RAGING HORMONES: A DISCUSSION OF THE WORLD TRADE ORGANIZATION’S DECISION IN THE EUROPEAN UNION-UNITED STATES BEEF DISPUTE

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For over a decade, the United States and the European Union (EU) have been involved in an ongoing dispute over the importation of beef from the United States into the EU. Because of political pressures, the EU has banned the importation of beef from countries, such as the United States, that utilize certain hormones in the production of cattle. This ban conflicts with an international trade agreement to which the EU is a party. As will be shown, it appears that the EU must either act contrary to popular political pressures or face the consequences of violating a rule of international trade that its member states helped create.

The ban has provided an important test case for the World Trade Organization (WTO) as the final arbiter of food safety disagreements. More specifically, this is the first WTO case that has involved the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) and should help define what impact that agreement will have on future trade disputes.

I. HORMONES?

Health concerns and lean meat proponents notwithstanding, consumers demand fat beef.¹ This demand drives the American beef industry’s production system.

Beef with fat deposits within the muscle tissue (marbling) is more palatable to most people than lean beef without fat deposits.² Marbling is most easily produced by feeding grain to the growing/fattening animals.³ This fact, along with the expertise of American farmers at producing corn (the major

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² See generally Everett L. Martin, Measuring Beef Quality, in THE FEEDLOT 237-57 (G.B. Thompson & Clayton C. O'Mary eds., 1983) (explaining that one characteristic of high-grade beef is marbling, which is present when there are fatty deposits within the meat).

³ See generally David P. Hutchenson & G.B. Thompson, Cattle Feeding, in THE FEEDLOT, supra note 1, at 165-84 (explaining that grains are the primary source of energy for beef cattle and that energy is required for the production of fat, which leads to marbling).
component of cattle feed), led to the development of the modern cattle feeding industry and that industry's reliance on large feed lots.⁴

In stark contrast to the picturesque pastoral scenes often associated with cattle, not a blade of grass can be found in a modern feedlot. In these feedlots, which often have capacities exceeding 100,000 animals, cattle are fed a scientifically balanced ration that is carefully designed to provide the greatest gain at the least cost. Because of intense competition, feedlots operate on profit margins per animal that are often very thin or even negative.⁵ These thin profit margins ensure that only the most efficient feedlots survive.

The relentless demand for feeding efficiency spawned the practice of hormone supplementation. It was discovered that time released capsules of bovine growth hormones (implants) placed under the skin of growing/fattening beef cattle led to faster growth and less feed requirements per pound of beef produced.⁶ These hormones were determined by the United States Department of Agriculture to be a safe, cost effective way to increase feed efficiency and were approved for use on animals destined for human consumption.⁷

When feeders began using the hormone implants and realizing the benefits of their use, market forces dictated that other feeders also implant hormones to remain competitive. For this reason, the use of hormone implants in growing/fattening cattle is now an almost universal practice in American feedlots.⁸

Although the degree of marbling demanded by consumers is generally not obtainable without supplemental grain feeding, beef can be produced more cheaply by grazing than by the feeding of grain in feedlots.⁹ Therefore, in countries where consumers do not demand or cannot afford fat beef, cattle are generally not fattened on grain but are pastured until slaughter. Hormone implants are less economically advantageous to producers who produce

⁴ See generally Lennart A. Palme, Jr., Integrating in the Feeding Industry, in THE FEEDLOT, supra note 1, at 259, 259-63 (providing a brief history of integration and the rise of large-scale feeding lots).
⁵ See generally Edward Uvacek, Jr., Economics of Feedlots and Financing, in THE FEEDLOT, supra note 1, at 11-29 (explaining the economics of the feeding industry and how this relates to large feed lots).
⁶ Id.
⁷ Id.; see also William D. Price et al., The Feedlot and the Food and Drug Administration, in THE FEEDLOT, supra note 1, at 273-83 (outlining the Food and Drug Administration's regulation of animal drugs).
⁸ See generally Price et al., supra note 7 (noting that implants are widely used in feed lots).
⁹ See generally ALLAN NATION, PASTURE PROFITS WITH STOCKER CATTLE (1992) (comparing the economics of grazing and feeding cattle).
slaughter cattle completely on pasture without the use of grain. Thus, hormones are utilized much less frequently in those countries.

The existence of these two different finishing systems means that both beef produced with supplemental hormones and beef produced without supplemental hormones are available on the world market. In a true free trade regime, consumers would have the choice of buying beef produced with hormones, which is more palatable because of the marbling, or beef produced without hormones, which is cheaper because the cattle are not fed a concentrated grain ration. Consumers in the EU do not now have such an option because the EU has banned the importation and sale of beef for human consumption from hormone supplemented animals. A major trade dispute between the United States and the EU has resulted from this ban.

II. POSITIONS OF THE PARTIES

The basis of this dispute is a difference in opinion as to the relative importance of scientific standards of food production and consumer perceptions of food safety. The United States believes that scientific tests should determine safety, but the EU places more emphasis on consumer opinion.

The EU position is based on a popular distrust of meat produced with the use of supplemental hormones. This distrust arises from horror stories of health problems from such meat. For example, it has been reported that some Italian infants developed opposite sex characteristics after consuming baby food containing hormone contaminated beef products. Red meat consumption has dropped in European countries where illegal hormone use is present while it has risen in countries where meat has a “clean” image, indicating the prevalence of these consumer fears. The EU points to political pressure arising from these consumer perceptions to justify the ban, arguing that its sovereignty permits it to decide what is and is not healthy for its citizens.

The United States’ position is that the ban is nothing more than a trade barrier which “promotes misinformation” and needlessly scares European

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12 See Mueller, supra note 10, at 102.


14 See Mueller, supra note 10, at 102.
consumers. The United States points to numerous studies that have shown hormones to pose no health risk to consumers, including studies conducted by the EU itself, the World Health Organization, the United Nations Food and Agriculture Organization, and the Codex Alimentarius Commission. According to the United States, these hard scientific findings should determine whether food may be banned for health reasons; subjective consumer opinion should not be a factor.

