



# BYE BYE CAGES!

The legality of an EU ban on the sales  
of meat and eggs produced from caged  
animals including imported food

# INTRO

In recent years, with the growing awareness of intensive livestock farming and its impacts on animal welfare, the use of cages in animal farming has become a recurring topic in the public debate notably in the European Union (EU). As such, nearly 1.4 million citizens have signed a European Citizens' Initiative (ECI) called "End the Cage Age",<sup>1</sup> which calls on the EU to ban caged farming.

**This initiative follows multiple actions already undertaken at the national level, as several EU Member States have already banned the use of enriched cages for laying hens; in some cases the bans are already in force while in other cases the bans come into force at specified future dates.<sup>2</sup> This progress is the result of a scientific consensus recognising that cages are inherently and severely detrimental to animal welfare.**

The European Parliament (EP) has supported the initiative in a 2021 resolution calling on the European Commission "to propose legislative instruments on fair and sustainable farming [...] with the objective of phasing out the use of cages in EU animal farming, assessing a possible phasing-out by 2027".<sup>3</sup> The European Parliament also raised the issue of imported products, calling for future EU rules to apply to these imports. EU Food Safety Commissioner, Stella Kyriakides, has indicated that the Commission will look at the requests, taking into account in particular the "EU's obligations under the World Trade Organisation (WTO)".<sup>4</sup>

The animal welfare movement has been calling for years for EU animal welfare standards to be applied to imported goods. In a Eurobarometer survey published in 2016, more than 90% of EU citizens agreed that imported products should respect the same animal welfare standards as those in the EU. Imposing future cage-related rules to imports is thus important both to fulfil the wishes of European citizens, but also to ensure that EU imports do not fuel inhumane and unsustainable models of production outside the EU.

One of the main arguments brandished by officials to oppose this idea is that it would contradict the rules of the WTO. Yet, this argument does not stand up to an examination of the existing case law of the WTO. If the EU were to adopt a ban on using cages in the EU, accompanied by a ban on sales of meat and eggs produced from caged animals regardless of their origin, the chances are high that, if this measure was to be challenged at the WTO, it would be found to be in compliance with the WTO rules.

## A RESTRICTION BASED ON ETHICAL CONCERNS

**First, it is important to underline that the EU's decision to adopt such rules on caged products stems from serious concerns expressed by EU citizens regarding the welfare of animals farmed in cages, given that scientific studies show that it is impossible for animals kept in cages to exhibit their natural behaviours. Second, while the WTO rules do not permit import bans (subject to certain exceptions), they do allow the EU to place restrictions on sales provided that imports are treated just as well as similar EU products. If the EU adopts a ban on sales of caged products regardless of their origin, it would be applying the same rules to both European and foreign products, without any discrimination.**

However, an exporting country may challenge the EU's new rules at the WTO arguing that traditional WTO thinking does not permit EU sales rules to treat imported caged and cage-free products differently just because one comes from animals treated humanely while the other has been cruelly produced. But the EU could point out that more recent WTO case law does allow such differential treatment in cases where consumers view two products as being different and are not willing to substitute one product for another. So the EU could argue that a caged product is not the same as an uncaged one, based on the fact that many EU consumers would not be willing to buy caged meat and eggs instead of cage-free products. If this difference is recognised, it would mean that the caged products could be treated differently trade-wise.

However, if an exporting country were to challenge an EU ban on the sale of caged meat and eggs at the WTO, a WTO Dispute Panel may, despite the arguments outlined above, rule that the EU is not entitled to distinguish between caged and cage-free products in its sales rules. Or it may rule that the EU measure is not really a sales restriction but a prohibited import ban. In this case the EU could still argue that they can rely on the exceptions provided by the WTO rules. These exceptions reflect what the WTO rules recognise as legitimate public policy concerns that can justify what would otherwise be a breach of the WTO rules. However, any trade restrictions applied under the exceptions must not be not applied in a way that amounts to arbitrary or unjustifiable discrimination.

The exception the EU could rely on is the one related to public morals, which is considered to cover concerns over animal welfare according to the WTO ruling on the EU ban on the sale of seal products. In that case the WTO recognised that in the EU, animal welfare is an issue of an ethical or moral nature.

Due to the importance of the trade aspects, Compassion in World Farming and Eurogroup for Animals commissioned a Legal Opinion from Clémentine Baldon, Avocate au barreau de Paris, to inform the discussions on these trade elements. This Opinion is set out in full later in this briefing.

While there are high chances that the EU could defend its cage-related rules at the WTO, it should also be noted that in trade, everything is allowed as long as no WTO member challenges you. In practice, the risk of an actual WTO dispute seems rather remote in view of the fact that the future EU rules would not discriminate between EU-produced and imported meat and eggs and the low rate of WTO disputes in practice.<sup>5</sup> As an illustration, the EU Slaughter Regulation adopted in 2009 requires imported meat to come from animals slaughtered to welfare standards equivalent to the EU's, but it has not been challenged at the WTO.<sup>6</sup> Similarly, the dispute that was initiated by the US against the EU interdiction, also applied to imports, against using chlorine to rinse poultry meat. It did not go all the way to panel proceedings, and therefore remains in place. It is also worth noting that the state of California in the United States is in the process of adopting a similar ban on sales of products from animals kept in cages, and it has recently notified this at the WTO, meaning the EU could have an unexpected ally in the future.<sup>7</sup>

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1 <https://www.endthecageage.eu>; [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12842-Animal-welfare-End-the-Cage-Age-European-citizens-initiative\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12842-Animal-welfare-End-the-Cage-Age-European-citizens-initiative_en)

2 All cage systems for hens are already banned in Austria, Luxembourg and Switzerland. Germany, Czech Republic and Slovakia have enacted bans that come into force in 2025, 2027 and 2030 respectively. France has banned the installation of any new cages.

3 [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0295\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0295_EN.pdf)

4 [https://ec.europa.eu/commission/commissioners/2019-2024/kyriakides/announcements/opening-speech-commissioner-kyriakides-european-parliament-plenary-session-european-citizens\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/kyriakides/announcements/opening-speech-commissioner-kyriakides-european-parliament-plenary-session-european-citizens_en)

5 See "TBT Brochure" published by WTO in 2015

([https://www.wto-ilibrary.org/the-wto/technical-barriers-to-trade\\_fae85f65-en](https://www.wto-ilibrary.org/the-wto/technical-barriers-to-trade_fae85f65-en)): "WTO members have notified over 25,000 draft regulatory measures to the Technical Barriers to Trade (TBT) Committee over the past 20 years, covering imports ranging from food to medical devices. Over 470 of these measures have undergone detailed scrutiny by WTO members in the TBT Committee. But only a handful of these issues have resulted in formal disputes, proving the effectiveness of the committee process."

6 Similarly, the *EC – Poultry* case regarding chlorinated chicken did not go all the way to panel proceedings.

7 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/TBTN21/USA1737.pdf&Open=True>

# WHAT IMPACT COULD BANNING CAGES HAVE ON IMPORTS?

By including imports within the scope of its coming legislation on cages, the EU would send a very positive message, reaffirming its role as a global leader when it comes to animal protection. These new rules would apply to EU imports of pig meat, egg and egg products, chicken meat and rabbit meat.

In most cases EU imports are relatively small so requiring them to be cage-free will not have a major impact on exporting countries as only a small proportion of their exports go to the EU market. In addition, while only exporters from partner countries targeting the EU market would have to comply with EU rules, the measure could also have a trickle down effect on companies that supply the local market.

Below we set out data for EU imports of meat and eggs.

