.com/1998/09/24/nyregion/cornucopia-native-foie-gras-partners-efforts-produce-menu-delicacy-abundance.html?pagewanted=print&src=pm.
23. *Id.*
24. *See* About Foie Gras, NOFOIEGRAS.ORG, http://www.nofoiegras.org/about.html (last visited Mar. 21, 2013).
25. *Foie Gras Report, supra* note 6, at 61.
26. *Id.* at 49 ("The mortality rate in force fed birds varies from 2% to 4% in the two week force feeding period compared with around 0.2% in comparable ducks.").
27. Marshall Sella, *Does a Duck Have a Soul?,* N.Y. MAG. (Jun. 18, 2005), *available at*

is enlarged, it still functions normally.[28] The birds show less aversion to their feeders than they do to an unknown person.[29] The World Poultry Science Association's 2004 study concluded that "physiological indicators of stress, nociceptive signs (signs of pain) and behavioral responses were hardly affected by the force-feeding procedure."[30] Therefore, proponents argue that what ducks endure as a result of foie gras production is not particularly cruel.

II. CALIFORNIA'S LAW: S.B. 1520 AND ITS LEGAL STATUS IN THE UNITED STATES

S.B. 1520 could encounter some legal challenges from domestic foie gras producers who want to keep selling foie gras in California. This section will analyze the substance and history of S.B. 1520 itself. Then, it will look at the legality of S.B. 1520 within the framework of the Dormant Commerce Clause of the U.S. Constitution. Finally, since the law has potential international effects, this section will analyze how S.B. 1520 complies with the Foreign Commerce Clause and the Supremacy Clause of the Constitution.

After S.B. 1520 passed through the California legislature, Governor Arnold Schwarzenegger signed the bill into law on September 29, 2004.[31] The law "prohibit[s] a person from force feeding a bird for the purpose of enlarging the bird's liver beyond normal size . . ."[32] It also "prohibit[s] a product from being sold in the state if it is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size."[33] Violating the law will result in a "$1000 per violation per day"[34] fine. Even though the Governor signed S.B. 1520 in 2004, the bill did not go into effect until July 1, 2012.[35]

California State Senator John Burton introduced S.B. 1520 on February 19, 2004.[36] In stating the bill's purpose, the legislature pointed to a number of things: that the birds have difficulty walking and

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http://nymag.com/nymetro/food/features/12071 (stating that ducks have no gag reflex and their livers have a natural propensity to expand and retract).

28. *Foie Gras Report, supra* note 6, at 48.

29. Guémené & Guy, *supra* note 5, at 218.

30. *Id.* at 220.

31. *See* Cal. S.B. 1520 at 473.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 474.

36. *Hearing on S.B. 1520 Before the S. Comm. on Bus. and Professions*, 2003–04 Leg., Reg. Sess. 1 (Cal. 2004), *available at* http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_1501-1550/sb_1520_cfa_20040427_093828_sen_comm.html [hereinafter *S.B. 1520 Hearing*].

breathing; that many other countries ban the practice; that forced confinement causes behavioral problems for the birds; that "normal exploratory behavior" of the birds is thwarted; that the birds are under stress; and that the birds cannot "interact socially in a normal manner."[37]

Not only will this ban criminalize production in California, but it will have negative consequences for the rest of the United States' foie gras industry as well. The foie gras industry in New York alone employs 488 people and generates $23.1 million in economic output.[38] An outright ban in California, the country's most populous state, will surely have an impact on that production. California is also considered by many to be "the epicenter of the American food scene . . . [and] where eating trends are born . . ."[39] Therefore, the California ban will most certainly produce effects that will be felt beyond the state's borders.

A. Illinois Restaurant Association v. City of Chicago and the Dormant Commerce Clause

Less than seven months after S.B. 1520 was signed into law, the city of Chicago followed California's lead and introduced an ordinance banning any "food dispensing establishment" from selling foie gras.[40] The law was passed on April 26, 2006,[41] and went into effect ninety days later.[42]

Not long after its passage, the Chicago ban was challenged by the Illinois Restaurant Association in federal court.[43] They claimed that the ordinance violated the Illinois state constitution as well as the Commerce Clause of the U.S. Constitution.[44] However, the case was dismissed for the plaintiffs' failure to state a sufficient claim.[45]

Given the similarity between the Chicago and California bans, the court's analysis in addressing the Restaurant Association's Commerce Clause claim is particularly useful for analyzing the constitutionality of

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37. *Id.* ¶¶ 4–10. *See also* Cal. S.B. 1520, ¶¶ 4–9.

38. SHEPSTONE, *supra* note 9, at 1.

39. Baylen J. Linnekin, *The "California Effect" & the Future of American Food*, 13 CHAP. L. REV. 357 (2010).

40. CHICAGO, ILL. MUN. CODE § 7-39-002 (2006), *available at* http://www.amlegal.com/nxt/gateway.dll/Illinois/chicago_il/municipalcodeofchicago?f=templates$fn=default.htm$3.0$vid=amlegal:chicago_il (repealed 2008).

41. Grant, *supra* note 10, at 65.

42. CHICAGO, ILL. MUN. CODE § 7-39-003 (2006).

43. *See generally* Illinois Restaurant Assoc. v. Chicago, 492 F. Supp. 2d 891 (N.D. Ill. 2007).

44. *Id.* at 893.

45. *Id.*

the California ban. The Commerce Clause gives Congress the power "[to] regulate commerce with foreign nations, and among the several states."[46] While it is not explicitly mentioned in the Constitution, the courts have long recognized that the Commerce Clause also creates an implied limitation on states' ability to burden interstate commerce.[47] Generally, courts follow a two-step approach.[48] First, if the law discriminates against interstate commerce so that it acts as a protectionist measure for in-state commerce, the law is per se invalid.[49] However, "if a law indirectly affects interstate commerce and regulates evenhandedly," the court must "examine whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the putative local benefits."[50] According to *Pike v. Blue Church, Inc.*, once the legislation is found to have "a legitimate local purpose . . . then the question becomes one of degree."[51] Second, the inquiry looks at the "extent of the burden" on interstate commerce, the "nature of the local interest involved, and . . . whether it could be promoted as well with a lesser impact on interstate activities."[52]

The district court decision in *Illinois Restaurant Association v. Chicago* determined that the Chicago ban was not protectionist by nature.[53] However, it did not conduct the second part of the usual approach and apply *Pike*.[54] In refusing to use the *Pike* standard, the court highlighted a split in dormant Commerce Clause jurisprudence.[55] On one hand, *Pike* is an old standby, used "by generations of law students" analyzing fact patterns under the dormant Commerce Clause.[56] However, the *Illinois Restaurant Association* court followed a Seventh Circuit decision that found it unnecessary to use *Pike* for laws that "are facially neutral and 'do not give local firms any competitive advantage over those located elsewhere.'"[57]

Some advocates insist that the district court employed the correct

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46. U.S. CONST. art. 1, § 8.

