

Why is the *Beef Hormones* Dispute Still Pending?

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I. Introduction

“The safety of meat has been at the forefront of societal concerns in recent years, and indications exist that challenges to meat safety will continue in the future,” notes John N. Sofos. Challenges to meat safety have ever-greater prominence for a variety of reasons. These reasons include greater global trade, evolving consumer preferences, more consumption of meat worldwide, the public’s increasing desire for products with minimal processing, and different methods of animal production—traditional production versus biotechnology—and the processing and distribution of meat products.¹ In recent years, there have been regular clashes between the European Communities (“EC”) and the United States (“US”) “over the social, ethical, and environmental implications of producing, using, and trading the products of modern science.”² The ongoing dispute over the use of growth hormones in beef between the EC and the US—the *Beef Hormones* dispute—is one such clash that this paper will examine.

In *Beef Hormones*, the EC imposed an almost complete ban on beef treated with growth hormones in 1989. This measure resulted in the prohibition of the importation of most US beef since the use of growth hormones is allowed in the US and widely used by the American farmers. Consequently, the case was brought to the Dispute Settlement Body (“DSB”) of the World Trade Organization (“WTO”) twice. The DSB failed to resolve completely both of these disputes even today. The first dispute that the DSB had to resolve will be referred to as *EC-Hormones* in this paper. The second dispute brought to the DSB will be referred to as *Continued Suspension of Obligations in the EC – Hormones Dispute*. This dispute as a whole, first dispute and second dispute included, will be referred to as the *Beef Hormones* Dispute throughout this paper.

¹ John N. Sofos, *Challenges to meat safety in the 21st century*, 78 MEAT SCI. 3 (2008).

² Cinnamon Carlarne, *From the USA with Love: Sharing Home-Grown Hormones, GMOs, and Clones with a Reluctant Europe*, 37 ENVTL. L. (2007), 302.

This essay aims to identify the reasons why the *Beef Hormones* dispute is still pending. It should be noted that there is a similar case pending between the EC and Canada concerning the use of growth hormones in beef. Due to spatial limitations, this essay does not cover the Canadian case. Also, for the same reason, this essay will discuss briefly the two disputes between the EC and the US over hormone-treated beef.

This paper begins with a brief history of the *Beef Hormones* dispute (II). Then it identifies the underlying reasons that led to the dispute (III). In addition, it shows how the Agreement on Sanitary and Phytosanitary Measures (the “SPS Agreement”) of the WTO that aimed initially to resolve the dispute managed only to complicate the situation (IV). It also outlines the difficulties in interpreting the SPS Agreement that the Panel and Appellate Body of the DSB faced in the first dispute between the EC and the US over the use of growth hormones in beef (V). Furthermore, it discusses the issues in the second dispute between the US and the EC over the same topic and shows why this decision of the Panel did not result in a decisive outcome (VI). Finally, it concludes with a summary of findings, a brief overview of a potential remedy to this dispute, and covers an actual issue strongly related to the topic of this paper (VII).

II. Brief History of the *Beef Hormones* Dispute

A. The EC Ban and the US Response

The dispute between the US and the EC over the use of hormones in beef started in the 1980s when the EC adopted a series of Council Directives (Council Directives 81/602/EEC, 88/146/EEC, 88/299/EEC) in response to an extensive consumer’s lobby. These directives prohibited the use and importation of meat and meat products treated with six hormones for growth purposes. Three of them are “naturally occurring hormones: oestradiol-17 β , progesterone, and testosterone.”³ Three of them are

³ World Trade Organization, *EC Measures Concerning Meat and Meat Products (Hormones)*, Complaint by the United States, Report of the Panel, WT/DS26/R/USA (Aug. 18, 1997), para. II.8 [hereinafter World Trade Organization, *EC Measures Concerning Meat and*

“artificially produced hormones: trenbolone, zeranol, and melengestrol acetate (MGA).”⁴ It restrictively allowed the use of these hormones for “therapeutic or zootechnical purposes.”⁵

The ban became effective on January 1, 1989⁶ and led to an extreme reduction of the importation of US beef because a very large percentage of the US beef is treated with growth hormones. This caused the US to strongly oppose the ban. Once bilateral negotiations between the EC and the US failed to produce any results, the US levied unilateral tariffs on \$153.5 million in EC products on January 1, 1989,⁷ hoping that the EC would remove the ban. However, the EC refused to stop the ban and the US maintained its sanctions against the EC until a WTO Hormones Panel (“Panel”) was established in 1996.⁸ The Council Directive 96/22/EC, which replaced the former directives on July 1, 1997, reinforced the previous ban by imposing more stringent restrictions.⁹

B. The First Dispute: *EC-Hormones*

In 1997, the Panel found that the EC ban is “not based on existing international standards.”¹⁰ As a result, the Panel decided that the EC had to prove that it conducted scientific research before imposing the ban and that it had based its ban on a risk assessment. The Panel found that the EC ban on MGA “is not based on a risk assessment.”¹¹ The Panel added that the EC ban on the five other hormones is “arbitrary or unjustifiable”¹² and “result in discrimination or a disguised distinction on international trade.”¹³ Furthermore, the Panel decided that “...the precautionary principle has been

Meat Products (Hormones), Complaint by the United States, Report of the Panel]

⁴ *Id.*, at para. II.9.

⁵ *Id.* at paras. II.2, II.3, and II.4.

⁶ Heather Berit Freeman, Note, *Trade Epidemic: The Impact of the Mad Cow Crisis on EU-U.S. Relations*, 25 B.C. INT’L & COMP. L. REV. 343 (2002), 359.

⁷ George H. Rountree, Note, *Raging Hormones: A Discussion of the World Trade Organization’s Decision in the European Union-United States Beef Dispute*, 3 GA. J. INT’L & COMP. L. 607 (1999), 612-613.

⁸ C. O’Neal Taylor, *Impossible Cases: Lessons from the First Decade of WTO Dispute Settlement*, 28 U. PA. J. INT’L ECON. L. 309 (2007), 359.

⁹ World Trade Organization, *EC Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States, Report of the Panel*, *supra* note 3, at para. II.5.

¹⁰ *Id.* at para. 8.245.

¹¹ *Id.* at para. 8.258.

¹² *Id.* at para. 8.238.

¹³ *Id.* at para. 8.241.

incorporated and given a specific meaning in ... the SPS Agreement” and “can not override” other provisions of the same Agreement.¹⁴ The Panel concluded that the EC has acted inconsistently with the SPS Agreement of WTO. Finally, the Panel recommended that “the [DSB] requests the European Communities to bring its measures into conformity with its obligations under [the SPS Agreement]”.¹⁵

The EC appealed the Panel’s report. On January 16, 1998, the Appellate Body “uph[eld], modif[ied] and reverse[d]” the parts of the Panel’s report that the EC appealed.¹⁶ The Appellate Body agreed with the Panel that the EC ban was not based on a risk assessment. The Appellate Body also agreed with the Panel’s conclusions concerning the precautionary principle.¹⁷ However, the Appellate Body rejected the Panel’s findings that the EC ban was “arbitrary,” discriminatory, and protectionist.¹⁸ Consequently, the Appellate Body “*recommended* that the [WTO] Dispute Settlement Body request the European Communities to bring the SPS measures found in this Report and in the Panel Reports, as modified by this Report, to be inconsistent with the *SPS Agreement* into conformity with the obligations of the European Communities under that Agreement.”¹⁹ The DSB adopted the “Appellate Body Report and the Panel Reports, as modified by the Appellate Body Report” in *EC-Hormones* in 1998.²⁰ The EC informed the DSB that it intended to comply with the DSB decision. Both the US and the EC claimed victory.

C. Interpretations of the DSB Ruling and Issues of Compliance

The parties failed to agree on the same interpretation of the DSB ruling. The EC claimed that the ruling meant that it needed to conduct additional “scientific studies constituting a risk

¹⁴ *Id.* at para. 8.157.

¹⁵ *Id.* at para. 9.2.

¹⁶ World Trade Organization. *EC Measures Concerning Meat and Meat Products (Hormones): Report of the Appellate Body*, AB-1997-4, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998), para. 254 [hereinafter World Trade Organization, *EC Measures Concerning Meat and Meat Products (Hormones): Report of the Appellate Body*].

¹⁷ *Id.* at para. 125.

¹⁸ *Id.* at para. 244.

¹⁹ *Id.* at para. 255.