**In 2020, the EU imported 537,399 tonnes of chicken-related products.**

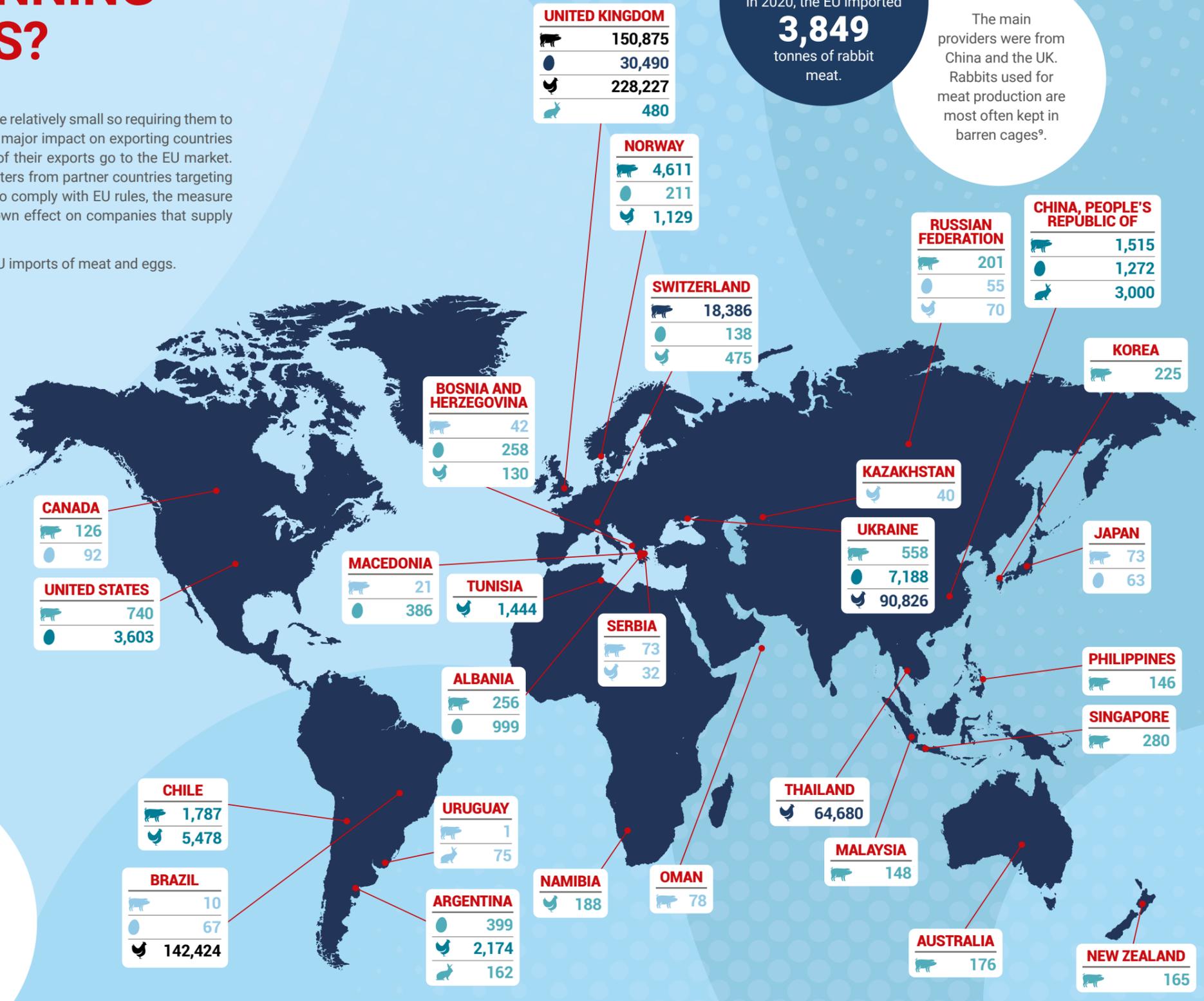
The main providers were from the UK, Brazil, Ukraine, Thailand, Chile, Argentina and Tunisia. While broiler chickens are mostly kept in barns, there is a small but growing trend to keep breeders in cages. Cage-free rules in the EU could thus contribute to prevent the spread of this practice<sup>8</sup>.

**In 2020, the EU imported 45,282 tonnes of eggs and egg products.**

The main providers of these imports were the UK, where enriched cages are still permitted; Ukraine, that will have to approximate new EU rules according to the EU-Ukraine trade agreement; the US, China and Argentina - where battery cages are still frequently used.

**In 2020, the EU imported 182,145 tonnes of pig-related products.**

Most of them come from the UK, where gestation crates are already banned but farrowing crates are still permitted, and Switzerland and Norway, where all crates are already banned. The measure would still have a positive, while not disproportionate, effect on Chilean, Chinese and US productions.



**In 2020, the EU imported 3,849 tonnes of rabbit meat.**

The main providers were from China and the UK. Rabbits used for meat production are most often kept in barren cages<sup>9</sup>.



<sup>8</sup> <https://www.compassioninfoodbusiness.com/media/7431430/compassion-note-multi-tier-colony-and-net-flooring-systems-for-broilers.pdf>  
<sup>9</sup> <https://www.ciwf.eu/farm-animals/rabbits/rabbit-welfare/#cages>

## FOCUS ON PROPORTIONALITY - WHY IS LABELLING NOT ENOUGH ?

According to WTO rules, the EU's ban on the sale of caged meat and eggs, whether produced in the EU or third countries, must be 'proportionate'. This means that:

The EU legislation must be rationally related and calibrated to the policy objective in question, here the protection of animal wellbeing.

The legislation must not impose measures that would be more trade-restrictive than necessary to fulfil this legitimate objective.

It must not involve arbitrary or unjustifiable discrimination.

The EU must act in good faith and needs to find a balance between its right to invoke one of the Article XX Exceptions and the rights of the other members under other WTO provisions.

As the EU would not try to dictate what other countries should do regarding livestock farming, but simply provide that one particular method of production - the use of cages - must not be used for products aimed at the EU market, the EU legislation is likely to be deemed proportionate. In addition, there is a strong scientific corpus underlying the coming legislation, and a strong support among EU citizens.

The main question that will have to be addressed by the WTO is whether the EU could have adopted a less trade restrictive measure, such as labelling. Yet, it seems that an animal welfare labelling scheme – even mandatory – would not be adequate nor sufficient to meet EU citizens' ethical demands. This question was also raised in the dispute surrounding the EU ban on seal products, and the ruling in that case confirmed that a labelling system would not "meaningfully contribute" to addressing EU public moral concerns regarding animal welfare, and would thus not constitute a "reasonably available alternative". While labelling can help, and certainly did in the case of eggs which are labelled according to their method of production, it only does so to a certain limited extent. First and above all, a labelling scheme would not address EU public moral concerns to stop the marketing of caged-products in the EU. Second, from a practical point of view, it still results in involuntary consumption by EU consumers of products from caged animals, as imported animal products often end up in restaurants or processed products.

Likewise, there are many traceability issues in the food chain and many labelling schemes actually mislead consumers as to their real welfare impact. This limited contribution is now not enough in the eyes of EU citizens who want to make sure they do not foster practices contrary to their ethical values. Labelling is therefore unlikely to properly respond to EU public moral concerns regarding caged animals.