47. *Illinois*, 492 F. Supp. 2d at 897.

48. *Id.*

49. *Id.* at 897–98 (quoting City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)).

50. *Id.* at 898 (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)). This is known as the *Pike* balancing test.

51. *Pike*, 397 U.S. at 142.

52. *Id.*

53. *Illinois*, 492 F. Supp. 2d at 898.

54. *Id.*

55. *See id. See also* Grant, *supra* note 10, at 82.

56. *Illinois*, 492 F. Supp. 2d at 901–02.

57. *Id.* (quoting Nat'l Paint & Coatings Ass'n v. City of Chicago, 45 F.3d 1124 (7th Cir. 1995)).

analysis.[58] They argue that dormant Commerce Clause jurisprudence is primarily concerned with striking down anti-competitive and protectionist laws.[59] Furthermore, they claim that *Pike* is only used as a means to show protectionism, and should not be used when the law in question is not discriminatory.[60] Under this framework, if the law is not discriminatory in any way, then the *Pike* balancing test should not be used, as was the case in *Illinois Restaurant Association*.

The Supreme Court has not approved this strategy. The most recent case involving the dormant Commerce Clause, *Department of Revenue of Kentucky v. Davis*, reaffirms the use of the traditional approach.[61] In that case, the court analyzed a Kentucky law that involved tax exemptions for interest on Kentucky state bonds, but not interest from other states' bonds.[62] In laying out the framework for the dormant Commerce Clause analysis, Justice Souter said that if the law does not discriminate against interstate commerce, it would be upheld, unless it violates *Pike*.[63] He noted that "[state] laws frequently survive this *Pike* scrutiny . . . though not always."[64]

Unhappy with the district court's ruling, the Illinois Restaurant Association appealed the verdict to the Seventh Circuit.[65] However, before the case could be heard, it became moot, as the Chicago ban was repealed with a 37-6 vote by the same legislative body that had passed it 48-1 just two years before.[66] Among the reasons for repeal, Chicago's mayor said that the ban was "the 'silliest ordinance' the city council ever passed" and that they should be focused on "'real issues' like drug dealing and children caught in gang crossfire."[67]

If the California ban were to be challenged in court under the dormant Commerce Clause, it is likely that a court would apply *Pike*, given the recent Supreme Court jurisprudence. In doing so, the court would balance the state interest advanced by the law with the burden on

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58. Grant, *supra* note 10, at 82.

59. *See id.* at 82–83.

60. *Id.* at 83 (citing Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986)).

61. *See* Dep't of Revenue of KY v. Davis, 553 U.S. 328, 338–39 (2008).

62. *Id.* at 328.

63. *Id.* at 338–39.

64. *Id.* at 339.

65. Grant, *supra* note 10, at 81.

66. Monica Davey, *Ban Lifted, Foie Gras Is Back on the Menu in Chicago,* N.Y. TIMES (May 15, 2008), http://www.nytimes.com/2008/05/15/us/15liver.html?_r=1.

67. Dan Mihalopolous, *Foie Gras Wars: How the Chicago Ban Got Passed*, CHI. TRIB. (Mar. 16, 2009), http://articles.chicagotribune.com/2009-03-16/news/0903150177_1_foie-gras-aldermen-mayor-richard-daley.

interstate commerce. California's interest in passing the ban was to protect animal welfare and prevent unnecessary cruelty.[68] The ban will burden interstate commerce in that foie gras will no longer be made in California, which will decrease overall supply. Furthermore, California will no longer import foie gras from other states or countries, which will have negative impacts on the foie gras producers in New York and Minnesota. Because the *Pike* test is generally deferential to state legislatures,[69] and the state benefit is not clearly outweighed by the burden on interstate commerce, the ban would likely pass the *Pike* test and be upheld by the courts.

B. Foreign Impact: Legality Under the Foreign Commerce Clause

The dormant Commerce Clause is not the only constitutional hurdle that the California ban would have to overcome. There are two clauses in the Constitution that the ban might also violate. First, as stated earlier, the Commerce Clause gives Congress the exclusive power "to regulate Commerce with foreign Nations."[70] Next, the Supremacy Clause states that "all Treaties made . . . shall be the supreme Law of the Land".[71] The California ban could violate one or both of these provisions.

The rarely invoked Foreign Commerce Clause gives Congress greater power over foreign commerce than it has over domestic interstate commerce.[72] This is to establish national uniformity when it comes to foreign trade.[73] As a result, "[the] Supreme Court imposes tighter restrictions on state legislation under the dormant Foreign Commerce Clause than under the dormant Interstate Commerce Clause."[74] The landmark Foreign Commerce Clause case, *Japan Line Ltd. v. County of Los Angeles*, struck down a state tax on Japanese shipping vessels as an infringement on Congress's power to regulate foreign commerce.[75] In its opinion, the Court described a need for the federal government to "speak with one voice when regulating commercial relations with foreign governments."[76] This case found new "negative implications of Congress' power" under the Foreign

68. *See generally S.B. 1520 Hearing*, *supra* note 36.
69. *See Davis,* 553 U.S. at 1808.
70. U.S. CONST. art. I, § 8, cl. 1.
71. U.S. CONST. art. VI, cl. 2.
72. Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 960 (2010).
73. *Id*.
74. *Id.* at 966. (citing Japan Line, Ltd. v. County of LA, 441 U.S. 434, 448 (1979)).
75. *See Japan Line*, 441 U.S. at 448.
76. *Id.* at 449.

Commerce Clause.[77] In other words, since regulating foreign trade is wholly within the ambit of the Federal government's power, the Foreign Commerce Clause acts as a barrier to forbid states from legislating in this area.