III. ECONOMIC IMPACT

United States beef prices are lower than European beef prices. These comparatively lower prices probably result, in part, from a greater efficiency of the United States producers. Supplemental hormones contribute to this efficiency. Traditional EU protectionism and farm subsidies have likely contributed to the price differential as well. These protectionist policies are now out of favor and most subsidies are coming to an end. As the prevalence of subsidies decline, many European beef producers welcome the lessened United States competition that a beef ban provides. Other nations such as Argentina, where hormones do not play a very large role in beef production, also welcome the ban and the potential it offers to capitalize on sales lost by the United States.

In contrast, the ban has caused significant losses of revenue for American beef producers. Estimates of losses to United States exporters range from 100 to 500 million dollars annually. In an attempt to eliminate these losses, the United States has, from the very beginning, vigorously opposed the ban.

16 See Meng, supra note 11, at 829.
17 See id.
19 See Southey, supra note 13, at 2.
21 See id.
22 See id.
23 See Mueller, supra note 10, at 101.
IV. HISTORY OF THE DISPUTE

In early 1981, a majority of the European Parliament favored a ban on the administration of growth hormones to animals destined for slaughter and on the meat from animals to which such hormones were administered.\(^{24}\) However, some European Economic Community (EEC) members, such as Ireland and the United Kingdom, as well as third parties such as the United States and the pharmaceutical industry, opposed a ban.\(^{25}\) In July 1981, the Council of Ministers (Council) issued a directive prohibiting the use of two hormones generally presumed to be harmful to humans. However, the directive allowed individual state regulations regarding five other hormones to remain in effect until further research was conducted.\(^{26}\)

By 1984, this research concluded that natural hormones were safe if administered in proper dosages but was inconclusive as to the safety of synthetic hormones.\(^{27}\) Nevertheless, in December 1985, the Council passed a directive based on article 43 of the EEC Treaty that generally banned the use of hormones in slaughter animals.\(^{28}\) Article 5 of this directive prohibited the transportation of hormone treated animals between member states.\(^{29}\) Article 6 prohibited the importation of such animals from third-party states.\(^{30}\) To ensure compliance with article 6, meat could only be imported from states and from processing plants that were on lists approved by the EEC. Third party states were given until January 1, 1988, to meet the requisite conditions and be listed.\(^{31}\) The United States was not listed.

The European Court of Justice (ECJ) nullified the 1985 directive on procedural grounds after a complaint was filed by the United Kingdom.\(^{32}\) However, in March of 1988, in accordance with proper procedure, the Council readopted the directive in unaltered form with an effective date of January 1, 1989.\(^{33}\)

In 1987, in anticipation of the forthcoming ban and after bilateral negotiations had failed to resolve the issue, the United States requested that an

\(^{24}\) See Meng, supra note 11, at 820.
\(^{25}\) See id.
\(^{27}\) See Meng, supra note 11, at 820.
\(^{29}\) See id. art. 5.
\(^{30}\) See id. art. 6.
\(^{31}\) See id.
\(^{32}\) See Meng, supra note 11, at 823.
investigative committee and a panel of experts be created under the authority of the General Agreement on Tariffs and Trade (GATT) to assess the legality of the ban. 34 The EU insisted that it had a sovereign right to determine the extent of the health risk posed to its citizens by hormone use and resisted any investigation. 35

The United States responded to the hormone ban on January 1, 1989, with tariffs affecting $153.5 million in products from the EU. 36 These conditional tariffs were effective only if the EU ban affected beef imports from the United States. The United States justified its position by declaring the EU ban to be a disguised barrier to international trade that was actionable under section 301 of the Trade Act of 1974. 37 In its view, the retaliatory measures were justified because the hormone ban was illegal under international law and because of the EU’s refusal to compromise on the issue. 38

When the GATT Council convened in February of 1989, the United States wanted a technical experts group to look into the legitimacy of the hormone ban, while the EU wanted a dispute settlement panel to investigate the legality of the United States’ unilateral sanctions. 39 The EU continued to block the formation of a panel to investigate the legitimacy of the hormone ban. The United States considered it inappropriate to allow the formation of a panel to address American retaliation under section 301 when the EEC would not agree to the United States’ panel request. 40

For these reasons, the early GATT proceedings were unsuccessful in resolving the dispute. The standoff continued with little change until 1996, when the United States requested that the new WTO review the conflict. 41

35 See Meng, supra note 11, at 825.
36 See id.
39 See id. at 841- 42.
40 See id. at 843.
V. WHAT IS THE WORLD TRADE ORGANIZATION?

The original GATT, signed in 1947, was a provisional agreement designed to cover the period prior to the forthcoming Havana Charter. One of the primary purposes of GATT was the reduction of tariffs. It was tremendously successful in that purpose, achieving a reduction in tariffs from an average of forty percent in 1947 to 4.7 percent in 1994. GATT also provided that imports should enjoy the benefit of national treatment for internal tax and trade regulation purposes.

The Havana Charter was an agreement of much greater scope that provided for an elaborate dispute settlement procedure. However, because the United States never ratified the Havana Charter, it never became effective, and GATT remained in force. GATT was the forum for a number of multilevel rounds of tariff negotiations during the 1950s and 1960s.

The next important period for GATT, the Tokyo Round negotiations, took place from 1974 to 1979 with the reduction of non-tariff barriers to trade as the principal objective. These negotiations resulted in several specific agreements known as "codes." These codes interpreted, defined or completed the relevant provisions of the General Agreement, which was often drafted vaguely. They also introduced a major inconvenience: GATT was no longer uniform because each agreement was subject to its own dispute settlement procedure and participation in each agreement varied, with each code having different signatory states. This has been referred to as the balkanization of

43 See id.
45 See GATT, supra note 34, art. III.
50 See Demaret, supra note 42, at 127-28.
51 See id. at 128.
Also, the Tokyo Round was not able to remedy certain weaknesses of GATT such as the marginal application of GATT to agricultural products. During the 1980s, GATT was gradually confronted with the risk of losing the preeminent role that it played in the organization of world trade since 1947. This occurred because GATT did not adequately address such issues as the trade in services, intellectual property rights and agriculture. The limited scope of application of the General Agreement explains why the United States and the EU attempted to protect certain exports by adopting unilateral measures of retaliation for what they saw as unfair trade practices.