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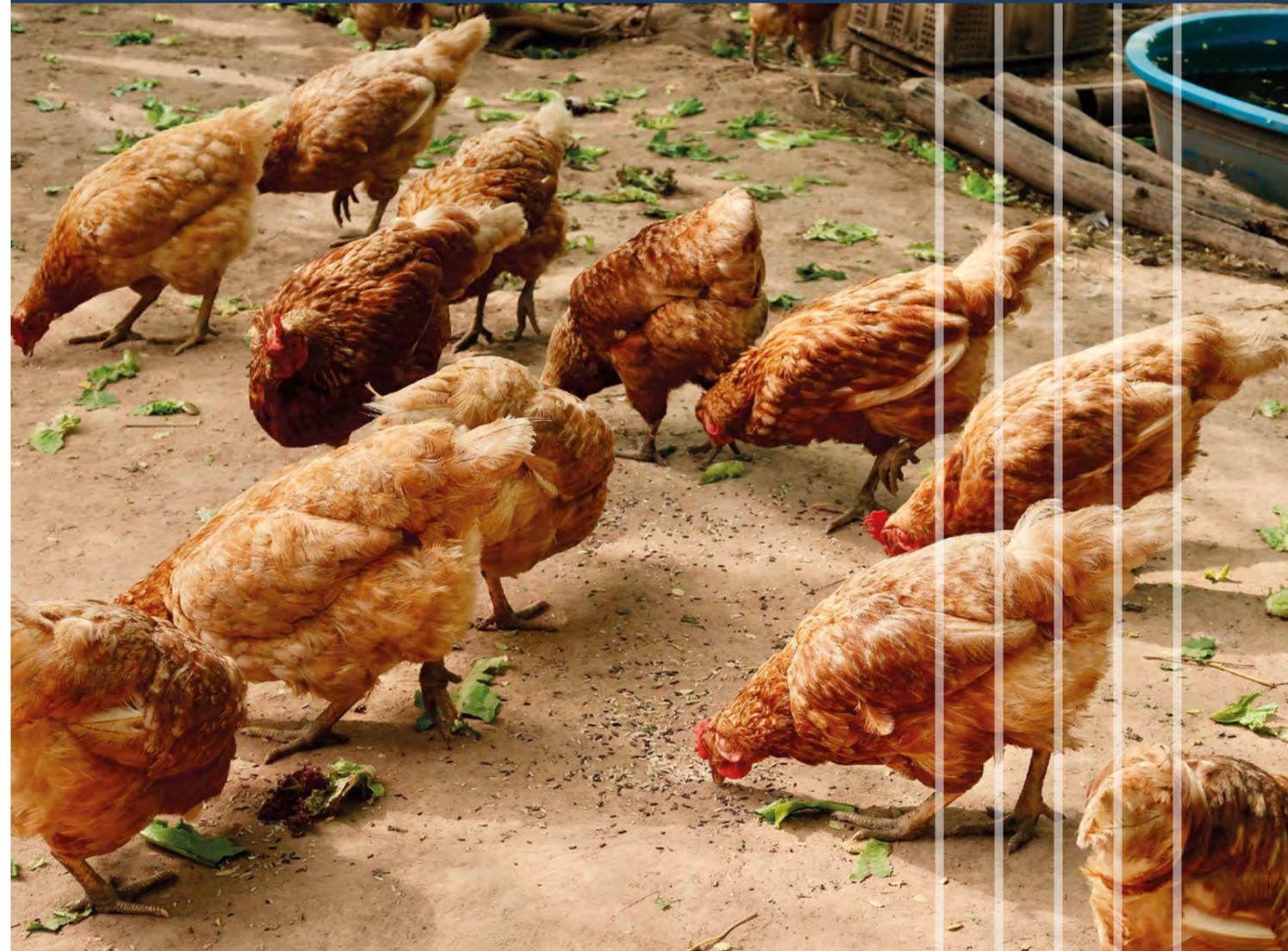
## WHY WOULDN'T IT BE PROTECTIONISM?

**First and foremost, the EU would do this to respond to concerns expressed by a huge share of its population. Although some stakeholders refer to economic arguments and to the improvement of the level playing field as an objective, this should only be seen as a side-effect of the measure. The main objective is to fulfil the wishes of EU citizens, and ensure that their consumption does not fuel inhumane practices in third countries, which could eventually lead to externalising the concerns that the EU initially wanted to address by adopting such legislation.**

To ensure it can avoid the criticism of protectionism, the EU should also ensure coherence between the legislation it applies within the EU and at the border, and avoid derogations. It should also provide a proper transition period.

In the meantime, the EU should also rely on diplomatic actions to promote cage-free farming. It could do so at multilateral level, in relevant international organisations, but it can also pursue cage-free language in bilateral agreements or declarations with partners.

Finally, this decision to impose more standards at the border should not imply the end of the cooperative approach the EU has developed over the past decade. To the contrary, it should be reinforced. The EU should put in place targeted support measures, especially aiming at farmers in developing countries, such as technical assistance, transfer of technology, and capacity building on the different forms of non-cage systems available for pigs, laying hens, rabbits and other farmed animals. Such assistance would help farmers in partner countries to operate non-cage systems successfully.



# LEGAL ASSESSMENT OF THE COMPATIBILITY WITH WTO RULES OF IMPOSING EU CAGE RULES ON IMPORTED PRODUCTS

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## 1

### THE PROPOSED MEASURE AND ITS RATIONALE

For more than 20 years, European legislation has acknowledged that animal welfare deserves adequate protection including as regards animal farming. As such, an EU Directive of 1998 already requires that “where an animal is continuously or regularly tethered or confined, it must be given the space appropriate to its physiological and ethological needs in accordance with established experience and scientific knowledge”.<sup>10</sup>

However, cage farming is at odds with such requirements as there is a growing scientific consensus showing that cages are inherently and severely detrimental to animal welfare.

Indeed, it appears from scientific studies that **animals do need to express their basic ethological behaviours**, and need space and certain materials and facilities to do so. Extensive scientific research shows that **cages, due to inherent physical and behavioural restrictions, cannot ensure a decent level of animal welfare**, no matter how good the management. All caged systems make it impossible for farm animals to express and satisfy their basic needs and behaviours. Proper exercise, whether walking, running, jumping, or flying, is severely restricted and often impossible for all animals kept in cage systems, as they do not provide sufficient space.

For example, laying hens have powerful drives to lay their eggs in a nest, peck and scratch in the ground (i.e., foraging), dust bath, perch and perform wing-stretching and flapping<sup>11</sup> which they cannot perform in any type of cages, including enriched cages<sup>12</sup>, causing negative welfare impacts.

Faced with such a contradiction between a legitimate desire to protect animal welfare enshrined in the EU legislation and the current farming methods<sup>13</sup>, **EU citizens have shown increasing concerns over animal welfare in intensive livestock farming**. This had led nearly 1.4 million citizens to sign the European Citizens’ Initiative “End the Cage Age”, which calls on the EU to end caged farming.

This initiative follows multiple actions already undertaken at the national level by a number of governments, particularly with regard to the use of cages for laying hens. The use of barren cages has been illegal in the EU since 2012. In addition, enriched cage systems for hens are already banned in Austria, Luxembourg and Switzerland while Germany’s ban comes into force in 2025, the Czech Republic’s in 2027 and Slovakia’s in 2030, and France<sup>14</sup> has already banned the installation of any new enriched cages.

Cage-free alternatives exist which can meet the physiological and behavioural needs for all species farmed. Welfare issues can occur in all farming systems but, unlike in cages, these can be properly addressed in cage-free systems through good design, breeding and management.<sup>15</sup> Such alternative systems have the potential to both deliver good health and welfare and ensure productivity.

Therefore, only a move away from caged systems, through a ban on their use in the EU and on the sale of such products, regardless of their origin, would guarantee sufficient protection and satisfy the public demands.

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10 European Commission, 1998. Council Directive 98/58/EC on the protection of animals kept for farming purposes. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31998L0058>

11 See e.g. LayWel, Welfare implications of changes in production systems for laying hens. Deliverable 7.1: Overall strengths and weaknesses of each defined housing system for laying hens, and detailing the overall welfare impact of each housing system (2006); European Commission, Scientific Veterinary Committee – Animal Welfare Section, *Report on the welfare of laying hens* (30 October 1996); EFSA, Opinion of the Scientific Panel on Animal Health and Welfare on a request from the Commission related to the welfare aspects of various systems of keeping laying hens, *The EFSA Journal* (2005) 197, 1-23.

12 Riddle, E.R., and al., “Space use by 4 strains of laying hens to perch, wing flap, dust bathe, stand and lie down” (2018) 13(1) *PloS One*, p.e0190532; D.C. Lay et al., “Hen welfare in different housing systems” (2011) 90(1) *Poultry Science*, 278-294; Louton et al., “Dust-bathing behavior of laying hens in enriched colony housing systems and an aviary system” (2016) *Poultry Science* 1-10.

13 Eurogroup for animals, No Animal Left Behind (October 2021), [https://www.eurogroupforanimals.org/files/eurogroupforanimals/2021-09/2021\\_10\\_04\\_No%20Animal%20Left%20Behind%20Report\\_EN.pdf](https://www.eurogroupforanimals.org/files/eurogroupforanimals/2021-09/2021_10_04_No%20Animal%20Left%20Behind%20Report_EN.pdf)

14 France has announced that by 2022, all shell eggs sold in French supermarkets will have to be free range.

15 See in general, Compassion in World Farming, Scientific briefing on caged farming (February 2021) <https://www.europarl.europa.eu/cmsdata/231963/Scientific%20briefing%20on%20caged%20farming,%20February%202021.pdf>.

## 2 APPLICABLE WTO AGREEMENTS

In order to conduct an analysis of the compatibility of the Measure with the WTO, it is first necessary to determine which WTO Agreements would be applicable to the Measure.

Several agreements should be considered. First, the application of the Agreement on the Application of Sanitary and Phytosanitary Measures (“SPS Agreement”), which deals with measures mitigating sanitary or phytosanitary risks, must be ruled out. Indeed, even if the Measure could incur by-benefits for animal and human health (eg. by lowering the occurrence of diseases and need to use antibiotics) its primary objective is to protect animal welfare and public morals – its ambition is thus more ethical than sanitary.