²⁰ EC Measures Concerning Meat and Meat Products (Hormones): Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Award of the Arbitrator, Julio Lacarte-Muró, WT/DS26/15, WT/DS48/13 (May 29, 1998), para. 1.

assessment...as a necessary first step to bringing the EC measures into conformity with the SPS Agreement.”²¹ The US argued that removing the ban was the only way for the EC to comply with the DSB ruling.²² The arbitrators in charge of resolving the problems of compliance adopted the US interpretation of the DSB decision.

The EC was given fifteen months to comply with this decision. However, the EC failed to bring its measures into compliance with the DSB’s recommendations during the delay. As a result, the arbitrators allowed the US the adoption of “tariff concessions...covering trade in a maximum amount of US \$116.8 million per year.”²³ Notwithstanding the tariffs, the adverse legal rulings, and repeated trade negotiations, the EC maintained its ban on U.S. hormone-treated beef.²⁴

In 2003, the EC implemented Directive 2003/74/EC²⁵ of the European Parliament, a measure that amended the previous Directive 96/22/EC and presumably took into account updated risk assessments.²⁶ This directive imposed a permanent ban on oestradiol-17 β and a provisional one on testosterone, progesterone, trenbolone acetate, zeranol and melengestrol acetate.²⁷

The EC notified the DSB that it considered its new directive to be in conformity with the DSB ruling. Subsequently, the EC asked the US to remove its sanctions but the US refused to do so, arguing that the EC’s new measure was not in compliance with the SPS Agreement.²⁸ The EC again

²¹ *Id.* at para. 32.

²² *Id.*

²³ World Trade Organization, *European Communities – Measures Concerning Meat and Meat Products (Hormones), Original Complaint by the United States, Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU, Decision by the Arbitrators*, WT/DS26/ARB (July 12, 1999), para. 84.

²⁴ Rosemary A. Ford, Andrew P. Vance Memorial Writing Competition Winner, *The Beef Hormone Dispute and Carousel Sanctions: A Roundabout Way of Forcing Compliance with World Trade Organization Decisions*, 27 BROOKLYN J. INT’L L. 543 (2002), 546.

²⁵ European Union, Directive 2003/74/EC of the European Parliament and of the Council of 22 September 2003 amending Council Directive 96/22/EC concerning the prohibition on the use in stockfarming of certain substances having a hormonal or thyrostatic action and of beta-agonists, OFF. J. EUR. UNION 17 (Oct. 14, 2003).

²⁶ World Trade Organization, *United States – Continued Suspension of Obligations in the EC–Hormones Dispute: Request for Consultations by the European Communities*, WT/DS320/1, G/L/713 (Nov. 10, 2004), 1-2.

²⁷ World Trade Organization, *United States – Continued Suspension of Obligations in the EC–Hormones Dispute: Report of the Panel*, WT/DS320/R (Mar. 31, 2008), para. 2.2 [hereinafter World Trade Organization, *United States – Continued Suspension of Obligations in the EC–Hormones Dispute*].

²⁸ *Id.* at paras. 2.5-2.6.

brought the dispute to the WTO Panel in 2004, alleging that the US violated its obligations under WTO rules by maintaining its countermeasures against the EC.²⁹

D. The Second Dispute: *Continued Suspension of Obligations in the EC – Hormones Dispute*

After several postponements, the Panel finally published its report concerning the EC allegations on March 31, 2008. The Panel decided that it needed to see if the EC's new directive is in compliance with the SPS agreement³⁰ in order to give recommendations concerning the claim of the EC. The Panel found that the EC ban was still not justified under the WTO rules but noted that its conclusions were not "actual findings" because this matter is not within its jurisdiction.³¹ The Panel added that it has only jurisdiction to decide if the US violated its obligations under the WTO rules. Consequently, the Panel "recommend[ed] that the Dispute Settlement Body request the United States to bring its measure into conformity with its obligations"³² under the WTO rules.

Although both sides claimed to have triumphed³³ upon the issuance of the Panel's report in *Continued Suspension of Obligations in the EC – Hormones Dispute*, neither side won a clear-cut victory³⁴ and the dispute continues to this day.

II. Underlying Reasons for the *Beef Hormones Dispute*

In order to explain why the *Beef Hormones* dispute remains unresolved even today, this paper first identifies the underlying reasons for the dispute. These reasons are cultural and economic and, additionally, involve differences in risk perception between the EC and the US.

²⁹ *Id.* at para. 3.1.

³⁰ *Id.* at para. 6.54.

³¹ *Id.*

³² *Id.* at para. 8.2.

³³ AFP, *WTO rules against US, Canada in beef row with EU*, TURKISHPRESS.COM, Mar. 28, 2008; The Associated Press, *Canada, U.S. win beef ruling: WTO to rule against European Union in long-running beef hormone dispute*, THESTAR.COM, Mar. 28, 2008; Edmund L. Andrews, *Europe Refuses to Drop Ban on Hormone-Fed U.S. Beef*, N.Y. TIMES, May 25, 2000; The Associated Press, *WTO backs US, Canada in beef dispute with EU, but both sides claim victory*, INT'L HERALD TRIB., Mar. 31, 2008.

³⁴ AFP, *WTO rejects EU beef hormone ban but also raps US, Canada*, YAHOO! NEWS, Mar. 31, 2008.

A. Cultural Reasons

1. Different Approaches to Food

There is a difference of food culture and habits between the Europeans and the Americans. “[F]ood is “high culture, if not religion” in Europe,”³⁵ observes Ruby R. Fernandez. “Europeans tend to be more attached to national culinary traditions and are more likely to expect food products to be fresh and natural compared to their American counterparts.”³⁶ On the other hand, a substantial number of Americans do not know that many of their culinary options contain growth hormones or other additives; nor do they necessarily focus on whether this is a positive or negative development, notes Cinnamon Carlarne.³⁷ It should be noted here that while “traditional food practices” such as “raw milk cheeses and traditional cured meats” are considered safe in Europe, the United States discourages the consumption of such foods on the grounds that they are unsafe.³⁸ Consequently, the consumer’s perception of food safety is relative and differs from one country to another.

2. Different Experiences with Food

In addition, Europeans and Americans have had different experiences with food that led them to trust or mistrust their respective governments. Indeed, in Europe, the occurrence of a number of food scandals appears to have led many Europeans to mistrust the EC agencies responsible for regulations and public health.³⁹

In 1980, hormone-treated beef became a subject of concern among Europeans because there were news stories concerning some unpleasant and unexpected side effects that resulted from the

³⁵ Fernandez, Note and Comment, *Monsanto and the Requirement for Real Risks in GM Food Regulation*, 28 LOY. L.A. INT’L & COMP. L. REV. 335 (2006), 343.

³⁶ *Id.*

³⁷ Carlarne, *supra* note 2, at 319.

³⁸ Marsha A. Echols, *Food Safety Regulation in the European Union and the United States: Different Cultures, Different Laws*, 4 COLUM. J. EUR. L. 525 (1998), 528.

³⁹ Fernandez, *supra* note 35, at 344.

hormones. “In Italy babies exhibited early sexual development after being fed baby food containing veal that had received large doses of the hormone stilbenes,” writes Christina L. Davis.⁴⁰ In 1996, controversy again centered on beef in the European market as a result of the publicity surrounding the occurrence of what is popularly known as “mad cow disease” (bovine spongiform encephalopathy - BSE).⁴¹ Mad cow disease has a human counterpart: Creutzfeldt-Jacob disease, or CJD.⁴²

During this period, authorities from the EU and various Member States made claims—which eventually turned out to be false and unwarranted—that bovine spongiform encephalopathy could not be transmitted from animals to human beings.⁴³ European consumers, therefore, had relatively little trust in the ability of government officials and consumer-protection experts to ensure that they would have a safe food supply.⁴⁴ In contrast, Americans seem to trust their government concerning food safety.

3. Various Pressures and Media Coverage

The fact that the EC consumers are more attached to their “national culinary traditions” and they mistrust the “EU regulatory and public health agencies” after the food scandals that happened in Europe “contributed to the consumer perception that the risk to public health will greatly increase if hormones and other new food innovations”—cloned food and GM foods, among them—enter the culinary marketplace.⁴⁵ The European consumers believed that beef treated with hormones constituted “a public health threat” and asked for the adoption of a ban on the use of growth hormones in beef.⁴⁶ In addition, consumers’ groups strongly encouraged the European consumers to “boycott” beef.⁴⁷ The

⁴⁰ CHRISTINA L. DAVIS, *FOOD FIGHTS OVER FREE TRADE: HOW INTERNATIONAL INSTITUTIONS PROMOTE AGRICULTURAL TRADE LIBERALIZATION* (2003), 322-323.