The growth of trading blocks such as the EEC and the North American Free Trade Agreement (NAFTA) free trade area was an indication that unless the GATT was revised, the organization of world trade would depend more and more on bilateral relations and relations based on the relative balance of power between a European block, a North American Block and a potential Asian block. Such a development was not as attractive as a multilateral system to most countries and to international businesses. The Uruguay Round of GATT, concluded in 1994, prevented this dependence on bilateral relations from developing and transformed GATT into the World Trade Organization.

The agreement that established the WTO was the high point of the Uruguay Round. Rather than include provisions of a detailed and substantial nature, the agreement established principles that are defined and explained in several annexes. The Understanding on Rules and Procedures Governing the Settlement of Disputes is found in these annexes; it established a binding dispute settlement procedure.

The agreements also applied the rules of GATT to agricultural products that previously were outside the scope of the rules. The negotiations concerning agricultural products attracted so much attention that the success of the Uruguay Round itself depended on an agricultural agreement. Despite vast

54 See Demaret, supra note 42, at 130.
55 See id. at 131.
56 See id. at 132-33.
57 See id. at 133.
58 See id.
59 See id.
60 See id. at 139.
61 See id.
differences between the American and the EU positions, an agreement was reached that addressed market access, price supports, and input subsidies.  

A state wishing to become a member of the WTO must agree to all of the multilateral agreements negotiated within the framework of the Uruguay Round. This all or nothing approach enabled the divergence of interests dividing certain countries to be overcome and ended GATT's balkanization. The establishment of a single dispute settlement procedure for the WTO added to this coherence.

The coherence, however, is not absolute. There are four “plurilateral” agreements annexed to the agreement setting up the WTO, one of which relates to the bovine meat sector. These agreements do not bind all members of the WTO, but only those who accept them. The new dispute settlement procedure will be applicable to relations between the parties who have accepted the plurilateral agreements.

The Uruguay Round has significantly increased the role given to the rule of law in the organization of world trade. The new provisions are more precise and more detailed than the GATT of 1947 and the Tokyo Round agreements. The importance of law in the organization of world trade is increasing simply because of the enlargement of the areas of trade covered by the WTO as opposed to the previous GATT. This expansion reduces the scope remaining for unilateral action by certain states. The agreement relating to the new dispute settlement procedure expressly provides that no member of the WTO may take justice into its own hands in the application of multilateral agreements. This should have the effect of limiting the use of section 301 of the

62 See Agreement on Agriculture, art. 4, in 28 Uruguay Round of Multilateral Trade Negotiations 21807 (1994).
63 See id.
64 Only the title and not the text of these agreements is reproduced in the document laying out the results of the Uruguay Round. See Agreement Establishing the Multilateral Trade Organization, Dec. 15, 1993, annex 4, 33 I.L.M. 13, 27.
65 See id.
67 See Demaret, supra note 42, at 136.
Trade Act by the United States\textsuperscript{68} and reducing the likelihood of unilateral action by the EU.\textsuperscript{69}

These limitations reflect a loss of sovereignty by the WTO member nations. However, such a loss is a necessary corollary to any nation's agreement to subject itself to the jurisdiction of an international body. A failure to recognize the loss as an inevitable circumstance at the time the treaty was ratified is no cause for complaint at the present time. Such an argument by either party in this dispute appears baseless on its face.

VI. SPS AGREEMENT

Sanitary and phytosanitary measures are covered by the SPS agreement, which deals particularly with agricultural products. The legitimacy of import restrictions based on sanitary considerations has been the subject of disputes between members of GATT.\textsuperscript{70} It is also the subject of the current beef dispute between the United States and the EU.

Under the SPS agreement, sanitary standards must be based on scientific principles and on international standards where such standards exist.\textsuperscript{71} Measures stricter than relevant international standards are allowed to the extent that they are justified on a scientific basis and result from an appropriate evaluation of the risks.\textsuperscript{72} Thus, states may set standards higher than those generally accepted internationally but may be required to provide scientific justification for the higher standards. The ambiguity in this provision may be explained by the fact that some signatories did not wish to be too tightly bound

\textsuperscript{68} The United States has often used section 301 of the Trade Act to fight acts, policies, or practices of countries that restrain trade. See Judith Bello, \textit{Section 301 of the United States Trade Laws: Champion of Market Liberalism}, in \textit{TRADE LAWS OF THE EUROPEAN COMMUNITY AND THE UNITED STATES IN A COMPARATIVE PERSPECTIVE} 109-31 (Paul Demaret et al. eds., 1992).


\textsuperscript{70} See Demaret, supra note 42, at 152.


\textsuperscript{72} See id.
by a requirement of scientific justification.⁷³ The EU has such sentiment in the instant case.

VII. CODEX

The standards set by the Codex Alimentarius Commission (Codex) are international standards as such standards are contemplated by the SPS agreement. Codex is an international organization that develops standards for safe food.⁷⁴ These standards guide the WTO in its decisions.⁷⁵ Codex has a three pronged purpose:

1) to facilitate international trade through the removal of non-tariff trade barriers caused by differing national food standards;
2) to protect the health of consumers and ensure fair practices in the food trade; and
3) to promote coordination of all food standards work undertaken by international governmental and nongovernmental organizations.⁷⁶

Codex standards gain their power from GATT⁷⁷ and have been adopted by the WTO.⁷⁸ Thus, Codex provides global standards for food safety, and its rules currently referee food safety related disputes.⁷⁹

A Codex committee deals with veterinary drugs in foods.⁸⁰ That committee is charged with the following in relation to the acceptability of hormones in food:

1) determine priorities for the consideration of residues of veterinary drugs (including hormones) in foods, establish a list of priority drugs in foods and establish a list for review;

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⁷³ See Demaret, supra note 42, at 152.
⁷⁵ See id.
⁷⁷ See id.
⁷⁸ See Leonard, supra note 74.
⁸⁰ See Malloy, supra note 76, at 338.
2) recommend maximum residue levels for the substances on these lists;
3) develop codes of practice as may be required; and
4) determine criteria of analytical methods used for the control of veterinary drugs.  

If Codex standards are to determine the outcome of the beef hormone dispute, the issue turns on whether Codex should consider only "hard sciences," such as chemistry and biology, or should also consider so-called "soft sciences," such as sociology and political science. Accepting soft sciences means considering consumer views and perceptions in establishing standards, while the hard science approach means focusing on laboratory data.  