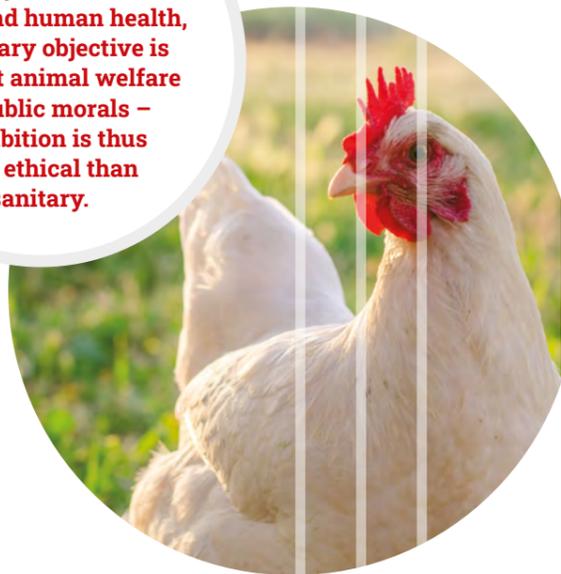
Two other agreements may apply to the measure: **the GATT, as general law, and the TBT Agreement as specific law.**

The GATT will in any event apply to the Measure, either alone or cumulatively to the TBT Agreement, as there is no rule of mutual exclusivity between those two agreements.

As regards the TBT Agreement, it applies to technical regulations, standards and conformity assessment procedures. Annex 1 of the TBT Agreement lists four types of “technical regulations”, including measures that lay down “product characteristics” and those that set out “their related processes and production methods” (so-called “PPMs”). However, there is an ongoing debate as to whether the TBT Agreement applies to measures regulating PPMs that do not result in physical differences in product characteristics – so called ‘non-product related PPMs’ (“NPR-PPMs”). In *EC – Seals*, the Appellate Body found that an EU regulation setting down conditions for seal products to be authorised on the market based on the way seals were hunted, did not lay down product characteristics and did not constitute a “technical regulation” under the TBT Agreement, and therefore only applied the GATT.<sup>16</sup> According to a majority, measures based on NPR-PPMs should be assessed under the GATT rules.<sup>17</sup> However, ambiguity remains and “room may exist to argue that the TBT Agreement could, in certain instances, also be applied to NPR-PPMs”.<sup>18</sup>

As regards the Measure, it would be likely considered as regulating NPR-PPMs since the physical appearance of the final product is rarely or not affected by animal welfare consideration.<sup>19</sup> However, in light of the ambiguity of the scope of the TBT regarding NPR-PPMs, at this stage and under a prudent approach, the TBT should not be set aside and analysis should also be carried out under this framework. In any case, despite the somewhat more specific and stricter standards in the TBT Agreement, the jurisprudence of the WTO Dispute Settlement Body (“DSB”) shows that the standards of the TBT Agreement tend to be applied in a similar way to the less stringent GATT analysis.<sup>20</sup>

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## 3 ASSESSMENT OF THE MEASURE UNDER THE GATT

Provided that it focuses on a sales ban rather than an import ban, the Measure would likely be interpreted as an “internal measure” falling within the scope of Article III:4, the national treatment provision governing internal regulations (3.1). This provision sets out a two-tier test to assess the compatibility of the measure with the GATT, namely whether the domestic and imported products are “like” (3.2) and, if they are “like”, whether imported products receive treatment less favourable than like domestic products (3.3). Should the Measure fail to pass this test it could still be justified under GATT Article XX (3.4).

### 3.1 The Measure would likely be interpreted as an internal measure falling within the scope of GATT Article III:4

Depending on whether a measure consists of a simple import ban or a general ban on sales, it may fall either within the scope of GATT Article XI<sup>21</sup> governing border measures or Article III:4<sup>22</sup> subjecting internal regulations to the national treatment obligation. Thus, assessing the measure’s GATT-consistency requires determining beforehand under which category it falls.

In the case of the Measure, it would consist of a ban on the use of cages within the EU as well as a ban on the sale in the EU of meat and eggs produced by caged animals **regardless of their origin**. Such a measure would logically constitute an internal regulation. As regards the ban on imports at the border necessary to enforce the Measure, it would likely qualify as a measure falling within the Note ad Article III.<sup>23</sup> Thus, the Measure would in turn be considered as an internal regulation and the risk of requalification of the Measure as an import ban falling within Article XI appears rather low. This holds even more true as the ban would likely affect domestic production at least as much as imported products, making it difficult to argue that this measure would in fact be directed at imports.<sup>24</sup>



16 Appellate Body (‘AB’) Report, *EC – Seal Products*, WT/DS400/AB/R (16 June 2014), paras. 5.16-5.70, esp. para. 5.57.

17 OECD Secretariat, *Processes and Production Methods (PPMs): Conceptual Framework and Considerations on Use of PPM-Based Trade Measures*, OECD/GD(97)137/11 (1997); Christiane R. Conrad, *Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals* 381 (Cambridge Univ. Press 2011); Peter Van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization* (Cambridge Univ. Press 4th ed. 2017) 854. This is supported by the negotiating history of the TBT that suggests that there was no intention for NPR-PPMs to be included (WTO Secretariat, *Negotiating History of the Agreement on Technical Barriers to Trade with regard to Labelling Requirements, Voluntary Standards, and Processes and Production Methods Unrelated to Product Characteristics*, Doc. WT/CTE/W/10 (29 August 1995). Amber Rose Maggio, *Environmental Policy, Non-Product Related Process and Production Methods and the Law of the World Trade Organization* (Springer 2017) 176.

18 Arthur E. Appleton, “The Agreement on Technical Barriers to Trade” in Patrick F. J. Macrory, Arthur E. Appleton and Michael G. Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer 2005) 382.

19 Another interpretation could also consider that measures such as ones concerning space offered to animals for roaming, as they affect the quality of meat as well as of eggs, do result in physical differences that go beyond the mere visual aspect and are thus product-related. See Anne Peters, *Animals in International Law* (Brill 2021) 296.

20 Robert, “The World Trade Organization 20 Years On: Global Governance by Judiciary” (2016) 27(1) *European Journal of International Law* 56.

21 “No prohibition or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.”

22 “1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products [...] should not be applied to imported products or domestic products so as to afford protection to domestic products.

[...] “4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. [...]”

23 “Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.”

24 This is also the case when the absence of production is already the consequence of a ban, as what has been done in some EU Member States. See Panel Report, *EC – Asbestos*, paras 8.91-8.96: on the basis of this decision, it could be argued that the absence of domestic production is simply the consequence of the marketing ban, and not the other way around, to confirm the applicability of Article III.

### 3.2 Application of the likeness test to the Measure under the GATT

The DSB has developed a likeness test under which consumer preferences are one of the main criteria to be reviewed (3.2.1). Under this test, it could be argued that, in view of consumer preferences, products from caged and non-caged farming are not “like” thus excluding discrimination (3.2.2).

#### 3.2.1 Likeness test: scope of the non-discrimination obligation

Pursuant to GATT Article III:4, similar products must receive treatment that is no less favourable. However, this non-discrimination obligation is triggered only with regard to ‘like products’. Then, if a (foreign) animal-unfriendly product is not a “like product”, differentiation becomes possible.

The Appellate Body has developed a set of indicators to assess likeness – international tariff classification, physical qualities and properties, end uses and consumer preferences and habits<sup>25</sup> – which have to be examined on a case-by-case basis.<sup>26</sup>

Physical characteristics of the products compared are only one factor in finding “unlike” products, and not the major one. They may sometimes even be irrelevant for their qualification as “like” or “unlike”. Rather than the raw material, what is decisive is the perception of consumers.<sup>27</sup> Along this line, the Appellate Body stressed that:

“evidence about the extent to which products can serve the same end-uses, and the extent to which consumers are – or would be – willing to choose one product instead of another to perform those end-uses, is highly relevant evidence in assessing the ‘likeness’ of those products under Article III:4 of the GATT 1994.”<sup>28</sup>

The key concern is the competition between the domestic and imported products:<sup>29</sup> only competing products that satisfy similar demands<sup>30</sup> – i.e. when they are interchangeable from the perspective of the consumers – are ‘like’ products. **Consumers’ taste and habits should thus be the leading criterion, as they determine the existence - or absence - of a “competitive relationship between products”.**<sup>31</sup>

Another important question is whether NPR-PPMs could affect likeness between two products, even if the method used does not leave a trace in the final product. This question remains unanswered and subject to a debate.