⁴¹ Fernandez, *supra* note 35, at 344.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ DAVIS, *supra* note 40, at 322-323.

⁴⁷ World Trade Organization, *EC Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States, Report of the Panel*, *supra* note 3, at para. II.26.

European media covered the debate over the use of hormones in food while “...food safety disputes between the United States and the EU have largely escaped the notice of the general American public.” “In the U.S., by contrast, change and experimentation--particularly with respect to new technology--are highly valued,” notes Marsha A. Echols.⁴⁸

B. Economic Reasons

The differing market conditions and the consumers’ needs and preferences have led American beef producers to adopt ways of producing beef that are contrary to those used by European farmers.

1. The US Beef Market

In the United States, farmers have been allowed to use synthetic and endogenous bovine growth hormones since the 1950s, when the U.S. Department of Agriculture and the U.S. Food and Drug Administration approved this technology.⁴⁹ U.S. policymakers saw the bovine growth hormones as safe and cost-effective. Livestock producers employ growth hormones in beef because this method is allowed by the US Administration, it seems to be accepted by a large number of US consumers, and it has financial incentives. In the United States, ninety percent of beef cattle are treated with synthetic growth hormones.⁵⁰

Christina L. Davis summarizes the rationale for doing this in her statement: “A cow treated with hormones will reach market weight faster and consume less feed.”⁵¹ “The cattle receive the hormones in the form of implants the size of pencil erasers behind their ears,” notes Rosemary A. Ford.

⁴⁸ Echols, *supra* note 38, at 529.

⁴⁹ Ford, *supra* note 24, at 550.

⁵⁰ Isis Amelia Rose Sien, Note, *Beefing Up the Hormones Dispute: Problems in Compliance and Viable Compromise Alternatives*, 95 GEO. L.J. 565 (2007), 567.

⁵¹ DAVIS, *supra* note 40, at 322.

“They are then able to convert the grain, usually corn, with greater rapidity into the succulent, high grade ‘marbled’ meat that U.S. consumers enjoy.”⁵²

2. The EC Beef Market

In Europe, by contrast, there is a “surplus production” of beef⁵³, the law prohibits the use of growth hormones in beef, and the consumers largely reject the use of this method. As a result, European farmers tended to adopt the traditional method of growing beef.

When the consumers supported the ban of beef treated with growth hormones and the EC approved this prohibition, European farmers did not oppose the ban. According to Christina L. Davis, European farmers had few concerns about competitiveness due to the EC’s export subsidies.⁵⁴

3. The EC Ban: Protection or Protectionism?

The EC’s ban on hormones had an immediate effect: “U.S. beef and veal exports to the EU dropped about 93 percent in 1 year, from about \$117 million in 1988 to about \$9 million in 1989.”⁵⁵

American beef producers viewed the ban as discriminatory and protectionist because they had to change their way of producing beef in order to be able to export their meat to Europe while European producers were already producing beef free from hormones.⁵⁶ Interest groups representing farmers lobbied the U.S. government on this issue in order to stop the losses they were incurring. Specifically, these groups wanted the US government to bring the case to the WTO and advocate that the ban on hormone-treated beef be found as illegal⁵⁷ since they believe that it is discriminatory and

⁵² Ford, *supra* note 24, at 550.

⁵³ DAVIS, *supra* note 40, at 324.

⁵⁴ *Id.*

⁵⁵ Sien, *supra* note 50, at 567 - 568.

⁵⁶ Sien, *supra* note 50, at 567.

⁵⁷ Geoffrey Lean, *The Hormone Scandal: Will Britons be forced to eat hormone injected beef?*, (LONDON, U.K.) DAILY MAIL, July 4, 2006.

protectionist. They also pressured the US to ask the WTO to apply some coercive sanctions on the EC if it insisted on keeping the ban in place.⁵⁸ Consequently, the US imposed tariffs on EC-imported products. However, the EC maintained its ban on beef treated with hormones. Therefore, the US brought the case to the WTO in 1996.

The fact that the EC maintained its ban despite the sanctions imposed by the US suggests that the EC ban was motivated by something that went far beyond protectionist and discriminatory reasons (e.g., the EC consumers' fears and the political pressures imposed on the EC).

C. Differences in Risk Perception

The *Beef Hormones* dispute has occurred, in large part, because the US and the EC have differing risk perceptions of health risks.⁵⁹ As Diahanna L. Post notes, both the EC and the US use the precautionary principle and risk assessment “but in different ways and to differing degrees.”⁶⁰ The EC tends to adopt the precautionary principle while the US is more likely to adopt the risk assessment approach when deciding matters of food safety. A discussion of the EC and the US perceptions of risk will be developed below.

1. Risk Perception in the EC

a) The Precautionary Principle

The EC decided to adopt “a “better safe than sorry” or precautionary approach” in dealing with the increase of risks to health and the environment.⁶¹ This approach was referred to as the precautionary principle.⁶² This principle is a “...controversial doctrine [that] is still evolving.”⁶³ In order to have a better understanding of the differences in risk perception between the US and the EC

⁵⁸ *Id.*

⁵⁹ Taylor, *supra* note 8, at 356.

⁶⁰ Diahanna L. Post, *The Precautionary Principle and Risk Assessment in International Food Safety: How the World Trade Organization Influences Standards*, 26 RISK ANAL. 1259 (2006), 1260.

⁶¹ Lawrence A. Kogan, *The Precautionary Principle and WTO Law: Divergent Views Toward the Role of Science in Assessing and Managing Risk*, 5 SETON HALL J. DIPLOM. INT'L RELAT. 77 (2004), 78.

⁶² *Id.*

⁶³ Ford, *supra* note 24, at 553 – 554.

that led to the EC ban,⁶⁴ this paper will explain the reasons behind the creation of the precautionary principle in the EC, the development of this principle, its meaning and the critiques addressed to it.

The need for the precautionary principle became evident during the late 1970s and 1980s.⁶⁵ The history of the precautionary principle as an organizing rule can be traced to Germany, where the theory of *Vorsorge* (foresight) has strongly influenced German environmental law since the early 1970s.⁶⁶ At that time, “environmental impact assessment” demonstrated that the changing environmental conditions could not always be immediately understood by strictly scientific measures.⁶⁷ Consequently, environmental activists advocated on behalf of adopting precautionary measures as a means of forestalling potential threats to the environment and public health that might take decades to be fully confirmed using conventional scientific indicators.⁶⁸

The precautionary principle’s relevance and applicability now transcend environmental matters and extend to a wide range of different policy matters. The precautionary principle was incorporated in many national and international agreements and conventions such as the Maastricht Treaty on the European Union (1992), the Rio Declaration on Environment (1992), and the Cartagena Protocol on Biosafety (2000).⁶⁹

However, the precautionary principle does not have one unique definition.⁷⁰ “The idea at the heart of the precautionary principle is that where human activities may have damaging effects, decision makers should not wait for full scientific proof before taking appropriate protective measures,” notes Halina Ward.⁷¹ There are complex social, cultural, political, and economic calculations that enter into

⁶⁴ Konrad von Moltke, *The Dilemma of the Precautionary Principle in International Trade*, 3 BRIDGES MONTHLY REV. (1999).

⁶⁵ TIM O’RIORDAN, JAMES CAMERON, AND ANDREW JORDAN, eds. REINTERPRETING THE PRECAUTIONARY PRINCIPLE (2001), 9.

⁶⁶ Joel A. Tickner, Carolyn Raffensperger, and Nancy Myers et al. *The Precautionary Principle in Action: A Handbook* (1999), 2.

⁶⁷ O’RIORDAN, CAMERON, AND JORDAN, *supra* note 65, at 9.

⁶⁸ *Id.*

⁶⁹ World Commission on the Ethics of Scientific Knowledge and Technology (COMEST), *The Precautionary Principle* (2005), 2.

⁷⁰ *Id.* at 12; Nancy Myers, *The Precautionary Principle Puts Values First*, 22 BULL. SCI. TECH. & SOC’Y 210 (2002), 211.

⁷¹ Halina Ward, Seminar Note, *Science and Precaution in the Trading System*, INT’L INST. FOR SUSTAINABLE DEV. & ROYAL INST. INT’L AFF. (2000), 2.

the considerations of balancing choices and the competing considerations of risk and burden.⁷²

The precautionary principle was criticized for being “not based on sound science,” “irrational and emotional,” costly, and against new innovations.⁷³

b) The Precautionary Principle: A Means to Justify the Ban

The EC adopted this ban mainly because of a combination of the cultural factors of consumers’ fears and distrust of science and the government and the political factors created by the pressures of the EC Council and the European Parliament. The economic factor was definitely on the minds of the EC policymakers; however this factor was not the main factor that led to the imposition of the ban.