Since *Japan Line*, there have only been a handful of Supreme Court cases that have dealt with the Foreign Commerce Clause, but they have chipped away at its scope. In *Container Corp. of America v. Franchise Tax Board*, the court distinguished "between state regulations that merely have 'foreign resonances' and those that 'implicat[e] foreign affairs,'"[78] and only applied the Foreign Commerce Clause to the latter.[79] Furthermore, the Court limited the clause's applicability by narrowly defining a measure that "implicates foreign affairs".[80]

Recently, the Court has been more likely to use "positive preemption through congressional action [rather than] the dormant Foreign Commerce Clause" to strike down state laws that interfere with foreign commerce.[81] It is unclear what constitutes governmental action sufficient to preempt a state law.[82] On one hand, "the preemptive force of [an] executive agreement" is enough to overrule a conflicting state law,[83] but on the other, a state law will be upheld where there is "no 'specific indications of congressional intent' to bar the state action challenged."[84]

Here, there is no federal governmental action that directly conflicts with the California ban. Congress has been silent on the foie gras issue. The Animal Welfare Act, which Congress passed in 1966, excludes animals that are used for farming.[85] The act specifically allows states to "retain the responsibility of protecting farm animals."[86] Thus, there is no indication that Congress intended to bar any state from passing a foie gras ban.

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77. *Id*.

78. Leanne M. Wilson, *The Fate of the Dormant Foreign Commerce Clause After* Garamendi *and* Crosby, 107 COLUM. L. REV. 746, 757 (2007) (quoting Container Corp. of America v. Franchise Tax Board, 463 U.S. 159, 194 (1983)).

79. *Id.* at 758.

80. *Id*.

81. *Id.* at 762 (citing Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000)).

82. *Id.* at 763.

83. *Id.* at 765 (citing Am. Ins. Ass'n. v. Garamendi, 539 U.S. 396 (2003)).

84. Barclays Bank PLC v. Franchise Tax Bd. of California, 512 U.S. 298, 324 (1994).

85. 7 U.S.C. 54 § 2132(g).

86. Lesley Peterson, *Talkin' 'Bout a Humane Revolution*, 36 BROOK. J. INT'L L. 265, 267 (2010).

C. Potential Preemption: Legality Under the Supremacy Clause

The Supremacy Clause could also operate to make the California ban illegal. According to the Supremacy Clause, any law that conflicts with a treaty made under the authority of the United States is preempted by that treaty.[87] On January 1, 1995, the United States acceded to be a part of the World Trade Organization ("WTO"),[88] the international organization created by the General Agreement on Tariffs and Trade ("GATT").[89] Since the United States is a party to that treaty, it follows that any conflicting state law would be presumptively invalid.

Article XI of GATT states that "[no] prohibitions or restrictions . . . shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party".[90] If the ban violates Article XI, then it would place the United States in breach of a treaty, and thus be preempted.

However, this ban on the foie gras trade would still be legal if it falls under one of GATT's exceptions under Article XX, as discussed below.[91] Ultimately, if the ban does not meet the requirements of Article XX, then it violates GATT, and would be illegal under the Supremacy Clause. However, if it falls under Article XX's reach, then it does not violate GATT or, by extension, the Supremacy Clause.

III. HOW THE WTO WOULD ADJUDICATE A COMPLAINT BASED ON CALIFORNIA'S BAN

S.B. 1520 could have a negative effect on international trade. This section will analyze what could happen if another foie gras producing country challenged the United States under the WTO rules based on the California ban being a violation of GATT. First, it will briefly outline the historical background of both the WTO and GATT. Next, there will be a discussion of the parts of GATT that are relevant to international free trade – those that another country would use to challenge S.B. 1520. Finally, this section will take a comprehensive look at Article XX, which lays out the general exceptions that are allowed in GATT. It will analyze whether S.B. 1520 could be considered a law that is

87. U.S. CONST. art. VI.

88. Trade Profiles, United States, WORLD TRADE ORG. (Oct. 2011), http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=US.

89. Understanding the WTO: Who We Are, WORLD TRADE ORG. (2012), http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm [hereinafter Understanding the WTO: Who We Are].

90. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, art. XI, § 1 [hereinafter GATT].

91. *See id.* art. XX.

necessary to benefit public morals or animal welfare.

GATT is a multilateral treaty that has been in effect since 1948.[92] Originally, GATT provided an international system of rules that governed trade between countries.[93] In order to further encourage and facilitate free trade, GATT has been modified through rounds of negotiations every few years since its inception.[94] The most recent round, which took place in Uruguay, resulted in the most significant changes to date; it created a comprehensive international trade dispute settlement body: the WTO.[95]

The goal of the WTO is to encourage and stimulate trade between countries by creating a comprehensive multilateral trading system.[96] It does this by setting up a framework that follows a number of principles designed to promote more robust trade: trade without discriminating between countries; gradually bringing about free trade; creating predictability between trading partners within the system; promotion of fair competition; and the encouragement of development and economic reform.[97]

Besides being an entity that codifies international trade rules, members also rely on the WTO to settle trade disputes and negotiate trade agreements with each other.[98] In a nutshell, the WTO is an organization "where member governments go, to try to sort out the trade problems they face with each other."[99]

As "the central pillar of the multilateral trading system," the WTO provides its members with a comprehensive system for dispute resolution.[100] The disputes are settled in stages overseen by the Dispute Settlement Body, which applies and interprets WTO law.[101]

Before any formal judicial action occurs, the disputing countries are encouraged to discuss the issue to see if they can resolve it themselves or with the help of mediation by the WTO director-

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92. Understanding the WTO: Basics, *What Is the World Trade Organization?*, WORLD TRADE ORG. (2012), http://wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *See* Understanding the WTO: Basics, *Principles of the Trading System*, WORLD TRADE ORG. (2012), http://wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.

98. Understanding the WTO: Basics, *What is the World Trade Organization?, supra* note 91.

99. *Id.*

100. Understanding the WTO: Settling Disputes, *A Unique Contribution*, WORLD TRADE ORG. (2012), http://wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm.