In the ruling over the disputes “US – Tuna I and II”, which were about the prohibition of the import of certain tuna and tuna products according to the impact of the fishing on dolphins in the early 1990s, it was found that NPR-PPMs could not be relevant in determining whether two products were “like”.<sup>32</sup> However, these cases were not adopted and have no legal status. Moreover, the concept of “likeness” has evolved since and several arguments weigh in favour of seeing PPMs as a factor affecting the likeness assessment:

In particular, Article III does not mandate the exclusion of PPMs from the likeness test.<sup>33</sup> Rather, it flows from Article III:1 GATT<sup>34</sup> – i.e. the general rule to Article III:4 – that differentiation based on PPMs are acceptable insofar as there is no protectionist intent. It is also worth recalling that the list of indicators for assessing likeness given by the Appellate Body is not exhaustive and subject to evolution. In *Canada – Renewable Energy*, the Appellate Body found that “what constitutes a competitive relationship between products may require consideration of inputs and processes of production used to produce the product”.<sup>35</sup> In that case (relating to subsidies), the Appellate Body found that conventional and renewable energy production were not part of the same market.<sup>36</sup> On these grounds, production methods have been said to have the potential to become a “fundamental characteristic of the product itself”.<sup>37</sup>

#### 3.2.2 Application of the likeness test to products from caged and non-caged farming

In view of the importance of consumer preferences in assessing whether products are “like”, it could be argued that the observance of animal-friendly PPMs can result in an “unlike” animal product when these PPMs shape consumers’ preferences to such a degree that the product no longer competes with the “cruelty product”,<sup>38</sup> even when products coming out of animal-friendly PPMs have identical physical properties as those resulting from industrial production.

Indeed, as long as preferences for some processes and methods of production are strong enough to translate into consumer behaviour, the competitive relationship of products can be affected and ‘likeness’ excluded.<sup>39</sup> In the *Tuna III* case, which was a dispute over tuna labelling, the panel did not exclude that the US consumers’ “preferences with respect to tuna products, based on their dolphin-safe status [...] may be relevant to an assessment of likeness”, to the extent that such preferences may have an impact on the competitive relationship between these products.<sup>40</sup>

This is all the more relevant as regards the use of cages, as studies demonstrate growing awareness and a matching willingness to pay.<sup>41</sup> As an illustration, when it comes to eggs and laying hens, around 52% of EU production comes from non-cage systems<sup>42</sup> which indicates that many EU consumers positively wish to buy non-cage eggs and do not view cage eggs as a substitute for non-cage eggs. This holds true even though the price of cage-free eggs is sometimes twice as much as cage eggs.<sup>43</sup> And European consumers’ preferences for cage free or organic eggs keep increasing each year at a steady pace.<sup>44</sup>

Therefore, the different production methods could arguably preclude similarity and allow differentiation between caged and non-caged products. In other words, following this line of reasoning, **there would be no obligation to accord national treatment to foreign products generated in an animal-unfriendly way, as they could be legally qualified as being a different product from the cruelty free products that are allowed to access the market.**

25 Appellate Body Report, *EC – Asbestos*, para. 101.

26 *ibid.*, para. 40.

27 Anne Peters, *Animals in International Law*, 294. Appellate Body Report, *Philippines – Taxes on Distilled Spirits*, WT/DS/396/AB/R (21 December 2011), para 132.

28 AB Report, *EC – Asbestos*, para. 117.

29 Panel Report (unadopted), *US – Taxes on Automobiles*, DS31/R (11 October 1994), para. 5.45.

30 Panel Report, *Tuna III*, WT/DS381/R (15 September 2011), para. 7.235 (summary of the Mexican argument on the comparison between Mexican tuna products and US tuna products, quoting AB Report, *EC – Asbestos*, para. 101).

31 AB Report, *EC – Asbestos*, para. 117.

32 GATT Panel Reports (unadopted), *US – Tuna/Dolphin I*, DS21/R (3 September 1991), and *US – Tuna/Dolphin II*, DS29/R (1994). The Panel considered that the Article III:4 GATT did not allow parties to take into account NPR-PPMs and considered that imports should be treated equally, “regardless of how they were produced or whether there are identical restrictions on domestic products” (Maggio, above n. 5, at 134).

33 See, more generally, Charlotte Blattner, *Protecting Animals Within and Across Borders: Extraterritorial Jurisdiction and the Challenges of Globalization* (OUP 2019) 103.

34 It states that “processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production”.

35 Appellate Body Reports, *Canada – Renewable Energy* and *Canada – Feed-In Tariff Program*, WT/DS412/AB/R and WT/DS426/AB/R (24 May 2013), para. 5.63. This statement was made regarding Article III. While there are some differences in the likeness test between the different paragraphs of the provision, it is worth reminding that the AB interprets it in a way that harmonizes it.

36 *ibid.*, paras 5.167-5.178.

37 Blattner, above n. 39, at 104, in reference to Kelch, above n. 25, at 253.

38 Anne Peters, *Animals in International Law*, 296.

39 Blattner, above n. 39, at 104.

40 Panel Report, *Tuna III*, para. 7.249. The Panel however considered it was not the case in the circumstances before it.

41 European consumers are increasingly informed and aware of ethical issues. See, e.g., Information Report No 476 (2019-2020) by Mrs Françoise Cartron and Mr Jean-Luc Fichet, *Vers une alimentation durable : Un enjeu sanitaire, social, territorial et environnemental majeur pour la France* (issued on behalf of the Senate Delegation for Foresight) (28 May 2020) 27 et seq. <[https://www.senat.fr/rap/r19-476/r19-476\\_mono.html#fnref17](https://www.senat.fr/rap/r19-476/r19-476_mono.html#fnref17)>. AB Report, *US – Clove Cigarettes*, para. 136 et seq. More generally, see also, IBM, *Meet the 2020 consumers driving change* (2020) 4 et seq. The IFC Good Practice Note on Animal Welfare already mentioned in 2014 surveys in Europe that report the consumers’ “willingness to pay significantly more for animal products they perceive to have come from farm animals raised humanely” (IFC, Good Practice Note: Improving Animal Welfare in Livestock Operations (December 2014), 10, <https://www.ifc.org/wps/wcm/connect/c39e4771-d5ae-441a-9942-dfa4add8b679/IFC+Good+Practice+Note+Animal+Welfare+2014.pdf?MOD=AJPERES&CVID=kGxNx5m>).

42 European Commission, *Eggs – Market Situation – Dashboard* (9 June 2021), [https://ec.europa.eu/info/sites/default/files/food-farming-fisheries/farming/documents/eggs-dashboard\\_en.pdf](https://ec.europa.eu/info/sites/default/files/food-farming-fisheries/farming/documents/eggs-dashboard_en.pdf).

43 IFC, Good Practice Note: Improving Animal Welfare in Livestock Operations (December 2014), 10.

44 See for instance: [https://www.bfimt.com/economie/consommation/les-francais-boudent-les-oeufs-de-poules-elevees-en-cage\\_AN-201902180099.html](https://www.bfimt.com/economie/consommation/les-francais-boudent-les-oeufs-de-poules-elevees-en-cage_AN-201902180099.html) [https://ec.europa.eu/info/sites/default/files/food-farming-fisheries/farming/documents/eggs-dashboard\\_en.pdf](https://ec.europa.eu/info/sites/default/files/food-farming-fisheries/farming/documents/eggs-dashboard_en.pdf) [https://lesoeufs.fr/public/uploads/2018/04/DP\\_CNPO\\_conf-25-avril-val.pdf](https://lesoeufs.fr/public/uploads/2018/04/DP_CNPO_conf-25-avril-val.pdf)



### 3.3 The existence of a discrimination – Are imported products treated less favourably than domestic products?

If caged and non-caged products are nevertheless considered as 'like', it should be verified that the imported products are not treated less favourably than like domestic products.<sup>45</sup> Although the Measures would in principle not be discriminatory *de jure* – since it would indistinctly apply to all goods placed on the European market<sup>46</sup> – trade partners that permit the use of cages and would be denied access to the EU market could invoke a *de facto* discrimination.