Codex evaluates food based on three criteria: quality, safety, and efficacy. To consider consumer perception, as the EU desires in this case, would require the introduction of a fourth criterion that Codex has been unwilling to do. This criterion would require the direct involvement of citizens and interest groups in determining the level of risk that a society is willing to accept. It could include such considerations as public perceptions of food safety, economic impact, social effects, and ethics. Scientific merit and study would take second place to consumer demands and perceptions if this criterion were adopted. Therefore, the goal of reducing trade barriers would be subordinated to consumer concerns and ethical considerations.  

This approach may be popular with many, but others view it as a trade barrier in disguise. This latter perspective is supported by a "social needs test" considered by the European Parliament. The plan would allow the EU to consider any impact that a particular technology might have on employment and local industry. Such a plan would hardly leave any practical restraint on

81 See Leonard, supra note 74, at 4.
82 See id.
84 See id.
85 See id.
87 See Leonard, supra note 74, at 4.
88 See Malloy, supra note 76, at 341.
89 See generally Bailey, supra note 83, at 166 (arguing that American cattle producers lost over $100 million in beef export sales because of restrictions on stimulants in Europe).
90 Id. at 166.
barriers to trade. It seems that every country could come up with some social reason to justify not accepting a particular food. For example, Muslims are concerned that the Codex does not provide grounds for objections based on religious beliefs.

At its July 1995 meeting, Codex rejected the soft science approach. It adopted a set of recommendations that mandated a hard scientific basis for standards in international trade. These recommendations were to make Codex the "source of scientific standards for international trade." At this same meeting, Codex also set standards for residues for five growth hormones. Beef produced with these supplemental hormones, such as that from the United States, was determined to be safe for human consumption as long as the residues were within the limits of the standards.

Predictably, the United States and the EU had opposite reactions to these Codex developments. The United States secretary of agriculture commented: "The commission's actions will benefit both consumers and producers around the world by establishing standards on food products that are based on sound science." In contrast, the EU secretary of agriculture expressed his displeasure by commenting on the commission's secret ballot procedure. The EU Secretary stated that "it was totally unacceptable that an international organization should make such an important and far reaching decision in secret, and this procedure totally contradicts the need to ensure greater transparency in the world of Codex."

VIII. STRUCTURE OF THE WTO

One purpose of the WTO is to provide a "common institutional framework for the conduct of trade relations among its Members." Like the proposed but ill-fated International Trade Organization that was to be established by the

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91 See id.
92 See id.
93 See Jon F. Schied, United States Wins Two of Three Codex Points, FEEDSTUFFS, July 17, 1995, at 4.
94 Id.
95 See id.
96 See Southey, supra note 13, at 2.
97 Schied, supra note 93, at 4.
98 Id.
Havana Charter, the WTO is a three-tiered organization comprised of the Ministerial Conference, the General Council, and certain other Councils.\textsuperscript{100} The Ministerial Conference is at the top of the WTO organizational chart. It consists of representatives of all of the WTO’s members. It has authority to make any decisions necessary to fulfill the functions of the WTO. The Ministerial Conference meets biannually and delegates authority to certain committees to carry out the functions of the WTO agreements.\textsuperscript{101}

The General Council is the executive branch of the WTO and is also composed of representatives of all members. It is responsible for the day to day functions of the WTO. It also performs the functions of the Ministerial Conference during the time that the latter is in recess. The various councils of the WTO are under the authority of the General Council and operate under its guidance.\textsuperscript{102}

The actual “work” of the WTO takes place in the various Councils that meet when necessary to carry out their individual functions. Council membership is open to representatives of all members. The Councils are granted authority to create subordinate organizations and to establish rules of procedure for themselves and their subordinates.\textsuperscript{103}

The Council responsible for the settlement of disputes between or among the members is the Dispute Settlement Body (DSB). The DSB is composed of all General Council members so a meeting of the DSB is essentially a special meeting of the General Council.\textsuperscript{104}

\textbf{IX. DISPUTE SETTLEMENT PROCESS}

The dispute settlement procedure consists of the following stages: consultation, panel investigation, report, appellate review, decision adoption, and implementation. A parallel procedure for binding arbitration is also available when all parties to a dispute agree to the procedure.\textsuperscript{105}

\textsuperscript{100} See id. at 362. 
\textsuperscript{101} See id. 
\textsuperscript{102} See id. 
\textsuperscript{103} See id. 
\textsuperscript{104} See id. 
\textsuperscript{105} See id. at 368.
A. Consultation

The consultation stage is the initial phase of the dispute resolution process. Consultation is not simply a formality but is intended to play an important role in the dispute settlement.\textsuperscript{106} Article 3 paragraph 7 of the Dispute Settlement Understanding (DSU) clearly provides that "[a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred" because the aim of the dispute settlement mechanism is to secure a positive solution to the dispute.\textsuperscript{107}

When the complaining party requests consultations, the other party has ten days to respond, and thereafter must enter into consultations within thirty days.\textsuperscript{108} If the other party does neither, the complaining party may go directly to the panel phase.\textsuperscript{109} If the parties do begin consultations but do not resolve the dispute within sixty days of the request, the complaining party may request that a panel be established.\textsuperscript{110} The thirty and sixty day time limits are decreased to ten and twenty days respectively in urgent cases.\textsuperscript{111} The time limits may also be modified by agreement of the parties.\textsuperscript{112}

During consultations, the members in dispute are charged to make an attempt to "obtain a satisfactory adjustment of the matter" in confidential negotiations that, in reference to any further proceedings beyond consultations, shall not prejudice the rights of either party.\textsuperscript{113} The DSU specifically provides that "[e]ach Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former."\textsuperscript{114}

If both parties voluntarily agree, good offices, conciliation, and mediation may be requested and may begin at any time, and the right to a subsequent panel phase is not prejudiced.\textsuperscript{115} Thus, there are four or five avenues by which