Frans Andriessen, who served as Agricultural Commissioner of the European Communities, noted: “Scientific advice is important, but it is not decisive. In public opinion, this is a very delicate issue that has to be dealt with in political terms.”⁷⁴ The obvious public-health concerns of European consumers led the EC policymakers to take action on the hormone issue.⁷⁵

C. O’Neal Taylor describes the political pressures that the EC faced before imposing its almost total ban as follows:

The EC Council was...charged with determining whether any hormones should be allowed. The Council authorized an EC Commission report on hormone effects and scientific development in order to fulfill its mandate. The report ultimately produced by the commission did not support a complete ban, leading the Commission to propose a ban on artificial hormones. There was immediate political opposition to this result from the EC Economic and Social Committee, the EC Council of Ministers, and the European Parliament. In response to this push for a stricter policy, the Commission cancelled further meetings of the scientific group that examined Commission reports. ... The adoption of the complete ban was widely perceived as the EC...responding to consumer preferences regarding hormones and the belief that the public did not trust the government or "science" to decide the issue.⁷⁶

⁷² *Id.*

⁷³ Joel A. Tickner, Carolyn Raffensperger, and Nancy Myers, et al. *The Precautionary Principle in Action: A Handbook* (1999), 15 -16.

⁷⁴ DAVIS, *supra* note 40, at 325.

⁷⁵ Taylor, *supra* note 8, at 356 – 357.

⁷⁶ *Id.*

In *EC-Hormones*, the EC argued that it had the right to choose “a risk level of no risk.” Then the EC claimed that the precautionary principle, which “could be considered as part of customary international law,”⁷⁷ allowed it to impose a ban on the use of growth hormones in cattle since this principle takes into consideration the European citizens’ fears that growth hormones can harm health.⁷⁸

2. Risk Perception in the US

a) The Place of the Precautionary Principle

U.S. laws and policies do not explicitly invoke the precautionary principle. At the same time, there are some American laws that are precautionary in “nature,” for example, the National Environment Act.⁷⁹ However, the Reagan administration’s deregulatory positions during the 1980s led to the marginalization of the precautionary principle in U.S. legislation relating to the environment and occupational safety and health.⁸⁰

Even though by signing and ratifying the Rio Declaration in 1992, the US officials accepted officially the precautionary principle as a possible approach to risk, they did not make real efforts to implement it.⁸¹ In practice, the US government tended to “actively” oppose the precautionary actions of other sovereign states.⁸² This is what happened in the *Beef Hormones* case. “This lobbying threatens to undermine use of the precautionary principle in other countries, which will ultimately affect the pressure that other countries can exert on the U.S. to invoke the principle,”⁸³ notes Joel A. Tickner.

⁷⁷ World Trade Organization, *EC Measures Concerning Meat and Meat Products (Hormones)*, Complaint by the United States, Report of the Panel, *supra* note 3, at para. 8.157.

⁷⁸ Kathleen A. Ambrose. *PART II: REVIEW OF KEY SUBSTANTIVE AGREEMENTS: Panel II D: Agreement on Technical Barriers to Trade (TBT) and Agreement on the Application of Sanitary and Phytosanitary Measures (SPS): Science and the WTO*, 31 LAW & POL’Y INT’L BUS. 861 (2000), 863.

⁷⁹ Tickner, Raffensperger, and Myers et al., *supra* note 66, at 2.

⁸⁰ O’RIORDAN, CAMERON, AND JORDAN, *supra* note 65, at 188.

⁸¹ Tickner, Raffensperger, and Myers et al., *supra* note 66, at 2-3.

⁸² *Id.*

⁸³ *Id.*

b) The Use of Risk Assessment

In *EC-Hormones*, the US took the position that the EC's ban on meat treated with growth hormones is a barrier to international trade because it unnecessarily frightens European consumers and encourages misinformation.⁸⁴ The US noted that the EC has done a number of studies that showed consumers face no risks to their health from hormones.⁸⁵ The US argued that the determination of meat safety should be assessed by science.⁸⁶ The opinion of European consumers should not be taken into consideration.⁸⁷

In order to understand the U.S. position, we need to understand the American approach to risk. Risk assessment is part of governance in the United States. This method is “particularly adapted to the disjointed character of U.S. government, which requires the constant construction of a formal record at one level or in one branch of government since any decision is liable to be reviewed at another level or in another branch that functions independently,”⁸⁸ according to Konrad von Moltke. “[T]he U.S. position favors a...‘rational’ analysis of decision sequences and judgments about who might gain or lose, their legal basis for protection or complaint, and the likely overall advantages of acting with care,” observe the authors of *Reinterpreting the Precautionary Principle*.⁸⁹

In the US, risk assessment and cost-benefit analysis came into their own in the 1970s, when such decision-making mechanisms “were developed to bridge the gap between uncertain science and the political need for decision-making to limit harm.”⁹⁰ This development meant that science was expected to create models that accurately forecast the likelihood of harm.⁹¹

Policymakers and others rely on risk assessment to provide concrete, quantifiable answers in

⁸⁴ Rountree, *supra* note 8, at 609 – 610.

⁸⁵ *Id.* at 610.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Von Moltke, *supra* note 64.

⁸⁹ O’RIORDAN, CAMERON, AND JORDAN, *supra* note 65, at 27.

⁹⁰ Tickner, Raffensperger, and Myers et al., *supra* note 66, at 13.

⁹¹ *Id.*

situations with much variability and great uncertainty.⁹² It is nearly impossible to do so with precision and foolproof judgments each time, however,⁹³ notes Joel A. Tickner. American businesspeople and governmental personnel typically consider risk assessment as the most scientific way to make decisions due to the concrete, quantifiable evidence that it offers them.⁹⁴ Critics of this approach, though, believe that it can be subjective, unscientific, and dependent on scientific and public-policy assumptions that attempt to predict unknown or unmeasurable dynamics.⁹⁵

By opposing the ban and imposing sanctions on the EC, the US sought to respond to the economic interests of its homegrown beef producers.⁹⁶ When the US strongly opposed the EC ban the US was accused—among other accusations—of wanting to impose the “unhealthy lifestyle and [the] American culture ... on the rest of the world”⁹⁷

This cultural and political dispute over the use of food innovations is having an adverse impact on the trade relationship between the United States and the European Union, two entities that “are highly integrated economically,”⁹⁸ creating “...volatile areas of modern United States-EU economic conflict.”⁹⁹ “This soon developed into one of the most serious trade disputes between the United States and the EC,” observes Christina L. Davis.¹⁰⁰

IV. The SPS Agreement: A Complicating Factor

A. The Need for the SPS Agreement

Initially, the US alleged that scientific evidence did not support the EC ban and requested the creation of a group of technical experts in accordance with the rules of the Technical Barriers to Trade

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 13 - 14.

⁹⁶ Taylor, *supra* note 8, at 357.

⁹⁷ Colin B. Picker, *Reputational Fallacies in International Law: A Comparative Review of United States and Canadian Trade Actions*, 30 BROOK. J. INT'L L. 67 (2004), 95.

⁹⁸ Krzysztof Kuik, *Recent Developments in EU/US Trade Relations*, 79 U. DET. MERCY L. REV. 433 (2002), 434.

⁹⁹ Carlarne, *supra* note 2, at 305.

¹⁰⁰ DAVIS, *supra* note 40, at 322.

Agreement (TBT Agreement) in 1987.¹⁰¹ The EC refused to form this group of technical experts and argued that “a production and process method” is not covered by the TBT Agreement.¹⁰² Consequently, there was no progress on ending the dispute over hormones in beef through the application of the TBT Agreement.¹⁰³

Among several main objectives, the Uruguay Round negotiations intended to include in the GATT rules an agreement concerning agricultural trade.¹⁰⁴ This resulting agreement was named the SPS Agreement. The negotiators of this Agreement took into consideration how the TBT Agreement failed to resolve the *Beef Hormones* dispute.¹⁰⁵

B. The Negotiation Process

During the negotiation of the SPS Agreement, the US focused on the idea that risk assessment should be the governing principle of the Agreement.¹⁰⁶ The US contended that “culturally based food safety measures” are inherently subjective measures that promote restrictive trade policies and, therefore, need to be counterbalanced by scientifically objective measures.¹⁰⁷ The US wanted to institute a two stage process that would significantly reduce the influence of the consumers on any trade measure. At the first stage, the safety of the food should be determined by risk assessment without any consumer interference.¹⁰⁸ At the second level and only after the safety of the food is determined, the consumers can play a role.¹⁰⁹

The EC did not block the creation of new international standards under the SPS Agreement,

¹⁰¹ Taylor, *supra* note 8, at 359.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ JOHN H. JACKSON, WILLIAM J. DAVEY, AND ALAN O. SYKES JR., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS* (4TH ED. 2002; REPRINT, 2003), 579.