Based on *US – Tuna II*, there are **two criteria for determining the existence of a *de facto* discrimination**: (i) the use by the exporting State of a production method which is prohibited in the importing State, and (ii) a change in competition conditions introduced by the measure **to the detriment of imported products**.<sup>47</sup> The mere fact that there is a distinction between products with different production methods is not sufficient *per se* to find "less favourable treatment"; it is only when such regulatory differences distort the conditions of competition that a *de facto* discrimination can be found.<sup>48</sup> For instance, there is no less favourable treatment when the effects are equivalent on both sides (i.e. the importing country and the exporting country) and the measure imposes no heavier burden for foreign goods. It is therefore not sufficient that only a small part of importers from a single country receive worse treatment.<sup>49</sup>

In the case of the Measure, the first criteria would be met as nearly all EU trading partners still allow the use of cages.

As regards the second criteria, this would need a factual analysis of the nature and characteristics of EU imports of animal products to assess whether imports are more severely impacted than EU products.

As an illustration in the case of eggs, only 0.2% of eggs come from non-EU countries,<sup>50</sup> so that the actual impact would first appear to be much more significant for domestic products than for imports. However, if eggs imported from non-EU countries are mainly produced from battery cages, they may comparatively be affected more than European producers. Thus, a finding of a *de facto* discrimination cannot be excluded, in which case the Measure would be found to breach GATT Article III:4.

### 3.4 Justification of the Measure under GATT Article XX

Should the ban be found to create a discrimination and thus to be inconsistent with Article III, the Measure could still be justified under GATT Article XX.

Indeed, although some conservative views advocate for the exclusion of laws differentiating between PPMs which have indirect extraterritorial effects from the scope of Article XX,<sup>51</sup> more recent case-law shows that there is room for such measures under Article XX. In particular in *US – Shrimp* – a dispute about the US ban on importing shrimps in cases where devices were not used to ensure no turtles were caught at the same time – the Appellate Body found that:

**"conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX."**<sup>52</sup>

In this case, the Appellate Body also considered that NPR-PPMs measures could qualify for one of Article XX exceptions.<sup>53</sup> It can thus be concluded that nothing, *in principle*, precludes NPR-PPMs from being justifiable under GATT Article XX.<sup>54</sup>

In order to be justified under Article XX, the Measure would need to fall within one of Article XX exceptions (3.4.1) and meet the conditions of the "chapeau" of Article XX (3.4.2)

**When it comes to eggs, around 52% of EU production comes from non-cage systems which indicates that many EU consumers positively wish to buy non-cage eggs and do not view cage eggs as a substitute for non-cage eggs.**



45 The Appellate Body has stressed the fact that this remains a condition that requires demonstration, see AB Report, *EC – Asbestos*, para. 100.

46 In the absence of derogations.

47 Appellate Body Report, *US – Tuna II (Mexico)*, WT/DS381/AB/R (16 May 2012), paras 221-239.

48 *ibid.*, para. 214; AB Report, *EC – Asbestos*, para. 100.

49 In *US – Clove Cigarettes*, the Appellate Body had assessed the ban's overall impact on the vast majority of imported products vis-à-vis the majority of like domestic products.

50 European Commission, Eggs – Market Situation – Dashboard (9 June 2021), [https://ec.europa.eu/info/sites/default/files/food-farming-fisheries/farming/documents/eggs-dashboard\\_en.pdf](https://ec.europa.eu/info/sites/default/files/food-farming-fisheries/farming/documents/eggs-dashboard_en.pdf).

51 Blattner, above n. 39, at 100.

52 Appellate Body Report, *US – Shrimp*, WT/DS58/AB/R (6 November 1998), para. 121.

53 *ibid.*, para. 142.

54 see Frank Biermann, "The Rising Tide of Green Unilateralism in World Trade Law: Options for Reconciling the Emerging North-South Conflict" (2001) 35 *Journal of World Trade* 421, 430).

### 3.4.1 Justification of the Measure under GATT Article XX(a)

The Measure could fall under the scope of GATT Article XX(a) exception relating to public morals (i) and also pass the test of being both "designed" and "necessary" to protect public morals (ii).

(i) Scope of the public morals exception under Article XX(a)

As regards the applicable Article XX exceptions, the Measure – as well as other measures motivated by animal welfare – could relate to the protection of human, animal or plant life or health (Article XX(b)), the preservation of exhaustible natural resources (Article XX(g)), and the protection of public morals (Article XX(a)).<sup>55</sup> However this latest exception appears to be the most appropriate defence for animal welfare measures, in view of the landmark case *EU – Seal Products*, in which the WTO Appellate Body recognised that the public morals exception could be invoked to provisionally justify a measure taken on the basis of animal welfare considerations.

In accordance with the conditions set in this case<sup>56</sup>, (i) the concern at issue must exist in the regulating country and (ii) fall within the scope of 'public morals' as defined by that country.

Here, these conditions should be satisfied. Indeed, first there is ample evidence to support that caged farming is a proven concern in the EU. In the EU, the Eurobarometer – which interviewed 27,000 citizens in 28 Member States – showed that over 90 percent of EU citizens believe protecting the welfare of farmed animals is important.<sup>57</sup> The European Citizens' Initiative "End the Cage Age"<sup>58</sup> gathered more than 1.4 million signatures from citizens of all 28 Member States in support of banning cage farming in the EU, obliging the Commission to examine the measures to be taken in this area.<sup>59</sup> Likewise, the fact that several European countries have moved, or are moving, away from caged systems for hens<sup>60</sup> reflects increasingly pressing concerns of citizens on this issue.<sup>61</sup>

The second condition would also undoubtedly be met here. Indeed, in *EU – Seal Products*, the Panel was "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>62</sup> In addition, WTO members enjoy large discretion as "it is up to each Member to determine what level of protection is appropriate in a given situation", thus making it possible for a country to adopt a higher level of protection of public morals in its territory.<sup>63</sup>

Finally, the invocation of the public morals exception presents some advantages as it mitigate the risk of potential criticisms as to the extraterritoriality of the Measure, since the consumers whose morals are protected are situated inside the State so that there is a jurisdictional nexus to domestic territory<sup>64</sup> even if the Measure could entail aiming at protecting animals outside the EU.<sup>65</sup>

It should also be noted that "risk" and scientific considerations are not relevant in assessing the scope of public morals,<sup>66</sup> which "can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values".<sup>67</sup>

(ii) Design and necessity of the Measure

As regards the **design of the Measure**, it would be necessary to show how it responds to the identified moral issue – i.e. how it is *designed to protect it*. As such, "evidence regarding the design of the measure at issue, including its content, structure, and expected operation" is of particular importance in the panel's review.<sup>68</sup>

Here, it seems quite straightforward as the very object of the Measure is to meet EU citizens' ethical concerns regarding animal welfare. The Measure should be crafted in such a way to make it clear that products from caged animals are barred access to the market in response to public concerns to ensure animals' basic needs.

55 See Anne Peters, *Animals in International Law*, 297-310.

56 Panel Report, *EC – Seal Products*, para. 7.383.

57 European Commission, Special Eurobarometer 442 Report: Attitudes of Europeans towards Animal Welfare (2016) 3-4.

58 <https://www.endthecageage.eu/>

59 <https://www.europarl.europa.eu/news/fr/press-room/20210407IPR01519/elevage-en-cage-dans-l-ue-audition-sur-l-initiative-citoyenne-europeenne>

60 See above n. 2.

61 This is also shown by the recent adoption by the European Parliament of a resolution on the End the Cage Age ECI with an overwhelming majority, urging the European Commission to ban the use of cages in animal farming by 2027 and emphasises that all products placed on the EU market – including imported ones – must comply with future cage-free standards. See European Parliament resolution of 10 June 2021 on the European Citizens' Initiative 'End the cage age', [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0295\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0295_EN.html).