101. *Id.*

general.[102] If that fails, the case goes to a panel, where each party presents their case.[103] Afterwards, the panel makes final rulings or recommendations.[104] Finally, if a party is unhappy with the ruling of the panel, it can make an appeal to the WTO Appellate Body, which can uphold, modify, or reverse the panel.[105]

Any member of GATT can bring a case against a second member when they think the second member has violated the treaty.[106] In response to the California foie gras ban, the United States could find itself being challenged by France, Canada, or any other country that exports foie gras into the United States. Even though California is not an independent party to GATT, it is a territorial unit of the United States, so its legislative actions create liability for the United States as a whole.[107]

A. Article XI Analysis

A complaint lodged against the United States would argue that the California ban violates Article XI of GATT. Article XI, as stated above, "prohibits countries from imposing quantitative restrictions on imports."[108] A trade restriction or tariff will generally not violate GATT unless it is seen as a protection for that country's "like" product.[109] However, a ban on a particular good violates article XI regardless of whether or not that good is "produced domestically or imported from any country besides the one in question."[110]

A leading WTO case on trade restrictions is *United States—Restrictions on Imports of Tuna* ("*Tuna-Dolphin I*"). At issue was a U.S. ban on tuna caught by Mexican fishing vessels equipped with nets that were hazardous to dolphins.[111] In that case, the WTO panel found that the restriction violated article XI of GATT, because GATT forbids

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102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. Rep. of the Int'l Law Comm'n, 56th Sess., [2004] 2 Y.B. INT'L L. COMM'N 40, U.N. Doc. A/CN.4 (St)R.A./2004/Add.1.
108. Robert Galantucci, *Compassionate Consumerism Within the GATT Regime: Can Belgium's Ban on Seal Product Imports Be Justified Under Article XX?*, 39 CAL. W. INT'L. L.J. 281, 286 (2008–2009).
109. Edward Thomas, Note, *Playing Chicken at the WTO: Defending an Animal Welfare-Based Trade Restriction Under GATT's Moral Exception*, 34 B.C. ENVTL. AFF. L. REV. 605, 613–14 (2007).
110. *Id.* at 614.
111. Panel Report, *United States Restrictions on Imports of Tuna*, 52, WT/DS29/R (June 16, 1994) [hereinafter *Tuna-Dolphin II*].

quantitative restrictions on imports.[112] The United States did not ban all tuna, nor did it ban all fish from Mexico; it only banned those tuna that had been caught in a specific way.[113] However, the panel still found that this was an impermissible barrier to free trade.[114]

The California ban would meet a similar fate under WTO scrutiny. It bans all foie gras, regardless of where it comes from. This is a more restrictive trade constraint than the ban on Mexican tuna caught with non-dolphin safe nets. Therefore, a WTO panel would almost certainly find that California's ban on foie gras violates GATT article XI.

B. Can California Find an Exception Under Article XX?

A finding that a country's trade restriction violates article XI does not end the inquiry into the legality of that restriction. If a country is found to violate a provision of GATT, they "may seek to defend it under the General Exceptions set out in Article XX."[115] Article XX partially reads:

> 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; [or] (*b*) necessary to protect human, animal or plant life or health . . .[116]

The Article XX inquiry has two parts: it first attempts to find a particular exception that the restriction falls under; then it asks whether the restriction satisfies the introduction to the Article, the "chapeau."[117] Another consideration to keep in mind is that the Appellate Body sees Article XI rights as fundamental substantive rights, but it does not afford Article XX rights the same level of deference.[118] As a result, panels interpret Article XX exceptions "narrowly, in a manner that preserves the basic objectives and principles of the General

112. *Id.* at 51.

113. *Id.* at 4.

114. *Id.* at 51.

115. Peter Stevenson, *The World Trade Organization Rules: A Legal Analysis of Their Adverse Impact on Animal Welfare*, 8 ANIMAL L. 107, 121 (2002).

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

117. Appellate Body Report, *United States – Standards for Refomulated and Conventional Gasoline*, 22, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter *U.S.-Gasoline*].

118. Thomas, *supra* note 109, at 617–18.

Agreement."[119]

1. Article XX(a): The Public Morals Exception

The first issue is whether the California ban is "necessary to protect public morals."[120] There is very little WTO jurisprudence on Article XX(a), also known as the public morals exception.[121] However, faced with an Article XX(a) issue, a panel would use a similar analytical framework to that used with other Article XX exceptions.[122] Thus, a WTO case analyzing Article XX(g), a GATT exception for conserving natural resources, would contain the framework a panel would likely use for Article XX(a).

In *United States – Standards for Reformulated and Conventional Gasoline*, (hereinafter "*U.S.-Gasoline*"), the Appellate Body used a three-part test to determine if the disputed regulation fell within an Article XX(g) exception.[123] They looked at: (1) whether the regulation was within the scope of the exception; (2) whether it was "necessary" to fulfill the policy goals of that exception; and (3) whether it was a violation of the chapeau's ban on trade discrimination or protectionism.[124] Therefore, using the framework from *U.S.-Gasoline*, a panel would likely use the following analysis for Article XX(a): (1) whether it regulates a "public moral", (2) whether it is "necessary" to protect that moral, and (3) whether it complies with the chapeau.[125]

According to the panel in *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (hereinafter "*U.S.-Gambling*"),[126] public morals "can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values."[127] The *U.S.-Gambling* panel argued that countries should be given some flexibility to come up with their own

119. Panel Report, *United States – Restrictions on Imports of Tuna*, 54, WT/DS29/R (June 16, 1994) [hereinafter *Tuna-Dolphin II*].

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

121. Peterson, *supra* note 86, at 284.

122. Thomas, *supra* note 109, at 620.

123. *See* Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, 12–22, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter *U.S.-Gasoline*] (describing their analysis for issues arising under Article XX(g)).

124. Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L. L. 689, 729 (1998).

125. Thomas, *supra* note 109, at 620.

126. Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.461, WT/DS285/R (Nov. 10, 2004) [hereinafter Panel Report].

127. *Id.*

definitions of "public morals."[128] In this case, the panel defined "public morals" as a term that "denotes standards of right and wrong conduct maintained by or on behalf of a community or nation."[129] Traditional subjects of moral regulation in the past have included the slave trade, drugs and alcohol, and obscene materials.[130] In *U.S.-Gambling*, the goal of the legislation was "the prevention of underage gambling and the protection of pathological gamblers."[131] Ultimately, the panel decided that this goal "could fall within the scope" of the public morals exception.[132]

It should be noted that the dispute in *U.S.-Gambling* fell under the General Agreement on Trade in Services ("GATS"), not GATT.[133] However, GATS Article XIV, which was at issue in *U.S.-Gambling*, and Article XX of GATT, are similar enough that a panel would use the same analytical framework.[134] Furthermore, interpretations by previous GATT Appellate Bodies were valid under GATS as well.[135] Therefore, logic would dictate that any GATT adjudication could look to GATS jurisprudence in a similar fashion.