¹⁰⁵ Dale E. McNiel, *The First Case Under the WTO's Sanitary and Phytosanitary Agreement: The European Union's Hormone Ban*, 39 VA. J. INT'L L. 89 (1999), 110.

¹⁰⁶ Echols, *supra* note 38, at 541.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

even though the EC knew that these new standards would obviously be required to be based on science.¹¹⁰ The EC stressed that nations should have the right to establish standards that exceeded those of the international community.¹¹¹ At the same time, the EC agreed that such standards should be based on scientific proof.¹¹²

The EC signed the SPS agreement without any major political objections from the European Council and Parliament.¹¹³ This is very surprising because the European Parliament was highly involved in the adoption of the EC directives imposing the hormone beef ban. The European Parliament was not involved in the negotiations of the SPS Agreement because this agreement fell outside its jurisdiction.¹¹⁴

From the circumstances under which the negotiations for the SPS Agreement were conducted, it can be concluded that the US played a major role in these negotiations. The US approach to risk prevailed in the SPS Agreement after considerable lobbying¹¹⁵ by the US. According to Konrad von Moltke, “the tradition of risk assessment, with its emphasis on a carefully constricted record, is more appropriate for international organizations.”¹¹⁶ In his opinion, the precautionary principle would be “particularly difficult to operationalize at the international level.”¹¹⁷ However, he notes that it is impossible to “transpose” this method “without adjustment from one jurisdiction to another.”¹¹⁸

The absence of any involvement of the European Parliament in these negotiations was an important gap in this Agreement given that it was partly intended to resolve cases such as *EC-Hormones*. The role of the European Parliament should not be underestimated in any upcoming trade

¹¹⁰ DAVIS, *supra* note 40, at 329.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Sien, *supra* note 50, at 568.

¹¹⁶ Von Moltke, *supra* note 64.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

matter related to health, even though the Parliament has a limited jurisdiction in the negotiations of trade agreements because it has “a veto role” “in a legalized dispute on the single issue.”¹¹⁹ It can still paralyze the effects of the SPS Agreement even though this agreement was adopted by the EC.

Soon after the SPS Agreement became effective in 1995, the US challenged the EC’s ban on beef treated with hormones and brought the dispute to the WTO Panel. “Thus, the United States arguably created the mechanism it then used to combat the EU prohibition on hormone-treated beef,”¹²⁰ writes Isis Amelia Rose Sien.

C. A Brief Overview

The SPS Agreement contains essential rules that ensure food safety and preserve the health of the human beings, animal and plants. Under this agreement, WTO members are strongly encouraged to follow international standards (Article 3.3 of the SPS Agreement). A WTO member is allowed to set standards that are higher than the international standards and adopt measures restrictive to trade if these measures are “necessary” (Articles 2.1 and 2.2 of the SPS Agreement), consistent with the provisions of the SPS Agreement, and justified by science (Article 3.3 of the SPS Agreement). These measures should not be “arbitrary,” discriminatory (Article 5.5 of the SPS Agreement), protectionist (Article 5.6 of the SPS Agreement) and should be based on a risk assessment (Article 5.1 of the SPS Agreement). If there is a lack of scientific proof to assess the risks, the WTO member is allowed to impose a provisional sanitary or phytosanitary measure, but it should conduct additional research “for more objective assessment of risk and review” of its measure “within a reasonable period of time” (Article 5.7 of the SPS Agreement). This article implicitly uses the precautionary principle.

The international standards, mentioned in the SPS Agreement, are determined by the Codex Alimentarius Commission (“Codex”) “an international body of which most WTO Members are

¹¹⁹ Davis, *supra* note 40, at 338.

¹²⁰ Sien, *supra* note 50, at 568.

members”; this includes the US and the EC.¹²¹ Codex adopts these standards “on the basis of the advice of the Codex Committee on Residues of Veterinary Drugs in Foods and the recommendations of the Joint FAO/WHO Expert Committee on Food Additives (“JECFA”).”¹²²

In July 1995, Codex adopted international standards for the growth hormones at issue in *EC-Hormones*, except for MGA.¹²³ Thirty-three persons voted in favor of these standards, twenty-nine persons voted against, and seven persons abstained. The EC noted in *EC-Hormones* that “a very close vote ... is unusual in Codex practice where proposals are normally adopted by consensus, indicating that the issue of hormone growth promoters has been and continues to be very controversial.”¹²⁴

V. The First Dispute: Difficulties in Interpreting the SPS Agreement

One of the major difficulties in *EC-Hormones* was that the Panel and the Appellate Body had to interpret the SPS Agreement which was a new agreement that contained “a new type of obligation – positive obligations that hold communities to standards.”¹²⁵ In *EC-Hormones*, the Panel and the Appellate Body often reached the same conclusion. However, the Appellate Body corrected the Panel’s interpretation of the SPS Agreement on several issues taking into consideration the “purpose and object” of the SPS Agreement as well as “its context, including the preamble.”¹²⁶ In most of the cases, the EC disagreed with the Panel and Appellate Body interpretations of the SPS Agreement. Both of the Panel and the Appellate Body found that EC ban was not in compliance with the SPS Agreement and tended to agree with the US position.

¹²¹ World Trade Organization, *EC Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States, Report of the Panel*, *supra* note 3, at para. 8.59.

¹²² *Id.*

¹²³ *Id.* at para.8.70.

¹²⁴ *Id.* at para. 8.67.

¹²⁵ Taylor, *supra* note 8, at 338-339.

¹²⁶ Robert Howse, *Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization*, 98 MICH. L. REV. 2329 (2000), 2339.

A. The Burden of Proof

Both the Panel¹²⁷ and the Appellate Body¹²⁸ consider that the determination of the burden of proof is of “particular importance.” Determining the burden of proof was a major issue in *EC-Hormones* because providing evidence that a food is safe or risky can be very hard.

In *EC-Hormones*, the EC alleged that the US has to prove that the use of growth hormones in beef “is safe and without risk.”¹²⁹ The Panel and the Appellate Body agreed that the complaining party, the US in this case, must initially prove that there is a violation of the SPS Agreement. Once this is proven, the defending party, the EC in this case, has to prove that this allegation is false.¹³⁰ However, the Panel found that if the member imposing the SPS measure adopted a standard higher than the international standard, then the burden of proof shifts to this member.¹³¹ The Appellate Body rejected this conclusion of the panel and corrected other findings made by the Panel concerning this issue.

The Appellate Body found that the US has proved that the EC violated its obligations under the SPS Agreement. Therefore, the EC had to prove that the use of hormones in beef is risky and that its ban is based on risk assessment. As we will see below, the EC had a hard time to prove that the use of growth hormones in beef is risky.

¹²⁷ World Trade Organization, *EC Measures Concerning Meat and Meat Products (Hormones)*, Complaint by the United States, Report of the Panel, *supra* note 3, at para. 8.48.

¹²⁸ World Trade Organization, *EC Measures Concerning Meat and Meat Products (Hormones): Report of the Appellate Body*, *supra* note 16, at para. 97.

¹²⁹ World Trade Organization, *EC Measures Concerning Meat and Meat Products (Hormones)*, Complaint by the United States, Report of the Panel, *supra* note 3, at para. 8.50.

¹³⁰ *Id.* at para. 8.51.

¹³¹ *Id.* at para. 8.54.

B. Standard of Review

In *EC-Hormones*, the Panel and the Appellate Body had to determine whether the EC based its ban on the international standards set by Codex for the growth hormones at issue. The Panel found that international standards adopted by Codex exist for the growth hormones at issue in this case except for MGA.¹³² Then the Panel decided that Article 3.1 of the SPS Agreement requires the EC to base its ban on these international standards. Furthermore, the Panel found that the EC ban was not “based on” these standards.¹³³ The Panel considered that “based on” means that the ban should “conform to” the international standard and “reflect the same level of sanitary protection as the [international] standard.”¹³⁴ The Appellate Body rejected the Panel’s interpretation of the expression “based on”. According to the Appellate Body, the expression “based on” means that the measure should be “supported” by international standards¹³⁵ but agreed with the Panel’s finding that the EC ban was not based on the international standards.