\textsuperscript{106} See id. at 381.
\textsuperscript{107} Marrakesh Agreement Establishing the World Trade Organization, annex 2, Apr. 15, 1994, 33 I.L.M. 1226, 1227 [hereinafter DSU].
\textsuperscript{108} See id. art. 4, para. 3.
\textsuperscript{109} See id.
\textsuperscript{110} See id. art. 4, para. 7.
\textsuperscript{111} See id.
\textsuperscript{112} See Dillon, supra note 99, at 381.
\textsuperscript{113} DSU, supra note 107, art. 4, paras. 5, 6.
\textsuperscript{114} Id. art. 4, para. 2.
\textsuperscript{115} See id. art. 5, paras. 1, 3.
a complaining party may reach the panel stage: consultation, good offices, conciliation, and mediation both during or after arbitration.\footnote{See Dillon, \textit{supra} note 99, at 382.}

In the United States - EU beef dispute, the consultation phase was not effective. Each party was convinced of the correctness of its position and was unwilling to compromise. Therefore, the dispute moved directly to the panel phase when the United States, on April 25, 1996, requested that a panel be established.\footnote{See WTO, \textit{supra} note 41.}

\subsection*{B. Panel Investigation}

The DSU provides that a panel "shall be established" following a written request by the complaining member containing the relevant issues and a brief summary of the legal basis of the complaint.\footnote{DSU, \textit{supra} note 107, art. 6, paras. 1, 2.} Thus, a panel will be convened in all cases unless the DSB, by consensus, decides not to form one.\footnote{See William E. Scanlan, Comment, \textit{A Test Case for the New World Trade Organization's Dispute Settlement Understanding: The Japan-United States Auto Parts Dispute}, 45 \textit{U. Kan. L. Rev.} 591, 600 (1997).}

Panels are composed of three or, if agreed to within ten days of panel establishment, five "well qualified governmental and/or non-governmental individuals."\footnote{DSU, \textit{supra} note 107, art. 8, para. 1.} Panel nominations are made by the Secretariat, and the parties may not oppose the nomination without "compelling reasons."\footnote{Id. art. 8, para. 6.} Impartiality is maintained by excluding the disputing parties from participating on the panel hearing their case.\footnote{See \textit{id.} art. 8, para. 3.} If the parties cannot agree to the composition of the panel within twenty days of the order that the panel be established, the WTO Director-General, in consultation with the Chairman of the DSB and the chairman of the relevant council, shall appoint a panel.\footnote{See \textit{id.} art. 8, para. 7.}

Panels conduct confidential deliberations,\footnote{See \textit{id.} art. 14, para. 1.} set deadlines,\footnote{See \textit{id.} art. 12, para. 5.} receive submissions and rebuttals,\footnote{See \textit{id.} art. 12, para. 6.} and consider oral arguments.\footnote{See \textit{id.} art. 15, para. 1.} Panels may request information from any appropriate body or source, including experts, and acquire confidential information from administrative bodies in the
Contracting Parties’ nation. The deliberations are conducted within a timetable set by the panel and are not to exceed six months, or three months in case of urgency. Exceptions can be made to these deadlines, but the DSU strongly disfavors proceedings that take longer than nine months.

Unless there is a contrary agreement by the parties, the panel will examine the matter referred to the DSB, in light of the relevant provisions in the agreements cited by the parties to the dispute and make such findings as will assist the DSB in making the recommendations or in giving rulings provided for in those agreements. Panels make the final determination as to the facts of a case. However, they do not have the last say on legal issues; that responsibility falls on the DSB itself.

A panel was established to look into the United States’ complaint. The dispute was investigated with the panel completing its duties and issuing a report.

C. Report

After discovery and deliberations are complete, the panel must submit a written report to the DSB containing its findings of fact and law, a description of the applicability of the relevant provisions, and the basic rationale behind its decision. Before the report is submitted, there is an interim review stage in which the panel presents its findings to the parties and receives written comments from them in return. The panel will then issue an interim report containing its findings and conclusions. The panel is not required to alter its findings in any way, but the parties may require, through a written request, that the panel address particular aspects of the interim report before it is made.

128 See id. art. 13, paras. 1, 2.
129 See id. art. 14, para. 1.
130 See id. art. 12, para. 8.
131 See id. art. 12, para 9.
132 See id. art. 7, para. 1.
133 See Dillon, supra note 99, at 383-84.
134 See DSU, supra note 107, art. 16, para. 4.
135 See WTO, supra note 41.
137 See DSU, supra note 107, art. 12, para. 7.
138 See id. art. 15, para. 1.
139 See id. art. 15, para. 2.
final. Once this is complete, the panel issues a final report and circulates it to the DSB members for consideration.

Members not a party to the dispute may submit objections to the report no later than ten days prior to the DSB meeting where the report will be considered. Twenty days after the issuance of the report, members may consider whether it should be adopted. Adoption of the final report is automatic unless a party to the dispute appeals or the DSB decides, by consensus, not to adopt it. The automatic adoption of panel reports is seen as preferable to adoption by majority vote because the latter would leave the dispute settlement process open to the sway of political influence.

The panel considering the United States - EU dispute issued a final report on June 30, 1997. This report, circulated to members on August 18, 1997, found that the ban was inconsistent with articles 3.1, 5.1, and 5.5 of the WTO’s SPS agreement, an agreement both the EU member States and the United States are parties to.

In adopting a position similar to that of the United States, the panel reached these specific conclusions:

(1) By maintaining sanitary measures that do not rest on a scientific "risk assessment," the EU has acted inconsistently with Article 5.1 of the SPS Agreement.

(2) When the EU adopted arbitrary or unjustifiable distinctions in the levels of sanitary protection it deemed suitable in different situations, it set up a discrimination or a disguised restriction on international trade. This action does not square with the demands of SPS Article 5.5.