For the second prong of the analysis, a measure must be necessary to be valid. The *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (hereinafter "*Korea-Beef*")[136] appellate body defined "necessary" as not only "that which is 'indispensable' or 'of absolute necessity' or 'inevitable'" but it also includes "a range of degrees of necessity."[137] The standard requires balancing how much the law is tailored to meet the goals of the law, "the importance of the common interests or values protected by that law . . . and the accompanying impact of the law . . . on regulation on imports or exports."[138] In more concrete terms, necessity is based on how much the measure affects other nations (how outwardly directed the measure is), as well as whether the restricting country has attempted to implement less trade-

128. *Id.*
129. *Id.* ¶ 6.465.
130. *See* Charnovitz, *supra* note 124, at 710–12.
131. Panel Report, *supra* note 126, ¶ 6.469.
132. *Id.* ¶ 6.474.
133. *Id.* ¶ 6.461.
134. *Id.*
135. *Id.* ¶ 6.452.
136. Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R (Dec. 11, 2000) [hereinafter *Korea-Beef*].
137. *Id.* ¶ 161.
138. *See* Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.476-6.477, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter *U.S.-Gambling*] (quoting *Korea-Beef*, *supra* note 136, ¶ 164–66).

restrictive alternatives.[139]

The appellate body in *Korea-Beef* found that the Korean practice requiring imported beef to be kept distinct from domestic beef violated GATT.[140] Korea's goal in implementing this practice was to eliminate fraudulent sales of imported beef, but the Appellate Body did not view this practice as "necessary."[141] The panel and Appellate Body both found that Korea had not explored alternative means of achieving the desired ends.[142] The Korean government could effectively minimize fraud by leveling fines or requiring beef sellers to keep records of their transactions, rather than requiring separate sales of imported beef.[143] Therefore, the measures in place were not "necessary" to prevent fraudulent practices.[144]

In the case of S.B.1520, California would argue that foie gras production is a cruel practice, and banning it is necessary to protect public morals. If a panel were to analyze this claim under Article XX(a) according to past WTO jurisprudence, it may find that California has a valid argument.

The panel would first have to determine whether the foie gras ban protects public morals. They would look to see if the public has a general interest in animal welfare and whether the production of foie gras implicates California's standards of right or wrong.

As to the first inquiry, a panel would find that animal welfare is something that has been regulated for decades.[145] Therefore, the scope of Article XX(a) would presumably include animal welfare as a public moral.[146] Furthermore, as shown in *U.S.-Gasoline*, panels are deferential to legislatures when determining whether a regulation implicates public morals.[147]

On the other hand, a good argument can be made for excluding animal welfare from the scope of Article XX(a). A treaty must be interpreted first by looking at the ordinary meaning of its words and

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139. Thomas, *supra* note 109, at 621; *see also* Appellate Body Report, *European Communities – Import Prohibition of Certain Shrimp and Shrimp Products – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/RRW (Mar. 12, 2001) [hereinafter E.C.-Asbestos].

140. *See Korea-Beef, supra* note 136.

141. *Id.* ¶ 179.

142. *Id.*

143. *Id.*

144. *Id.*

145. *See* Charnovitz, *supra* note 124, at 712.

146. *Id.* at 729–30.

147. *U.S.-Gambling, supra* note 138, ¶ 6.461.

second by the context of those words.[148] Article XX(a)'s words are unrevealing; they could be interpreted as being either broad and deferential to legislative whim, or narrow and only to be used in extreme or obvious circumstances.[149] Here, it is insightful to look at the context of Article XX(a), specifically in light of the other exceptions explored within this article.

Article XX(b), to be discussed subsequently, allows trade restrictions in order to protect animal life or health.[150] Issues involving animal welfare seem to fit easily into Article XX(b). Thus, "assuming that every section of Article XX is supposed to have its own independent meaning, one could argue that the scope of section (a) does not include measures which fall under section (b)."[151] S.B. 1520 illustrates this perfectly; according to the legislature, the motivation for passing S.B. 1520 was really to protect the health of the birds being raised for foie gras, not to protect the public.[152]

Overall, because there has not been any GATT adjudication based on Article XX(a), there is no decisive precedent. There are persuasive arguments on both sides as to whether force-feeding ducks and geese would be found to implicate public morals. Therefore, it is unclear whether or not S.B. 1520 would fall within Article XX(a)'s exception.

Whether a ban is *necessary* to safeguard those public morals is another difficult issue. First, it is important to note that the regulation is not directed outwardly; it does not ask foie gras producing countries to stop their practices, it just bars them from exporting to California. Next, it is unlikely that there are any less trade-restrictive alternatives. S.B.1520 specifically bans "force feeding a bird for the purpose of enlarging the bird's liver beyond normal size;"[153] it does not ban foie gras per se. Furthermore, at this point in time, foie gras cannot be produced without force-feeding. If a country wanted to prevent that specific form of animal cruelty, it could not allow any foie gras.[154] Thus, proponents of S.B. 1520 would argue that the ban is narrowly tailored to the goal of protecting the public morality against the cruelty of foie gras

148. Vienna Convention on the Law of Treaties art. 31.1–31.2, May 23, 1969, 1155 U.N.T.S. 331.

149. *See* Christoph T. Feddersen, *Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and "Conventional" Rules of Interpretation*, 7 MINN. J. GLOBAL TRADE 75, 106–07 (1998).

150. GATT, *supra* note 90, art. XX(b).

151. Feddersen, *supra* note 149, at 108.

152. *S.B. 1520 Hearing, supra* note 136, at 41 (claiming in the purpose section of the bill that the practice of force feeding was detrimental to the birds' health).

153. *Id.*

154. Foie Gras Report*, supra* note 6, at 53.

production.

Foie gras producers, however, would argue that S.B. 1520 is underinclusive and arbitrary. A more in-depth discussion will follow in Part IV, but if the legislature is truly trying to protect the public from the evils of animal cruelty, foie gras is a poor choice to do it with. There are farming practices involving other animals that are equally, if not more, cruel to animals than foie gras farming. Also, foie gras production is inconsequential, compared to the chicken or beef trade, which are both rife with inhumane practices. Thus, foie gras production should be relatively low on the list of priorities for those whose goal is stopping inhumane farming practices.