Since the EC ban was not based on international standards, the Panel concluded that it would verify if the EC ban is in compliance with Article 3.3 of the SPS Agreement.¹³⁶ This article requires the member who is adopting a standard that is higher than the international standard to prove that its standard is justified by science. Alternatively, this article requires the member to prove that its standard is in conformity with Article 5 of the SPS Agreement. The Panel found that a member can “... act in a precautionary manner in the absence of sufficient science but require[d] that Member to seek to obtain the science.”¹³⁷

¹³² World Trade Organization, *EC Measures Concerning Meat and Meat Products (Hormones)*, Complaint by the United States, Report of the Panel, *supra* note 3, at para. 8.70.

¹³³ *Id.*

¹³⁴ World Trade Organization, *EC Measures Concerning Meat and Meat Products (Hormones)*, Complaint by the United States, Report of the Panel, *supra* note 3, at para. 8.72-8.73.

¹³⁵ World Trade Organization, *EC Measures Concerning Meat and Meat Products (Hormones): Report of the Appellate Body*, *supra* note 16, at para. 163.

¹³⁶ World Trade Organization, *EC Measures Concerning Meat and Meat Products (Hormones)*, Complaint by the United States, Report of the Panel, *supra* note 3, at para. 8.78.

¹³⁷ Ambrose, *supra* note 78, at 863-864.

Both the Panel and the Appellate Body considered that Article 3.3 of the SPS Agreement—that allows a state member to adopt standards higher than the international standards—requires the EC to be in compliance with the requirements of Article 5.1 which requires the ban to be based on risk assessment.¹³⁸

C. Risk Assessment: Interpretations of Articles 5.1 and 5.2 of the SPS Agreement

In interpreting Article 5 of the SPS Agreement, the Panel referred to “two separate aspects of a Member’s decision to enact or maintain a sanitary measure.”¹³⁹ The Panel named these two aspects: “Risk Assessment” and “Risk Management.” According to the Panel, the EC should first make a risk assessment. This means that the EC should assess “the risks to human, animal or plant life or health against which a sanitary measure is intended to protect” and “*evaluate the potential or probability of occurrence of such effects.*”¹⁴⁰ The Panel decided that the EC ban should be “necessary” (Article 2.2 of the SPS Agreement), based on this assessment, and other factors included in Articles 5.1, 5.2, and 5.3 of the SPS Agreement.¹⁴¹ Then the EC should decide “the extent to which it can accept the potential adverse effects related to a specific substance which have been identified in the risk assessment”: this is the “risk management” aspect.¹⁴² The EC should take into consideration the “non-scientific factors” in this aspect. These factors, however, should not be taken into account in the risk assessment aspect.¹⁴³ The Panel found the EC did not base its ban on a risk assessment.

¹³⁸ World Trade Organization, *Appellate Body Report: EC Measures Concerning Meat and Meat Products (Hormones)*, WorldTradeLaw.net Dispute Settlement Commentary (DSC), WT/DS26,48/AB/R (2001), 4 [hereinafter World Trade Organization, *Appellate Body Report*], at 8.

¹³⁹ World Trade Organization, *EC Measures Concerning Meat and Meat Products (Hormones)*, *Complaint by the United States, Report of the Panel*, *supra* note 3, at para. 8.91.

¹⁴⁰ *Id.* at para. 8.98.

¹⁴¹ *Id.* at para. 8.93.

¹⁴² *Id.* at para. 8.95.

¹⁴³ *Id.* at para. 8.146.

The EC appealed the Panel’s conclusion. The Appellate Body rejected the Panel’s distinction between risk assessment and risk management,¹⁴⁴ noting that the latter has “no textual basis.”¹⁴⁵ Then, the Appellate Body agreed with the Panel’s interpretation of risk assessment but replaced the word “potential” with “possibility.”¹⁴⁶ In addition, the Appellate Body agreed with the Panel’s conclusion that the EC’s measure is not “based on” a risk assessment as described in Articles 5.1 and 5.2 of the SPS Agreement.¹⁴⁷ However, the Appellate Body noted that “[i]t is essential to bear in mind that the risk that is to be evaluated in a risk assessment under Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk 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 and work and die.”¹⁴⁸ Consequently, the Appellate Body seemed to have implied that “the WTO might consider cultural variables as well as scientific data.”¹⁴⁹

D. Protection or Protectionism?: The Answer of the Panel and the Appellate Body

In *EC-Hormones*, the Panel and the Appellate Body found that the EC ban is “unjustifiable” and “arbitrary” (Article 5.5 of the SPS Agreement). However, the Appellate Body refused to confirm the conclusion of the Panel that the EC measure leads to “discrimination or a disguised restriction on international trade.”¹⁵⁰ The Panel justified this conclusion by referring to six factors. Among these factors, the Panel mentioned “the objectives of the measure in reducing barriers to intra-community trade and providing “more favourable treatment” to domestic producers,” “the fact that before the ban took effect the percentage of hormone-treated beef was lower in the European Communities than

¹⁴⁴ World Trade Organization. *Appellate Body Report*, *supra* note 138, at 206.

¹⁴⁵ *Id.* at 8.

¹⁴⁶ *Id.* at 9.

¹⁴⁷ *Id.* at 10.

¹⁴⁸ World Trade Organization. *Appellate Body Report*, *supra* note 138, at 187.

¹⁴⁹ *Sien*, *supra* note 50, at 569.

¹⁵⁰ World Trade Organization. *Appellate Body Report*, *supra* note 138, at 9.

in...the United States,” and “that the hormones at issue are used in the bovine sector, where the European Communities wants to limit supplies....”¹⁵¹

The Appellate Body reviewed the factors that led the Panel to conclude that the EC ban was discriminatory and protectionist then rejected the Panel’s findings. It stressed that the Panel has documents proving that the consumers in Europe have genuine fears concerning the safety of the use of hormones in beef and referred to the EC need to harmonize its regulations in order to create “a common internal market for beef.” It also argued that the European farmers were also prohibited from using growth hormones in beef. The Appellate Body added that the Panel did not support its conclusion by the “architecture and structure” of the ban.¹⁵²

E. The Precautionary Principle: Interpretation of Article 5.7 of the SPS Agreement

In *EC-Hormones*, the EC claimed that it had the right to choose “a risk level of no risk”¹⁵³ or “a no residue level.”¹⁵⁴ The EC argued that its ban was based on the precautionary principle. The Panel said in *EC-Hormones* that the precautionary principle “could be considered as part of customary international law” but it “would not override the explicit wording of Articles 5.1 and 5.2” of the SPS Agreement.¹⁵⁵

The EC appealed the decision of the Panel claiming that the ban was “precautionary in nature.”¹⁵⁶ The EC alleged that the precautionary principle is “a general customary rule of international law or at least a general principle of law.”¹⁵⁷ The EC asked the Appellate Body to rule

¹⁵¹ *Id.* at para. 243.

¹⁵² *Id.*

¹⁵³ Ambrose, *supra* note 78, at 863.

¹⁵⁴ World Trade Organization. *EC Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States, Report of the Panel*, WT/DS26/R/USA (Aug. 18, 1997), para. 8.75-8.76

¹⁵⁵ World Trade Organization, *EC Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States, Report of the Panel*, *supra* note 3, at para. 8.157.

¹⁵⁶ World Trade Organization, *Appellate Body Report*, *supra* note 138, at 3.

¹⁵⁷ World Trade Organization, *EC Measures Concerning Meat and Meat Products (Hormones): Report of the Appellate Body*, *supra* note 16, at para. 16.

against the conclusion of the Panel.¹⁵⁸ The Appellate Body said that the place of the precautionary principle in international law is “less than clear”¹⁵⁹ but did not try to make any finding concerning this matter. The Appellate Body said that the precautionary principle is implicitly mentioned in Articles 3.3 and 5.7 of the SPS Agreement.¹⁶⁰ Then the Appellate Body upheld the decision of the Panel concerning this issue and considered that the EC measure is not in compliance with the SPS Agreement.

The Appellate Body, in *EC-Hormones*, corrected the Panel’s interpretations of the SPS Agreement. However, the Appellate Body did not give an answer to all the issues related to this case. The Appellate Body decision that the EC should bring its ban into compliance with the SPS Agreement was very vague because it did not explain what the EC should do in order to comply with its decision. Consequently, the EC and the US interpreted the Appellate Body decision in different ways. The EC and the US needed to have recourse to arbitration in order to resolve this issue. Moreover, the Panel that was later constituted to resolve the second dispute between the US and the EC had a hard time determining if the EC’s new directive was in compliance with the SPS Agreement.