62 Panel Report, *EC – Seal Products*, para 7.409.

63 Panel Report in *China – Publications and Audiovisual Products*, WT/DS363/R (12 August 2009), para. 7.819. In this case, the Panel endorsed the interpretation of "public morals" given in the *US – Gambling* case (*ibid.*, para. 7.759) where the Panel had considered that the "public morals" exception allows Members to "define and apply for themselves the concepts of 'public morals' in their respective territories, according to their own system and scales of values". (Panel Report, *US – Gambling*, WT/DS285/R, 10 November 2004, paras 6.461-6.465. The Panel found that the content of public morals, in relation to Article XIV(a) of the GATS, refers to "standards of right and wrong conduct maintained by or on behalf of a community or a nation". See also, Panel Report, *EC – Seal Products*, WT/DS400/R/ WT/DS401/R/ (16 June 2014), para. 7.409)

64 Blattner, above n. 39, at 126.

65 As accepted by the Panel in *EC – Seal Products*.

66 AB Report, *EC – Seal Products*, para.5.198.

67 Panel Report, *US – Gambling*, paras 6.461-6.465.

68 Appellate Body Report, *Colombia – Textiles*, WT/DS461/AB/R, 7 June 2016, paras 5.67-5.70.

As regards the **necessity of the Measure**, in accordance with the case law of the Appellate Body, the necessity test entails “a process of **‘weighing and balancing’ a series of factors**”, such as the **importance of the objective**, the **contribution of the measure to that objective**, and the **trade-restrictiveness of the measure**.<sup>69</sup>

In the case of the Measure, as it would invoke the protection of public morals within the EU, it could make it easier to prove the full contribution made to the objective, which would be fulfilled more “directly” than other objectives such as the protection of animal health. Since the EU cannot interfere in the national policies of its trading partners, it can only respond to this situation by ensuring that the EU market does not encourage practices that run counter to its concerns and commitments. By refusing market access to products that do not comply with its enhanced animal welfare requirements, the EU would meet the societal demand expressed by European citizens and consumers who refuse to contribute to practices that are contrary to their ethical imperatives and which some of them already have democratically decided to reject.

The Panel in *EC – Seal Products* already recognised that animal welfare was “a globally recognised issue”<sup>70</sup> that gave rise to an “ethical responsibility for human beings in general”.<sup>71</sup> It also accepted that the protection of animals was “an important value or interest” in the EU.<sup>72</sup>

The necessity test also implies a **‘comparative’ analysis** that requires an assessment of the measure compared to possible alternatives. It should be considered whether there is a (i) less trade-restrictive measure that (ii) provides an equivalent contribution to the achievement of the objective, and (iii) whether this alternative measure is reasonably available – i.e. “capable of being implemented at reasonable cost in the real world”<sup>73</sup>. In the case of the Measure, this requires examining if banning market access to meat and eggs from caged animals is the only way to meet EU citizens’ ethical concerns regarding the welfare of farmed animals, or if other options could allow to reach the same goal.

Here, **based on extensive scientific reviews, it appears that the level of animal welfare required by EU citizens and sought by the Measure could not be ensured in another manner than banning cages**.<sup>74</sup> Several scientific reports contend that cages, due to their inherent physical and behavioural restriction, cannot provide good welfare, no matter how good the management. For example, in the case of laying hens, it has been shown that only non-cage systems provide the possibility for hens to express their full behavioural repertoire – e.g. nesting, foraging, dust-bathing and perching. Laying hens cannot express their full behavioural repertoire when kept in cages, including enriched cages<sup>75</sup>, causing negative welfare impacts.<sup>76</sup>

As regards the possibility to require an **‘equivalent’** outcome rather than a ban - which are normally preferred under WTO rules<sup>77</sup> - they appear to be inadequate here. Indeed, it has been proven that cages as such are the problem and that no system based on cages can provide a comparable level of effectiveness (i.e. enable animals to express their basic behaviours and ensure proper animal welfare outcomes).<sup>78</sup> In addition, it could be argued that the proscription of a system is much less intrusive than the prescription of one: the Measure would not require exporters to use a given method of production or comply with a specific regime. They will remain free to choose one as long as it does not involve cages.



**Several scientific reports contend that cages, due to their inherent physical and behavioural restriction, cannot provide good welfare, no matter how good the management.**

69 AB Report, *EC – Seal Products*, para.5.214. See also, AB Report, *China – Audiovisual Products*, para. 310. AB Report, *Korea – Various Measures on Beef*, para. 163; AB Report, *Brazil – Retreaded Tyres*, para. 150.

70 Panel Report, *EC – Seal Products*, para 7.420, confirmed by AB Report, *EC – Seal Products*, para. 5.201.

71 *ibid.* para. 7.409.

72 *ibid.*, para. 7.632.

73 Robert Howse and P. Levy, The TBT Panels: *US–Cloves, US–Tuna, US–COOL* (2013) 12(2), *World Trade Review*, 353, referring to Panel Report, *US – Clove Cigarettes*, para. 7.423.. The alternative measure should not be excessively costly or burdensome, so that it would be difficult to implement and enforce.

74 See in general, Compassion in World Farming, Scientific briefing on caged farming (February 2021), at <https://www.europarl.europa.eu/cmsdata/231963/Scientific%20briefing%20on%20caged%20farming,%20February%202021.pdf>.

75 E.R. Riddle and al.; D.C. Lay et al.; Louton et al, above n. 11.

76 See e.g. LayWel, Welfare implications of changes in production systems for laying hens. Deliverable 7.1: Overall strengths and weaknesses of each defined housing system for laying hens, and detailing the overall welfare impact of each housing system (2006); European Commission, Scientific Veterinary Committee – Animal Welfare Section, *Report on the welfare of laying hens* (30 October 1996); EFSA, Opinion of the Scientific Panel on Animal Health and Welfare on a request from the Commission related to the welfare aspects of various systems of keeping laying hens, *The EFSA Journal* (2005) 197, 1-23.

77 AB Report, *US – Shrimp*, para. 144.

78 Such reasoning is similar to the position adopted by the IFC, which referred to scientific research that shows that “certain housing systems have inherent major disadvantages for animal welfare and do not have the potential to provide satisfactory outcomes, for example, systems of extreme confinement of animals or barren environments” (see IFC, Good Practice Note: Improving Animal Welfare in Livestock Operations (December 2014), 16).

Similarly, an **animal welfare labelling** – even mandatory – **would not be adequate nor sufficient** to meet EU citizens’ ethical demands. Here, similarly to the Appellate Body’s findings in *EC – Seal Products*,<sup>79</sup> a labelling system would not “meaningfully contribute” to addressing EU public moral concerns regarding animal welfare, and would thus not constitute a “reasonably available alternative”. Indeed, labelling can help, and certainly did in some cases (e.g. for eggs), but only to a certain limited extent. First and above all, it does not address EU public moral concerns to stop the marketing of caged-products in the EU. Second, from a practical point of view, it still results in involuntary consumption by EU consumers of products from caged animals, as imported animal products often end up in restaurants or processed products. Likewise, many labelling schemes actually mislead consumers as to their real welfare impact. This limited contribution is now not enough in the eyes of EU citizens who want to make sure they do not foster practices contrary to their ethical values. Labelling is therefore unlikely to properly respond to EU public moral concerns regarding caged animals.

In this context, it could be argued that **no less trade-restrictive alternative measures are reasonably available**.

### 3.4.2 The Chapeau of Article XX

In accordance with the chapeau of Article XX GATT, measures violating GATT substantive obligations and which qualify under one of the exceptions can be justified, to the extent they are not “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination” or “a disguised restriction on international trade”. In other words, this requires the measure to be designed and applied in **good faith** and in a manner so as to guarantee due process.<sup>80</sup>

Here, if the Measure is carefully crafted and applied, nothing should prevent the criteria of the chapeau to be met.

**First**, the measures would specifically aim at ensuring **internal consistency in the regulatory regime** applicable to products placed on the European market. In the *Hormones* case, in the context of the SPS Agreement, the Appellate Body implicitly validated the structural impartiality of similarly designed measures<sup>81</sup> based on its architecture, operation and application to the particular circumstances of the case,<sup>82</sup> to demonstrate that the measure is not an instrument of arbitrary discrimination or protectionism. In this regard, **WTO law mainly requires coherence**. In *EC – Seal Products*, the EU measure did not pass the chapeau test because it granted an exemption that served purposes other than protecting public morals and animal welfare, which was found to be at odds with the objective of the measure.

As regards the Measure, the consistency of the EU’s approach would be considerably strengthened by **refraining from adopting derogations undermining the coherence of the Measure and the credibility of the EU position**. Providing for an **appropriate<sup>83</sup> transition period** would also soften the effects on world trade, given that the shift to cage-free systems has in some cases already been initiated by the industry, including in third countries.

**Second**, the Measure should also preferably be accompanied by **diplomatic actions** within the relevant multilateral bodies and in bilateral negotiations to promote the general phasing-out of the use of cages.