2. Article XX(b): The Animal Welfare Exception

Proponents of S.B. 1520 would also argue that the ban falls within Article XX(b)'s exception that allows WTO members to pass measures to protect animal life or health. Article XX(b) jurisprudence has been shaped by two cases involving dolphin-safe tuna fishing.[155] In both cases, the United States sought to ban non-dolphin safe tuna under Article XX(b), which allows free trade exceptions to protect animal life.[156] The *Tuna-Dolphin II* panel used a three-step approach to decide if the regulation fell within Article XX(b), just like the *U.S.-Gasoline* panel did for Article XX(a)—whether: (1) the policy is directed at protecting animal life or health; (2) the measure invoked to fulfill that policy is actually "necessary"; and (3) whether the measure is consistent with the chapeau of Article XX.[157]

For the first step, the panel in *Tuna-Dolphin I* looked to the legislative history of Article XX(b) and decided that its focus was to enable countries to pass "sanitary measures to safeguard life or health of humans, animals or plants within the jurisdiction of the importing country."[158] Even though protecting the lives of dolphins is within the general purview of Article XX(b), in that it seeks to protect animal life, the fact that the U.S. was trying to regulate outside of its own territory made the legality of its regulations unclear.[159] Allowing a country to create a policy that has extraterritorial effects is dangerous and potentially destructive to the GATT system. Ultimately, the panel found that the United States did not have the ability to regulate activities

155. *See Tuna-Dolphin II*, *supra* note 119; *see generally Tuna-Dolphin I*, *supra* note 111.
156. *Tuna-Dolphin II, supra* note 119, at 54.
157. *Id.* at 54–55.
158. *Tuna-Dolphin I*, *supra* note 111, at 45.
159. *Tuna-Dolphin II, supra* note 119, at 54.

involving dolphins that were in Mexican waters.[160]

Like the dolphin-protecting regulation in the *Tuna-Dolphin* cases, S.B. 1520 deals with animal health, in that it tries to protect ducks and geese from being force-fed. However, there is a critical difference in that the dolphin measure sought to protect wild animals, whereas S.B. 1520 looks to protect farm animals that are raised for slaughter.[161] This is an area that is traditionally outside the purview of animal cruelty laws.[162] As an example, "the U.S. [sic] [has] federal laws purporting to protect the welfare of all animals, but these laws specifically exempt farmed animals from their protection."[163] Furthermore, most states in the United States have animal cruelty laws that exempt agricultural practices.[164] There is a difference between regulating to protect the environment and regulating the farming industry.

Additionally, Article XX(b) has been interpreted to protect animal life and health, but has never been extended to protect animal welfare.[165] In practice, this exception is used "to prevent the spread of diseases or to ensure the safety of food products for humans,[166] not to protect animal rights.[167] Thus, the intent of Article XX(b) was to protect human beings, not the animals who are raised to feed them.

However, unlike the U.S. tuna fishing regulation, S.B. 1520 does not attempt to change how foie gras producers make their product. Since foie gras cannot be made without force-feeding, the bill bans *all* foie gras from California.[168] In the Tuna cases, the U.S. policy attempted to pressure the Mexican fishermen into using more animal-friendly methods. This is different because the goal of the foie gras ban is not to change how foie gras is made, but simply to keep foie gras from entering into the state. Therefore, S.B. 1520 does not attempt to legislate extra-jurisdictionally.

Article XX(b) also requires that the regulation be necessary. In order to determine the meaning of necessary, it is unclear whether a

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160. *Tuna-Dolphin II, supra* note 119, at 57.

161. *See Tuna-Dolphin I*, *supra* note 111; *see also Tuna-Dolphin II*, *supra* note 119; *see also* Cal. S.B. 1520.

162. Peterson, *supra* note 86, at 281 (citing Mariann Sullivan & David J. Wolfson, *What's Good for the Goose . . . The Israeli Supreme Court, Foie Gras, and the Future of Farmed Animals in the United States*, 70 L. & CONTEMP. PROBS. 139 (2007)).

163. *Id.* (citing 7 U.S.C. §2132(g)(3)).

164. DAVID FAVRE, ANIMAL LAW: WELFARE, INTERESTS, AND RIGHTS 288 (2011).

165. Thomas, *supra* note 109, at 618, *see also* Peterson, *supra* note 86, at 281.

166. Thomas, *supra* note 109, at 618; *see also* Stevenson, *supra* note 115, at 136.

167. Peterson, *supra* note 86, at 280–81.

168. *See* Cal. S.B. 1520; *see also* HCJ 9232/01 Noah v. Att'y General PD 215, 223 [2002–2003] (Isr.).

panel would follow the *Tuna-Dolphin* cases, since they also deal with Article XX(b), or the *Korea-Beef* decision, which is more recent but resolves an issue involving Article XX(d).

As discussed earlier, the *Korea-Beef* decision defines "necessary" in broad strokes, considering a wide range of circumstances as being "necessary."[169] The *Tuna-Dolphin II* panel, on the other hand, was influenced by the 1990 opinion in *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes* (hereinafter "*Thailand-Cigarettes"*) in determining Article XX's meaning of "necessary," which said:

> [A] contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.[170]

At first glance, this seems like a more restrictive definition of "necessary" than the one given in *Korea-Beef*. It does allow some wiggle room, however, by its liberal use of the term "reasonably." Thus, even under the *Thailand-Cigarettes* standard, in order to show compliance, a GATT member would only need to show that it acted reasonably in adopting the measures that violate GATT.

Because of the deference given to those who raise animals for food, however, the United States would probably not be able to justify the foie gras ban as "necessary" to protect animal life or health, as far as GATT is concerned.

3. Satisfying Article XX's Chapeau

The last step in the analysis under both Article XX(a) and XX(b) is to decide whether the measure violates the chapeau of Article XX.[171] The leading case on Article XX's chapeau is the appellate body's opinion in *United States – Import Prohibition of Certain Shrimp and*

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169. *Korea-Beef, supra* note 135, at 161.

170. Panel Report, *United States – Section 337 of the Tariff Act of 1930*, L/6439-36S/345 (Jan. 16, 1989).

171. *See* Thomas, *supra* note 109, at 623.

Shrimp Products (hereinafter "*Shrimp-Turtle I*").[172]

Article XX's chapeau makes sure that "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 [that they are] a disguised restriction on international trade."[173] In other words, the regulation will be struck down 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 . . ."[174]

In analyzing the chapeau's requirements, the *Shrimp-Turtle I* appellate body noted that the chapeau has to be followed in conjunction with a specific section of Article XX.[175] Just because a measure's policy goal is consistent with one of the Article XX exceptions does not mean that it will necessarily comply with the chapeau.[176] A measure that does not comply with a specific Article XX exception cannot be justified even if it satisfies the chapeau.[177] By the same token, a measure that does not satisfy the chapeau is invalid even if it falls within an exception.[178]

In general, the chapeau "embodies the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions . . . on one hand, and the substantive rights of the other Members . . . on the other hand."[179] Members can invoke the exceptions, but this should be done sparingly so as not to downgrade the effectiveness of the treaty system as a whole.[180] Essentially, the exceptions should be limited, conditional, and, most importantly, only invoked in good faith.[181]

Additionally, the trade-restricting nation cannot engage in "arbitrary or unjustifiable discrimination."[182] Unjustifiable discrimination occurs when a country treats WTO members differently

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172. *See* Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp-Turtle I*].