VI. The Second Dispute: Difficulties in Interpreting the WTO Rules and the Lack of a Decisive Outcome

A. Reasons behind the Non-Compliance of the EC with the DSB Ruling

The EC did not initially comply with the DSB decision in *EC-Hormones* because it failed to agree with the US on one single interpretation of this ruling. The US, however, thought that the only way for the EC to comply with this decision would be to remove its ban. In response, the EC argued that the decision of the DSB meant it had to perform additional risk assessment in order to justify its ban. The fact that the DSB applied a new agreement, the SPS Agreement—and the fact that there was

¹⁵⁸ *Id.*

¹⁵⁹ World Trade Organization, *Appellate Body Report*, *supra* note 138, at 3.

¹⁶⁰ *Id.* at 4.

no precedent for this case under this Agreement—might have given the EC some hope that it could interpret the DSB decision in its own way or maybe even gain some time. When the arbitrators in charge of resolving this disagreement agreed with the US position, the US was allowed to adopt retaliatory measures against the EC.

The EC maintained its ban despite the US sanctions since the EC is economically capable of “affording the costs of non-compliance.”¹⁶¹ Kathleen A. Ambrose suggested that the WTO laws should include “monetary penalties,” in addition to the sanctions that a winning country is authorized by the DSB to impose on the losing country that refuses to comply with the DSB decision.¹⁶² The imposition of financial sanctions such as monetary penalties or monetary damages should be avoided because they might result in the infringement of the WTO member’s sovereignty. As a general rule, the WTO should always encourage the use of new mediations and agreements between the parties.

In addition, the EC did not remove its ban because this measure had “great symbolic importance in the culture of the country” and the EC has committed itself to this ban for an extensive period of time.¹⁶³ As a result the EC, which is a democratic¹⁶⁴ entity, could not simply rescind a measure strongly supported by the consumers’ lobbying as well as the EC Council and Parliament, even though the DSB required it to do that.

Implementing the DSB ruling would have required the EC to operate “a major regulatory or policy shift.”¹⁶⁵ The EC was not yet ready for this change and needed additional time to find a solution to this issue.¹⁶⁶

¹⁶¹ Taylor, *supra* note 8, at 334.

¹⁶² Ambrose, *supra* note 78, at 867.

¹⁶³ Taylor, *supra* note 8, at 337.

¹⁶⁴ *Id.* at 335.

¹⁶⁵ *Id.* at 335-336.

¹⁶⁶ *Id.* at 336.

B. The EC's New Approach to the Dispute

The EC obviously learned a great deal from the DSB ruling in *EC-Hormones* in 1998. Despite the arbitrators' ruling that it should remove its ban in order to comply with the DSB decision, the EC decided to proceed as previously planned and perform a new risk assessment in order to justify its ban. The EC conducted additional scientific studies starting in 1997.¹⁶⁷ In 2003, the EC adopted Directive 2003/74/EC. This directive maintained the ban previously imposed but apparently seemed to be in compliance with the provisions of the SPS Agreement.

The measure first imposed a permanent ban on Oestradiol-17 β and justified this ban by a risk assessment. The EC argued that the permanent ban of this hormone was warranted under Article 5.1 of the SPS Agreement. The EC also adopted a temporary ban on the five other hormones and justified this ban by the precautionary principle. While the EC had recourse to the precautionary principle as a "general principle or at least a principle of customary law" in the first case, the EC claimed that its measure was justified by the precautionary principle as defined in Article 5.7 of the SPS Agreement. Consequently, the EC informed the DSB that it had complied with its previous ruling. Furthermore, it asked the US to remove its sanctions since its measure was in compliance with the WTO rules. Nevertheless, the US maintained its retaliatory measures, arguing that the EC measure was still in violation of the WTO rules. The US also refused to bring the case to the DSB.

Here, the EC chose to "...tr[y] something novel in DSU [Dispute Settlement Understanding] history. The EC attempted to reopen the case to validate its chosen course of conduct."¹⁶⁸ It decided to have recourse to the DSU, which contains some provisions that ensure the compliance of the WTO

¹⁶⁷ World Trade Organization, *Panel Reports: Canada/United States - Continued Suspension of Obligations in the EC - Hormones Dispute*, WorldTradeLaw.net Dispute Settlement Commentary (DSC), WT/DS320/R, WT/DS321/R (2008), at 25 [hereinafter World Trade Organization, *Panel Reports: Canada/United States - Continued Suspension of Obligations in the EC - Hormones Dispute*].

¹⁶⁸ Taylor, *supra* note 8, at 341.

members with the DSB ruling.¹⁶⁹ However, the DSU does not list “the conditions for removing the suspension when the responding Member has taken such action to comply.”¹⁷⁰ It does not also specify “how to determine whether the implementing measure brings the Member into compliance, leading to the suspension being removed.”¹⁷¹ As a result, the Panel had a difficult time interpreting the DSU and the other WTO rules in *Continued Suspension of Obligations in EC-Hormones*.

Once a Panel was formed, the EC argued that the Panel should presume that its new measure complies with the SPS Agreement since this measure “has implemented the DSB recommendations and ruling” in a consistent manner.¹⁷² The EC mentioned Article 21.5 of the DSU to support its argument. It also claimed that Article 26 of the Vienna Convention on the Law of Treaties (1969) allows the same presumption of compliance and contains “a general principle of good faith.”¹⁷³ Therefore, the US, in questioning the EC allegations of compliance with the DSB decision, has the burden to prove that the EC did not comply with the DSB decision.¹⁷⁴

The Panel made a very interesting finding regarding this matter: “While the presumptions based on good faith enjoyed by each party may have played a role in the burden of proof in the early stage of the Panel proceedings, it is the opinion of the Panel that they eventually “neutralized” each other since each party also submitted evidence in support of its allegations. Ultimately, each party had to prove its specific allegations in response to the evidence submitted by the other party.”¹⁷⁵ The Panel seems to have avoided responding to the question of the burden of proof by saying that this issue mattered only at the beginning of the procedures of this dispute.

¹⁶⁹ *Id.* at 313.

¹⁷⁰ World Trade Organization, *Panel Reports: Canada/United States - Continued Suspension of Obligations in the EC - Hormones Dispute*, *supra* note 167, at 26.

¹⁷¹ *Id.*

¹⁷² World Trade Organization, *United States – Continued Suspension of Obligations in the EC–Hormones Dispute*, *supra* note 27, at para. 7.293.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at para. 7.294.

¹⁷⁵ *Id.* at para. 7.386.

C. Jurisdiction of the Panel

The EC tried to win the case on the procedural level and argued that “it did not believe that it was necessary for this Panel to look into th[e] scientific issues to make findings and rulings within its terms of reference.”¹⁷⁶ It added that the Panel “d[id] not have the expertise” to look over this matter.¹⁷⁷

However, the Panel considered that it “should address the compatibility of the EC implementing measure with the provisions of the *SPS Agreement* referred to by the parties to the extent necessary to determine, with respect to the EC claim” (...) “whether the EC “measure found to be inconsistent” in the *EC – Hormones* case has been removed.”¹⁷⁸

D. Interpretation of the SPS Agreement

In *Continued Suspensions of Obligations in EC-Hormones*, the Panel reached the same conclusions made by the Appellate Body and the Panel in *EC-Hormones*. The Panel found that the new EC directive was still not in compliance with the SPS Agreement.

The Panel had to interpret the SPS Agreement once again in order to “resolve” the dispute between the US and the EC over the use of hormones in beef. First, it found that the EC scientific studies did not constitute a risk assessment as defined by Annex 4 of the SPS Agreement.¹⁷⁹ The Panel concluded that the EC ban on oestradiol-17 β does not comply with Article 5.1 of the SPS Agreement.¹⁸⁰ However, the Panel noted that the EC can still “complete its risk assessments pursuant to Article 5.1 of the *SPS Agreement*.”¹⁸¹ The Panel, too, found that the EC did not present “a critical mass of new evidence and/or information that calls into question the fundamental precepts of previous knowledge and evidence so as to make relevant, previously sufficient evidence now insufficient.”¹⁸²

¹⁷⁶ *Id.* at para. 7.56.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at para. 7.375.

¹⁷⁹ *Id.* at para. 7.578.

¹⁸⁰ *Id.* at para. 7.579.

¹⁸¹ *Id.* at para. 7.837.

¹⁸² *Id.* at para. 7.834.

Also, the Panel found that the EC ban on the five other hormones does not fulfill all the conditions of Article 5.7 of the SPS Agreement.¹⁸³

The Panel postponed the publication of its report many times. This shows how complicated the matter is, and how ill-equipped the Panel is to resolve the issue.