(3) The EU acted at odds with the stipulations of SPS Article 3.1 when it set up sanitary measures that are not

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140 See id.
141 See id.
142 See id. art. 16, para. 2.
143 See id. art. 16, para. 1.
144 See id. art. 16, para. 4.
146 See Schmertz & Meier, supra note 136, at 87.
147 See WTO, supra note 41.
148 See Miquel Montana i Mora, supra note 136, at 87.
149 See id.
based on existing international standards and lack scientific justification under Article 3.3.\textsuperscript{150}

On September 24, 1997, the EU notified its intention to appeal certain issues of law and legal interpretations developed by the panel in its decision.\textsuperscript{151}

\textbf{D. Appellate Review}

In the WTO appeals system, an appealed panel report is referred to the "Appellate Standing Body."\textsuperscript{152} This body is composed of seven persons "of recognized authority, with demonstrated expertise in law, international trade, and the subject matter of the covered agreements."\textsuperscript{153} Three members of this body serve on any one case.\textsuperscript{154}

Unlike the procedure in the panel phase, parties have no active role in choosing Appellate Body Members. The three members of the Appellate Body that serve on each case are selected by a rotation schedule that is created by the body itself in consultation with the DSB Chairman and the Director-General.\textsuperscript{155} However, a party is free to time its appeal, within limits, to coincide with the present or the next rotation. This passive manipulation of the panel of appellate "Judges" should not cause great concern, especially in light of the procedure whereby the Appellate Body members sitting on any particular case are chosen by lot.\textsuperscript{156}

Appellate Body proceedings are confidential\textsuperscript{157} and the opinions submitted by the Body members are anonymous.\textsuperscript{158} Therefore, Appellate Body members should not easily be "branded" as possessing any particular bias.\textsuperscript{159} This also has a deterrent effect on passive manipulation.\textsuperscript{160}

A request for Appellate Body review is granted unless the DSB rejects it by consensus.\textsuperscript{161} Unlike most judicial systems, there is no minimum threshold established to discourage frivolous appeals, even for the clearest violations.

\textsuperscript{150} Id.
\textsuperscript{151} See WTO, supra note 41.
\textsuperscript{152} DSU, supra note 107, art. 17, para. 1.
\textsuperscript{153} Id. art. 17, para. 3.
\textsuperscript{154} See id. art. 17, para. 2.
\textsuperscript{155} See id. art. 17, paras. 1, 9.
\textsuperscript{156} See Dillon, supra note 99, at 386.
\textsuperscript{157} See DSU, supra note 107, art. 17, para. 10.
\textsuperscript{158} See id. art. 17, para. 11.
\textsuperscript{159} See Dillon, supra note 99, at 386.
\textsuperscript{160} See id.
\textsuperscript{161} See DSU, supra note 107, art. 17, para. 1.
Therefore, it seems likely that most cases will be appealed because an appeal gives the losing party one more chance to prevail.\(^{162}\)

Because the fact finding of the Panel is final, the Appellate Body is limited to determinations of questions of law and legal interpretation.\(^{163}\) This limitation adds weight to the view that the new dispute resolution system creates something of a judicial tribunal.\(^{164}\)

Parties to the dispute are required to make written submissions to the Appellate Body.\(^{165}\) No ex parte communications are allowed.\(^{166}\) The deliberations must be completed within sixty days or, if an exception is granted in a special case, ninety days from the date of the formal request of appeal.\(^{167}\) Like panel reports, appellate reports are adopted automatically unless rejected by consensus of the DSB within thirty days of their circulation to members.\(^{168}\)

On January 15, 1998, the Appellate Body confirmed the decision of the panel in the beef dispute.\(^{169}\) The Appellate Body held that the EU beef ban violated the SPS agreement because it was not based on a risk assessment that included an evaluation of the potential adverse impact of hormone residues on human health.\(^{170}\)

However, the Appellate Body also pointed out that WTO members have a right to levels of protection that are higher than prevailing international standards, such as the Codex, in matters relating to human health.\(^{171}\) But higher levels of protection are allowed only when there is appropriate scientific justification.\(^{172}\) The Appellate Body agreed with the panel’s conclusion that the EU had not shown sufficient scientific justification for its ban on the import of hormone treated beef. However, it reversed the panel finding by concluding that the right to go beyond international standards is an important and autonomous right of governments and not merely an exception

\(^{162}\) See Dillon, supra note 99, at 385.

\(^{163}\) See DSU, supra note 107, art. 17, para. 6.

\(^{164}\) See Dillon, supra note 99, at 385.

\(^{165}\) See DSU, supra note 107, art. 17, para. 4.

\(^{166}\) See id. art. 17, para. 1.

\(^{167}\) See id. art. 17, para. 5.

\(^{168}\) See id. art. 17, para. 14.

\(^{169}\) See Gary G. Yerkey & Peter Menyasz, United States Applauds WTO Ruling Upholding Earlier One Against EU Ban on Beef Imports, 15 INT’L LEGAL REP. 77, 77 (Jan. 21, 1998).


\(^{171}\) See id.

to the general SPS obligation to base measures on prevailing international norms.\textsuperscript{173} The Appellate Body declared: "We do not believe that a risk assessment has to come to a monolithic conclusion that coincides with the scientific conclusion or view implicit in the SPS measure."\textsuperscript{174}

The EU contended that declaration permits it to disregard Codex and other international standards and justify the ban by its own assessment of the risks.\textsuperscript{175} On January 16, 1998, the EU announced that it would perform a new scientific assessment and would not be importing hormone treated beef any time soon.\textsuperscript{176}

The United States interpreted the decision to mean a ban can be based on scientific views that do not represent the views of the majority of scientists but can only be imposed where the risk involved is life threatening and perceived to constitute a clear and imminent threat to public health and safety.\textsuperscript{177}

According to an American official, "The problem here is that there is no basis for being more stringent than the Codex standards."\textsuperscript{178}

Another key panel finding overturned by the Appellate Body concerned the scope of risk assessments used to justify controls on food imports for health and safety reasons. According to the panel, such an assessment should be limited to factors that can be subject to quantitative analysis by empirical or experimental laboratory methods commonly associated with the physical sciences. However, the Appellate Body concluded that risk assessments could cover not only factors ascertainable in a scientific laboratory operating under strictly controlled conditions, but also risks in human societies as they actually exist; in other words, the actual potential for adverse effects on human health in the real world where people live, work, and die.\textsuperscript{179}

The EU pointed to this language as justification for its claim that factors such as a potential for improper use of hormones by farmers are proper for consideration when making a risk assessment.\textsuperscript{180} The United States replied that less restrictive methods, such as better residue tests, could be used rather than an outright ban on hormones.\textsuperscript{181}

\textsuperscript{173} See id.
\textsuperscript{174} Id.
\textsuperscript{175} See Yerkey & Pruzin, supra note 170, at 77.
\textsuperscript{176} See Steven Cahn, Wide Interpretation Follows WTO Ruling on EU Ban on Hormone-Treated Beef, Vol. 39 No. 49 FOOD CHEMICAL NEWS, available in 1998 WL 10981738.
\textsuperscript{177} See Yerkey & Pruzin, supra note 170, at 76.
\textsuperscript{178} Id. at 77.
\textsuperscript{179} See id.
\textsuperscript{180} See id.
\textsuperscript{181} See id. at 76.
The Appellate Body ruled that the EU beef ban was illegal as it stood. However, its position as to the EU meeting the requirements of the SPS agreement with a future risk assessment was less clear. In answering one question, the Appellate Body created other questions to which it gave no clear answer.