173. GATT, *supra* note 90, art. XX(b).

174. Thomas, *supra* note 109, at 56.

175. *See Shrimp-Turtle I*, *supra* note 172, at 56.

176. *See id.*

177. *See id.*

178. *See id.*

179. *Id.* at 60.

180. *See id.*

181. *Id.* at 61–62.

182. *Id.* at 57.

from each other, as was the case in *Shrimp-Turtle I*.[183] The measure in the *Shrimp-Turtle* cases violated the chapeau because "exporting members [of shrimp to the United States] were faced with 'a single, rigid and unbending requirement' to adopt *essentially the same* policies and enforcement practices as those applied to, and enforced on, domestic shrimp trawlers in the United States."[184]

In this case, Article XX's chapeau should not pose a significant problem for S.B. 1520, as long as it falls within an Article XX exception. For one thing, S.B. 1520 does not leave room for different treatment between countries. It unequivocally states that no food product that is the result of force-feeding will be allowed into California.[185] It treats producers in foreign countries the same as producers in the United States. While this might stifle trade, it is certainly not a protectionist measure, disguised or otherwise, which is really what the chapeau tries to eliminate. The bill is not trying to confer a competitive advantage on any U.S. industry. Its goal is to eliminate force-feeding in the United States as well as abroad. Therefore, a panel would have no reason to invalidate S.B. 1520 on the grounds that it violates the chapeau of Article XX.

IV. A SLIPPERY SLOPE: WHY BANNING FOODS FOR MORAL PURPOSES COULD BE DETRIMENTAL TO WORLD TRADE

A. It is Unlikely That S.B. 1520 Would Have its Day in WTO Court

Figuring out whether or not S.B. 1520 would survive a complaint is a nice exercise in WTO theory, but the likelihood of a country such as France or Canada lodging a formal complaint against the United States is low because of the small size of the foie gras trade and the small impact that one state has on that trade.

Of the total foie gras consumption in the United States, which is only $14.5 million, about eighty-seven percent comes from domestic foie gras production.[186] Canadian foie gras makes up six percent of U.S. consumption, which is 25.2 tons or $870,000 worth.[187] France accounts for seven percent of U.S. consumption, which equals about 29.4 tons of foie gras[188] or $1.02 million worth.[189] Since France produces about

183. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 35, WT/DS58/AB/RW (Oct. 22, 2001) [hereinafter *Shrimp-Turtle II*].

184. *Id.* at 45 (quoting *Shrimp-Turtle I*, *supra* note 172, at 43) (emphasis added).

185. Cal. S.B. 1520.

186. SHEPSTONE, *supra* note 9, at 2.

187. *See id*.

188. *See id.* at 5.

seventeen thousand tons of foie gras each year,[190] the United States only consumes 0.17 percent of total French foie gras produced. Thus, *California's* total consumption of foie gras is even less than 0.17 percent.

It makes little sense for either country to put in the time, effort, and political capital to challenge S.B. 1520. Canada exports fifty-seven thousand tons of poultry[191] and over 400 thousand tons of beef per year.[192] The total meat and poultry industry accounted for $21.3 billion in 2009.[193] That makes the total revenue that would have gone to California from Canadian foie gras producers *at most* 0.00004% of the Canadian meat and poultry industry. Similarly, France exports over a billion dollars' worth of poultry per year.[194] Total U.S. consumption of foie gras accounts for less than one tenth of a percent of that billion dollars. The reality is that neither country will likely feel the effects of S.B. 1520 enough to challenge it through the WTO. However, because of the reasoning behind S.B. 1520, and the general importance of the meat and poultry trade worldwide, the foie gras ban sets a dangerous precedent.

B. Arguments for Maintaining the GATT Scheme

In a broader sense, it would be dangerous for a country to be able to impose its own morality on international trade, especially under the free trade scheme that GATT establishes. It is true that the difference between foie gras and chicken production is huge when considering the worldwide value of each. However, philosophically, they are similar; in both cases, animals are being raised so humans can eat them. Saying that one is cruel and the other is not is simply a matter of personal judgment. Some would say that raising any animal for food is immoral; others might argue that animals being raised for food have no protectable interest; and there are countless positions in between. If a foie gras ban were upheld, future WTO panels could uphold any ban

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189. *See id.* at 2.

190. Guémené & Guy, *supra* note 5, at 215.

191. Canadian Poultry and Products Annual Overview, CANADIAN POULTRY, http://www.canadianpoultrymag.com/index.php?option=com_content&task=view&id=1010&Itemid=142 (last visited Mar. 23, 2013).

192. *See* Industry Statistics, *Canadian Livestock and Meat Industry – 2010 Industry Statistics*, CANADIAN MEAT COUNCIL, http://cmc-cvc.com/en/about-us/industry-statistics/beef-cattle (last visited Mar. 23, 2013).

193. *Id.*

194. *See French Poultry Press Kit*, JE MANGE HALAL 6 (Feb. 2006), http://www.jemangehalal.com/marche-du-halal/documents/poultry-presskitgb.pdf (stating that in 2004, the French poultry industry exported 983 million euros in poultry).

based on a nebulous insistence that it was enacted to protect public morals.

The WTO panel in *Shrimp-Turtle I* made an impassioned defense of a strong version of the GATT multilateral trading system:

> We are of the view that a type of measure adopted by a Member which, on its own, may appear to have a relatively minor impact on the multilateral trading system, may nonetheless raise a serious threat to that system if similar measures are adopted by the same or other Members. Thus, by allowing such type of measures even though their individual impact may not appear to be such as to threaten the multilateral trading system, one would affect the security and predictability of the multilateral trading system.[195]

The appellate body later overruled the panel on this issue and toned down the rhetoric, saying that the panel interpreted GATT's purposes too broadly in striking down the restriction.[196] The inquiry should not look at the purposes of GATT as a whole, the appellate body claimed; a restrictive trade measure falls within an Article XX exception as long as it does not attempt to abuse those exceptions.[197]

In so ruling, the appellate body weakens GATT too much. The beauty of GATT is in its simplicity. It protects the free flow of goods between countries. Thus, its exceptions should be allowed narrowly in order to maintain that free flow. Strengthening the Article XX exceptions creates a dangerous precedent, whereby countries can easily stifle free trade and WTO panels will have to make moral judgment calls. This would lead to inconsistent judicial results, unevenness in the law, and uncertainty about what a country can and cannot do.