E. The Potential Impact of the Panel Report

The Panel's report is not going to have any decisive impact on the EC ban. Indeed, even though the Panel found that the EC measure was not based on a risk assessment, it made it clear that its findings will not have any effect on the EC measure because it does not have any jurisdiction over the matter. However, the Panel's findings showed the EC that the scientific studies it conducted cannot be invoked to justify its ban and that it needed to perform a risk assessment as defined in the SPS Agreement in order to legitimize its ban.

The only finding that might have an impact is the Panel's finding that the United States has "acted inconsistently with its obligations" under the WTO procedural rules when it maintained its retaliatory measures against the EC and said that the United States is "presumed to have nullified or impaired benefits accruing to the European Communities" under the procedural rules of the WTO.¹⁸⁴ The Panel "recommend[ed] that the Dispute Settlement Body request the United States to bring its measure into conformity with its obligations under the DSU."¹⁸⁵ However, like in *EC-Hormones*, the Panel did not explain what the US should do in order to comply with the DSU provisions. As a result, the US and EC will probably argue again over the possible interpretations that could be given to the Panel's report. The US and the EC can still appeal the Panel's report. Consequently, the dispute over the use of hormones in beef remained unresolved.

The image of the WTO as the entity capable of resolving trade issues and enforcing its

¹⁸³ *Id.* at para. 7.835.

¹⁸⁴ *Id.* at para. 8.1.

¹⁸⁵ *Id.* at para. 8.2.

decisions is potentially damaged when cases such as the *Beef Hormones* dispute occur.¹⁸⁶ Christina L. Davis says that “[t]he evidence from this case provides a warning that WTO adjudication is likely to be ineffective against EU trade barriers, especially for nontrade topics with greater politicization.”¹⁸⁷ Konrad von Moltke believes that “[t]he WTO needs effective international organizations capable of assessing scientific evidence, understanding the different context of policy-making in different countries and able to assist in determining whether measures that have been adopted are reasonable.”¹⁸⁸

VII. Conclusion

This paper showed the reasons why the *Beef Hormones* dispute, which is an extremely controversial and “politicized dispute,”¹⁸⁹ is still pending. This dispute started because of consumers’ fears, political pressures, and differences in risk perception between the US and the EC. The SPS Agreement, which was created to resolve such disputes, mainly adopted the US approach to risk and consequently failed to bring a final solution to the dispute. In addition, the Panel and the Appellate Body in *EC-Hormones* faced difficulties interpreting this Agreement (which was new at that time). The Appellate Body did not explain how the EC should comply with its decision. The EC, which was bound by its decision to maintain the ban at the internal level and was economically powerful enough to afford the US sanctions, refused to comply with the DSB decision as interpreted by the arbitrators. However, the EC wanted its ban to be legitimized. After performing a risk assessment and consequently adopting a new directive that confirmed the ban, the EC claimed its new measure complied with the DSB ruling and asked the US to remove its retaliatory measures. It tried a new

¹⁸⁶ Carlarne, *supra* note 2, at 336.

¹⁸⁷ DAVIS, *supra* note 40, at 338.

¹⁸⁸ Von Moltke, *supra* note 64.

¹⁸⁹ Carlarne, *supra* note 2, at 333.

approach in order to win the second dispute over the use of growth hormones in beef, using a loophole in the DSU. Nonetheless, the decision of the Panel left no real winner or loser. Consequently, the case is still pending. This led C. Taylor O'Neal to nominate it to be included in the category of "impossible cases."¹⁹⁰

Resolving the *Beef Hormones* dispute is very important. Firstly, this fight is harming the respective reputations of the EC and the US, the world's biggest economies.¹⁹¹ Secondly, it is also harming the WTO's reputation and setting a "precedent for other regulatory battles to come."¹⁹² The dispute between the EC and the US over genetically modified food, for example, is another pending controversial and highly politicized dispute between the US and the EC. In essence, the *Beef Hormones* history seems to be repeating itself. Many controversial issues are yet to come between the EC and the US concerning various novel foods (e.g. cloned food) and will definitely create additional trade disputes between those two countries.¹⁹³

Mediations between the EC and the US seem to be the only way to put an end to the dispute over hormone-treated beef since an "adversarial approach"¹⁹⁴ failed to resolve the differences in risk perception between the US and the EC. The labeling solution seems to have high chances to put an end to this dispute.

Indeed, this solution responds to the European consumers' apprehensions and to the US farmers' needs to export beef without changing their production methods. Daniel Schramm argues that labeling is very important because it provides consumers with "the necessary information to make informed choices in the market that reflect their values and desires...."¹⁹⁵ Isis Amelia Rose Sien notes

¹⁹⁰ Taylor, *supra* note 8, at 331-332.

¹⁹¹ Kuik, *supra* note 98, at 434.

¹⁹² DAVIS, *supra* note 40, at 338.

¹⁹³ Carlarne, *supra* note 2, at 303.

¹⁹⁴ Ward, *supra* note 71, at 7.

¹⁹⁵ Daniel Schramm, Note, *The Race to Geneva: Resisting the Gravitational Pull of the WTO in the GMO Labeling Controversy*, 9 VT. J. ENVTL. L. 93 (2007), 127.

that this solution “could be justified under the... TBT Agreement.”¹⁹⁶ However, Kathleen A. Ambrose contends that this solution will be discriminatory: the European beef treated with hormones for therapeutic reasons will not be labeled and “other food products” might contain “residues” higher than the ones in beef.¹⁹⁷ In my opinion, the adoption of a thorough and impartial labeling approach for all products in the EC would solve this relatively small issue and resolve long-standing trade issues such as the *Beef Hormones* case. It should be noted that there are many other possible remedies to this dispute. Due to spatial limitations, though, this paper will not cover these remedies.

Moreover, the US and the EC need to work together in order to resolve another imminent and related issue: the “global food crisis.” Grain prices soared 42 percent globally in 2007, and there was an increase of almost 80 percent in world dairy costs.¹⁹⁸ “The recent rise in global food commodity prices is more than just a short-term blip,” notes Chatham House, a research organization in the United Kingdom.¹⁹⁹

This crisis is due to many interconnected reasons, including (but not limited to) such factors as “climate change,” “the chronically low productivity of farmers in the poorest countries,” the US and the EC financial support for biofuel production, the world’s growing population,²⁰⁰ and the need “for more land to produce.”²⁰¹ Consequently, the dramatic increase in food and energy expenses for consumers has the potential to diminish and even halt the rapid economic growth that has occurred in

¹⁹⁶ Sien, *supra* note 50, at 583.

¹⁹⁷ Ambrose, *supra* note 78, at 865.

¹⁹⁸ Russell Blinch and Brian Love. *World food prices soar as Asia consumes more*, INT’L HERALD TRIB., Mar. 31, 2008.

¹⁹⁹ *Id.*

²⁰⁰ Jeffrey D. Sachs, *How to End the Global Food Shortage*, TIME.COM, Apr. 24, 2008.

²⁰¹ Blinch and Love, *supra* note 198.

recent years in much of the developing world. Such events may contribute to political instability, too, in the poor countries that are the ones most impacted by this problem.²⁰²

The expanded production of novel foods (such as hormone-treated food and genetically modified food) is often cited as a solution for such problems, because it increases the amount of food produced, the speed by which it can be produced, and allows the use of less land.²⁰³ Accordingly, the advocates of such foods contend that they allow commodity producers to be more responsive to the needs of the world's growing population.²⁰⁴ In their article about global food costs, Russell Blinch and Brian Love note that countries such as Mexico have already removed their "ban on genetically modified crops to allow [their] farmers to compete with the United States, where high-yield, genetically modified corn is the norm." However, it is very unlikely that Europe will remove its bans on beef treated with hormones, genetically modified food and other novel food in the near future because the EC—being a union of wealthy countries—will be one of the last places to suffer from the food crisis, and the European consumers have shown many times that they are unwilling to accept novel foods unless a labeling approach is adopted. These issues create challenges for regulators, consumers, and policymakers. In conclusion, as Marsha A. Echols points out: "Regulators must balance the benefits of these changes in the globalizing food industry against consumers' concerns about the risks presented by new diseases and production processes, without creating disguised barriers to trade and investment."²⁰⁵

²⁰² Sachs, *supra* note 200.

²⁰³ Fernandez, *supra* note 35, at 336.

²⁰⁴ *Id.* at 336-337.

²⁰⁵ Echols, *supra* note 38, at 527-528.

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