E. Decision Adoption

Like panel decisions, Appellate Body decisions are automatically adopted unless rejected by consensus of the DSB. The ruling is circulated to the members and submitted to the DSB for action at its next meeting.

When the DSB convened at the February 13, 1998 meeting of the WTO, it adopted both the Panel Report and the Appellate Body Decision. Under WTO rules, the EU had thirty days from the adoption of these reports to disclose how it planned to implement the ruling.

After the decision was adopted, the United States wanted the EU to strictly comply with the Appellate Body ruling and lift the ban within a reasonable amount of time. The American trade representative wanted the ban "lifted quickly," and was not interested in receiving compensation or retaliatory tariff reductions on other products. He believed that a reasonable length of time could be up to fifteen months.

However, the EU saw the situation differently. On March 13, 1998, the EU announced that it would carry out new studies on the risks of hormone treated beef while maintaining its import ban. In a written statement, the EU responded that it would look into how to carry out its "international obligations," while conducting a new risk assessment. It claimed the ruling allowed it to keep the ban in place while it reassessed the risks of hormones.

The Office of the United States Trade Representative responded that the EU was misreading the WTO ruling by concluding that it could satisfy its

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182 See supra Part IX. D.
183 See Yerkey & Pruzin, supra note 170, at 76.
185 See id.
186 See Yerkey & Menyasz, supra note 169, at 77.
187 Id.
188 See id.
190 Yerkey & Pruzin, supra note 170, at 76.
191 See id.
obligations under the SPS agreement by conducting another risk assessment.\footnote{See id.} A representative from that office said that the use of the reasonable amount of time to conduct a new risk assessment without lifting the ban would be an inappropriate use of that time.\footnote{See id.} The representative pointed out that every risk assessment undertaken to date has shown that growth-promoting hormones in cattle pose no risk to human health.\footnote{See id.} This statement was made only one week after the release of a UN report that found no food safety or health concerns with hormone-treated beef.\footnote{See New UN Report Says Milk, Meat from Hormone-Treated Cows is Safe, ASSOCIATED PRESS, Mar. 5, 1998, available in 1998 WL 6643980.}

The spokesperson for the Canadian beef industry, which is also affected by the EU ban, was even more critical of the decision than the American spokesperson. The Canadian opinion was that the decision offered the EU a further opportunity to prove that a ban on hormone-treated beef is justified for health protective reasons.\footnote{See Yerkey & Menyasz, supra note 169, at 77.} The Canadians believed that the opinion gave the EU enough flexibility to ensure that Canadian beef would continue to be banned from the European market. The spokesperson commented that there was no "reason to think Europe [will] be any more amenable than they have been in the past."\footnote{Id.}

\section*{F. Arbitration}

If a member is found to be in violation of a WTO rule, the member is required to bring the measure into conformity with the relevant agreement within a reasonable amount of time proposed by the member in violation.\footnote{See DSU, supra note 107, art. 21, para. 3(a).} Where such a time period has not been approved by the DSB, a period of time is agreed to by the parties to the dispute. Where no agreement is reached within forty-five days of the adoption of the report or decision, the period of time will be determined by binding arbitration within ninety days of the adoption of the report.\footnote{See id: art. 21, para. 3(c).}

Not surprisingly, the United States and the EU could not agree on the amount of time required to implement the decision. The EU claimed that it needed up to four years to carry out a new scientific assessment, but the United
States wanted compliance within ten months. Therefore, the WTO appointed two arbitrators to decide the details of the implementation period. Before the decision was reached, one of the arbitrators stepped down because his position was considered by the WTO to be too close to the United States' position.

The remaining arbitrator announced his decision on May 29, 1998: the EU must comply with the Appellate Body decision by May 13, 1999. This date was fifteen months after the date of the Appellate Body decision. The arbitrator ruled that the EU could not wait to begin steps to change its legislation governing the ban until it had carried out a new scientific study. This seemed to indicate that the only way for the EU to comply with the ruling would be to lift the ban.

However, the EU responded that it would still carry out a scientific assessment of the risks of hormones; the results could be ready by the May 13 deadline, but there were no guarantees. By June 5, 1998, the EU had confirmed that fourteen scientists were working on new risk assessment analyses. Although some of these studies would not be completed before the deadline, the EU hoped to have a "clear view on the risk assessment" by the beginning of 1999.

G. Noncompliance

If the Member in violation fails to comply with the reasonable amount of time, the complaining party may call for negotiations for compensation; this payment is voluntary on the part of the Member in violation.

Where no compensation is agreed to within twenty days after the expiration of the reasonable amount of time, the complaining party may request that the
DSB authorize retaliation through suspension of the claimant's concessions or other obligations of the member in violation.\textsuperscript{210} At first retaliation is limited to the same sector and agreement. With respect to goods, "sector" is defined as "all goods."\textsuperscript{211}

If the complaining party believes such retaliation would be insufficient, it may retaliate across sectors and agreements.\textsuperscript{212} Cross retaliation is subject to a more stringent procedure. Where a respondent believes that the complainant seeking cross retaliation is in violation of article 22 of the DSU, the respondent may request arbitration to determine whether any retaliatory measures are appropriate.\textsuperscript{213}

Although the Republican-controlled United States Congress and the Clinton White House rarely agree, in October 1998, both agreed to retaliate against the EU if its beef import rules were not in compliance with the WTO ruling by May 13, 1999.\textsuperscript{214} More important, in January 1999, President Clinton revived the expired "Super 301," a controversial trade weapon that allows the United States Trade Representative to impose unilateral sanctions against other countries for unfair trade practices that affect United States exports.\textsuperscript{215}

Initially, retaliation would probably be limited to foodstuffs but could expand to encompass other areas of trade. The EU will probably exercise its right to arbitration to determine if any retaliatory measures are appropriate.