C. The Israeli Supreme Court's Unique Take on Foie Gras

Some would argue that S.B. 1520 is not the first step towards state-imposed vegetarianism; that the production of foie gras is unique in its cruelty among the methods that are used to raise animals for food. In fact, the issue was brought before the Israeli Supreme Court in a 2003 case that challenged foie gras production under Israeli animal cruelty laws.[198]

The Israeli animal welfare statute says that "[a] person will not torture an animal, will not be cruel toward it, or abuse it in any way."[199]

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195. *Shrimp-Turtle I, supra* note 172, at 40.
196. *Id.* at 44.
197. *Id.* at 43.
198. *See* HCJ 9232/01 Noah v. Att'y General PD 215 [2002–2003] (Isr.).
199. *Id.* at 222 (quoting the 1994 Protection of Animals Law, Section 2(a)).

The case came before the Israeli Supreme Court when a number of animal-protection groups petitioned the court to force the Minister of Agriculture to prohibit foie gras production under that law.[200] Ultimately, the court had to decide whether foie gras production could comply with the animal welfare statute.[201]

The court first acknowledged that there were two different points of view: one which views animals as property of the person that owns it, and the other, on the opposite side of the spectrum, which believes that animals, as living creatures, deserve the same protections as humans have.[202] Ultimately, whether an act can be considered torture, cruelty or abuse, and therefore in violation of Israeli law, it had to be analyzed according to a three-part test, laid out in a previous Israeli case, *Let the Animals Live v. Hamat Gader Recreation Enterprises*.[203] The analysis looks at: (1) whether a reasonable person would find the act to be torture, cruel or abuse; (2) that the animal encounters pain or suffering; and (3) whether the pain or suffering is proportionate to the purpose for which the animal is undergoing it.[204]

In the case of force-feeding, the *Noah* court found that the first element was satisfied, that a normal observer would surely find that the process constitutes torture.[205] Justice Grunis of the *Noah* court figured that the normal human response to seeing an animal force fed in order to enlarge its liver would see the process as torture.[206] The court also adopted the position of the EU's Scientific Committee on Animal Health and Animal Welfare in their report on the production of foie gras, which found that force-feeding ducks and geese causes suffering.[207] Lastly, the court had to determine whether "the ends justify the means" or whether having foie gras available justified the suffering of the ducks and geese.[208]

Ultimately, in a 2-1 opinion, the Court decided to ban the practice of force-feeding.[209] Justice Strasberg-Cohen wrote the opinion adopted by the majority, in which she drew a distinction between luxury and necessary food products.[210] In her calculus, the need to produce a luxury

200. *Id.*
201. *Id.* at 223–24.
202. *See id.* at 224.
203. *Id.* at 233.
204. *Id.*
205. *Id.* at 234.
206. *Id.*
207. *Id.*
208. *Id.* at 235.
209. *See id.*
210. *Id.* at 268.

food item was not serious enough to balance the suffering that the ducks and geese went through in the force-feeding process.[211] Therefore, the practice of force-feeding fell within the scope of the animal cruelty law and was declared illegal.[212]

The United States also has a law dealing with animal welfare: the Animal Protection Act. However, it deals mostly with animals used in research facilities and those that are transported alive to be sold elsewhere.[213] Furthermore, it specifically places responsibility on the Secretary of Agriculture to create standards that determine what constitutes cruelty.[214] Thus, it is unlikely that a court would even take a case like the one in Israel, as it presents a separation of powers issue and because food production falls outside of its intended purpose.

D. Looking to the Future

Lastly, even though the WTO does not protect agricultural animal welfare with Article XX, there are signs that they may adopt more animal-friendly measures in the future.[215] Many international animal health standards are adopted from the OIE, the World Organization for Animal Health.[216] "Beginning in 2001, the [OIE] agreed to begin a discussion on animal welfare issues with the goal of adoption of international standards."[217] While findings of the OIE would not become law immediately, it would have great influence on animal welfare laws worldwide.[218]

V. REACTIONS TO S.B. 1520 GOING INTO EFFECT

The California foie gras ban went into effect July 1, 2012. However, this has not stopped Californians from eating foie gras.[219] One restaurant is still serving foie gras because it claims that the ban does not apply to restaurants on federal property.[220] Some restaurants are serving foie gras for free, and others are preparing foie gras that

211. *See id.* at 268–69.
212. *See id* at 270.
213. 7 U.S.C. §2131 (2006).
214. *See id.*
215. *See* FAVRE, *supra* note 164, at 310.
216. *Id.*
217. *Id*.
218. *Id.*
219. Fenit Nirappil, *Foie Gras Ban: California Restaurants Duck New Law in Creative Ways*, HUFFINGTON POST (July 17, 2012), http://www.huffingtonpost.com/2012/07/17/foie-gras-ban_n_1680200.html?utm_hp_ref=los-angeles&ir=Los%20Angeles.
220. *Id*.

customers bring in themselves.[221] These restaurants claim they can do this because the ban does not expressly prohibit distribution.[222] There are also practical barriers to enforcement. For example, it is unclear who is charged with enforcing the ban. Thus, state agencies have little power to control defiant chefs and diners because of tight budgets and unclear statutory wording.[223]

Furthermore, the day the law went into effect, a lawsuit was filed against the state of California by a Canadian association of foie gras producers, Hudson Valley Foie Gras, and a restaurant group located in California.[224] The suit alleges that the law violates the Foreign Commerce Clause, the Interstate Commerce Clause, and the Due Process Clause of the Constitution.[225] On July 18, 2012, the judge hearing the case denied a temporary restraining order, but allowed the case to move forward on the merits.[226] The progress of this case is certainly worth following.

Overall, foie gras production is a complicated and difficult issue to make sense of, with passionate advocates on both sides. S.B. 1520 will probably not face any significant international legal challenges. It will, however, create discussion and encourage debate about the way we raise food to eat, and the role of government in regulating it.

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221. *Id*.

222. *Id*.

223. *Id*.

224. *See* Complaint, Assoc. Des Éleveurs de Canards et d'Oies du Quebec v. Harris, No. 12-05735 (D.C., July 2, 2012), *available at* http://insidescoopsf.sfgate.com/files/2012/07/ScoopFoieGrasLawsuit.pdf.

225. *Id*.

226. Stacy Finz & Paolo Lucchesi, *Judge: Foie Gras Ban Stands for Now*, S.F. CHRONICLE (July 18, 2012), http://www.sfgate.com/default/article/Judge-Foie-gras-ban-stands-3717558.php. A preliminary injunction hearing will be held on August 29, 2012. *Id.*