**Third, targeted support measures**, in particular to farmers in developing countries should be implemented to balance the trade effects of the Measure. This could possibly be done through technical cooperation and transfer of technology such as capacity building on the different forms of non-cage systems that are available for housing pigs, laying hens, rabbits and other farmed animals and on how to successfully operate such non-cage systems. Such support could well take place via the channel created for animal welfare cooperation in free trade agreements.



79 AB Report, *EC – Seal Products*, para. 5.279: the Appellate Body validated the Panel’s conclusion that the labelling system did not constitute a “reasonably available alternative” because it would face difficulties in addressing EU public moral concerns regarding seal welfare and “would not meaningfully contribute to addressing EU public moral concerns regarding seal welfare”.

80 AB Report, *US – Shrimp*, para. 181.

81 AB Report, *EC – Hormones*, para. 246.

82 *ibid.*

83 In this regard, in its resolution on the End the Cage Age ECI, the European Parliament has suggested that cage systems be phased out by 2027. A “reasonable” transition period would allow farmers to adapt while avoiding the creation of internal market distortions between competitors that would engage early in the transition and others who would wait and therefore benefit an undue advantage on the market due to lower prices.

## 4 ASSESSMENT OF THE MEASURE UNDER THE TBT AGREEMENT

To be found compliant with the TBT Agreement, the Measure should comply with Article 2.1 on lack of discrimination under a very similar test as the one applying under the GATT (4.1), and must also comply with both Article 2.2 and Article 2.4,<sup>84</sup> which respectively require that there be no unnecessary obstacle to trade (4.2) and that the measure be based on international standards unless such standards are ineffective for the fulfilment of the legitimate objectives pursued (4.3).

### 4.1 Discrimination under TBT Agreement, Article 2.1

Pursuant Article 2.1 of the TBT Agreement, a technical regulation must accord to imported products “*treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.*” In other words, similar products must receive identical treatment.

Although the ‘likeness’ tests are not exactly identical under GATT and TBT, the case law shows that the **standards contained in TBT Article are applied in a manner very similar to the analysis carried out under the GATT Article III:4**,<sup>85</sup> since both provisions share almost the same scope.

Therefore, the main arguments developed in Section 3.2 above regarding likeness in the framework of the GATT would also be relevant to the analysis under the TBT Agreement.<sup>86</sup>

In addition, in the context of the TBT Agreement, a measure which causes possible detrimental effects in the competitive relation between domestic and imported products may still meet the requirements of Article 2.1, if these effects are the result of a “**legitimate regulatory distinction**” rather than a discrimination against the group of imported products.<sup>87</sup> In other words, **de facto detrimental effects do not necessarily equate to a de facto discrimination**. For this, the measure must demonstrate “even-handedness” in its design, architecture, operation and application to the particular circumstances of the case.<sup>88</sup>

In this case, this means that the Measure and the distinctions it creates should be well “calibrated” to the risks for animals or for public morals, and not related to the origin of products.<sup>89</sup>

Here, it could be argued that the difference of treatment between caged and non-caged products is the result of a legitimate regulatory distinction, by analogy with the *Hormones* case, in which the Appellate Body implicitly validated the structural impartiality of similarly designed measures (under the SPS agreement)<sup>90</sup>. In that case it considered that the Panel’s finding that the measures made arbitrary and unjustifiable distinctions was not supported “*by the architecture [or] structure*” of the measure. A well-designed ban, depending on its real-life application, may thus lead to consider that its detrimental effects stem exclusively from such a legitimate regulatory distinction. The fact that imported products represent in some cases only a minimal market share may help in this assessment.



It could be argued that the difference of treatment between caged and non-caged products is the result of a legitimate regulatory distinction.

<sup>84</sup> Article 2.2 does not act as an exception like Article XX of the GATT.

<sup>85</sup> See, e.g., Appellate Body Report, *US – Clove Cigarettes*, WT/DS406/AB/R (24 April 2012), para. 100: the AB held that the interpretation of the concept of likeness set out in Article 2.1 TBT must be made in the context of the TBT Agreement and of Article III:4 of the GATT. Robert Howse, above n. 21, at 56.

<sup>86</sup> The four-criteria likeness test applies both to GATT and to TBT (AB Report, *US – Clove Cigarettes*, para. 145). However, likeness under TBT Article 2.1 could arguably be construed more narrowly than in the GATT, due to a difference in approaches: while the GATT has a “rule-exception dichotomy” with an “exclusive list of exceptions”, the TBT Article 2 works as one “compliance test”.

<sup>87</sup> AB Report, *US – Clove Cigarettes*, para. 175. For further on the legitimate regulatory distinction in the TBT Agreement, see Fonseca Duffo et al, *The Legitimate Regulatory Distinction in the TBT Agreement: Evolution, Criticism and Perspectives*, 12 Universidad Nacional de Colombia (2015) 187, 192.

<sup>88</sup> *ibid.* para 182. Appellate Body Report, *US – COOL*, para. 271.

<sup>89</sup> AB Report, *US – Tuna II (Mexico)* (Recourse to Article 21.5 of the DSU), WT/DS381/AB/RW/USA (14 December 2018), paras 6.12-6.14. The “calibration” lens is not a mandatory test, but rather a case-specific tool to assess even-handedness (para. 6.29).

<sup>90</sup> Appellate Body Report, *EC – Hormones*, WT/DS26/AB/R (13 February 1998), para. 246.



### 4.2 Necessity under TBT Agreement, Article 2.2

Article 2.2 of the TBT Agreement states:

“Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective.”

As regards the determination of **what constitutes a legitimate objective** under this provision, the Appellate Body found that objectives recognised in other WTO agreements are relevant considerations.<sup>91</sup>

In *US – Tuna II (Mexico)*, in considering TBT Article 2.2, the Panel said:

“The protection of dolphins may be understood as intended to protect animal life or health or the environment. In this respect, a measure that aims at the protection of animal life or health need not, in our view, be directed exclusively to endangered or depleted species or populations, to be legitimate. Article 2.2 refers to ‘animal life or health’ in general terms, and does not require that such protection be tied to a broader conservation objective. We therefore read these terms as allowing Members to pursue policies that aim at also protecting individual animals or species whose sustainability as a group is not threatened”.

Further, in *Seal products*, the Panel found both public morals and (less explicitly) animal welfare to be legitimate objectives under TBT Article 2.2.<sup>92</sup>

As for the **necessity test**, the Appellate Body has stated that the process of determining necessity in this case is similar to the weighing and balancing required to determine necessity in Article XX of the GATT (see above).<sup>93</sup>

Therefore, the Measure should be able to pass the test laid down by TBT Article 2.2 for the same reasons as those developed as regards GATT Article XX in Section 3.4 above.

### 4.3 Use of international standards under TBT Agreement, Article 2.4

Article 2.4 states that Members “*shall use*” relevant international standards “*as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued*”.

Thus, this provision explicitly allows countries to exceed international standards in certain circumstances, for example, when such standards do not enable a country to attain the level of protection that it considers to be appropriate.

In the case of the Measure, the EU could argue that existing OIE animal welfare standards, in case they are recognised as the *de facto* international standards, are to date ‘ineffective or inappropriate’ for the fulfilment of its animal welfare objectives.<sup>94</sup> As an illustration, the OIE standards do not include guidelines on hens, ducks, geese or rabbits, and the ones regarding pigs do not rule out the use of sow stalls; they simply state that pregnant sows “should preferably be housed in groups”.

This year, a large majority of EU Member States even opposed the adoption of the chapter on laying hens because they considered it set standards that were too low and did not go far enough compared to their ambitions.

Even though the TBT Agreement (as opposed to the SPS Agreement) does not require to undertake a risk analysis and does not refer to scientific considerations, scientific justification – such as the scientific studies mentioned above – would certainly strengthen the demonstration of the need for higher standards.

Thus, here again, the Measure should pass the test set out by Article 2.4 of the TBT Agreement.

<sup>91</sup> AB Report, *US – Tuna II (Mexico)*, para 313.

<sup>92</sup> Panel Report, *EC – Seal Products*, para. 7.409 (on animal welfare) and paras 7.415-7.421 (on public morals). This finding was not directly reversed by the Appellate Body but mooted, because the Appellate Body held that the TBT Agreement was not applicable (AB, *EC – Seal Products*, para 5.59).

<sup>93</sup> AB Report, *US – Tuna II (Mexico)*, para 320.

<sup>94</sup> Blattner, above n. 39, at 138. See e.g., Panel Report, *US-Tuna II (Mexico)*, para. 7.721-7.740

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