The wide range of possible retaliatory measures allowed by the DSU gives "teeth" to international trade disputes resolutions.\textsuperscript{216} The possibility of measures extending to a contracting party's activity in a nondisputed agreement means that contracting parties cannot choose which agreements to follow and which to violate.\textsuperscript{217} The DSU provides that the retaliatory measures must be "practicable or effective" in resolving disputes.\textsuperscript{218}

Thus, the notion that it may be more advantageous to receive a penalty than to comply with the decision should prove to be unfounded. According to the

\textsuperscript{210} See id. art. 22, para. 2.
\textsuperscript{211} Id. art. 22, para. 3(f)(i).
\textsuperscript{212} See id. art. 22, para. 3(b).
\textsuperscript{213} See id.
\textsuperscript{217} See id. at 194-95.
\textsuperscript{218} DSU, supra note 107, art. 22, para. 3.
new rules, "the penalty imposed for violating one agreement could be a suspension from another agreement, if such a suspension would be more effective."219 The heart of any dispute resolution mechanism is the deterrent value of its penalties. By having the Appellate Body determine whether penalties are practicable or effective, the DSU attempts to instill penalties that deter future violations.220

The EU neither lifted the ban by the May 13 deadline nor provided scientific evidence that the banned beef was hazardous.221 Consequently, the United States requested that the WTO impose sanctions on certain European agricultural products.222 On June 3, 1999, the WTO approved the request for sanctions and appointed an arbitration panel to determine the amount due.223 The panel approved 100% sanctions on 116.8 million dollars in damages for the United States.224

H. Compromise?

To say the least, this dispute has not been a model of effective negotiation and compromise. In October 1998, months after the decision of the arbitrator was announced, EU farm ministers expressed the opinion that it would be premature to prepare a response to the WTO before the results of the new risk assessments were in. At the same time, those ministers announced that the results would likely not be in by the May 13, 1999, deadline.225 By February 1999, it had become clear to the EU that it would not have firm evidence that beef produced with hormones represented a risk to human health by the May deadline.226

With the deadline drawing near and the United States preparing trade sanctions against the EU, the EU began to consider its options. It decided that the two best proposals were: 1) maintain the ban and pay compensation to the

219 Khansari, supra note 216, at 195.
220 See id.
222 See id.
United States and Canada; and 2) lift the ban on the condition that beef produced with hormones would be clearly labeled as such.\textsuperscript{227} With these options in mind, the EU adopted a plan to negotiate an interim solution with the United States. The interim plan is to end when the results of the risk assessments are available.\textsuperscript{228}

Although the EU’s willingness to negotiate indicated that it would not be fully complying with the WTO ruling, the United States saw it as a positive development.\textsuperscript{229} The United States stated that if the EU chose to make a proposal for compensation, the United States would follow the WTO rules.\textsuperscript{230} In reply to the labeling proposal, the United States offered to label all beef exported to the EU as American produced. The United States said it was prepared to affix labels such as “USDA Choice,” “USDA Prime,” and “USDA approved beef.”\textsuperscript{231} The United States proposal was not acceptable to the EU, which insisted that the beef be labeled as produced with hormones.\textsuperscript{232}

After the WTO approved trade sanctions against the EU on July 12, 1999, the United States expressed its continuing desire for a negotiated solution involving some form of labeling.\textsuperscript{233} However, the relatively low value of the approved sanctions may have reduced Europe’s incentive to deal.

X. IMPLICATIONS

To the extent that DSU decisions are expected to resolve disputes, a United States - EU compromise would be a success for the fledgling WTO. However, the credibility of the DSU may be weakened if the EU prevails in maintaining its ban after the ban is found to violate trade rules. This may or may not be a bad thing, depending on one’s view of the role that the WTO should play in this regard.

The strength of the SPS agreement is also in question. While this decision affirmed the position that sanitary measures must be based on scientific


\textsuperscript{228} See Elizabeth De Bony, EU Acts to Avert Trade War Over Beef Hormones, J. COM., Feb. 11, 1999, at Abstracts 1A.

\textsuperscript{229} See id.


\textsuperscript{231} United States Plan Fails to Ease Beef Dispute; Europeans Still Want American Meat Labeled as Hormone-Treated, BALT. SUN, Feb. 16, 1999, at 8C.

\textsuperscript{232} See id.

\textsuperscript{233} See id.; US Willing to Negotiate with EU in Beef Hormone Row, Despite WTO Ruling, AFX NEWS, July 12, 1999, available in 1999 WL 21851934.
standards, it clouded the water as to what constitutes a scientific standard. If member states are allowed to define "scientific" in each case, the SPS agreement will be a hollow gauge.

The EU interpretation of the decision could be used to justify more stringent food safety standards in other areas, so long as the measures were backed by something fitting the proponent's definition of science. Such standards could conceivably be used to restrict genetically modified foods or veterinary controls.\(^{234}\)

The WTO is likely to address the issue of whether to revise the SPS agreement in the new round of agriculture negotiations scheduled for 1999. The outcome of this dispute could be an important factor in whether or how the agreement is revised.\(^{235}\)

There is the distinct possibility that the ban will continue, even if it is not legally justified. In such a case, the United States can only resort to retaliatory sanctions. As this is written, sanctions appear imminent. This will not be a pleasant outcome for either side; both consumers and industries that use the sanctioned products will be affected. Generally, everyone loses when retaliatory measures are taken. That is why retaliation is, and is likely to remain, the exception rather than the rule.\(^{236}\) It is also a factor that may tend to weaken the force of DSU decisions to the extent that the prevailing party is reluctant to initiate sanctions.

The basic point is simple: both the EU and the United States are important customers of the other. Each can benefit only if both search for ways to accommodate their different interests. Regardless of the perceived role of the DSU, no dispute is likely to be settled unless the parties want it settled.

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\(^{234}\) See Pruzin, supra note 171, at 142.

\(^{235}\) See Bello, supra note 68.

\(^{236}\) See id.