

CASE STUDY ON WORLD TRADE ORGANIZATION DISPUTE
SETTLEMENT: EUROPEAN COMMUNITIES – MEASURES
AFFECTING MEAT AND MEATPRODUCTS (HORMONES),
COMPLAINT BY THE UNITED STATES

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Table of Contents

Executive Summary	ii
Introduction	1
Chapter I - The WTO: A Historical and Structural Overview	10
Description of the World Trade Organization	15
Theoretical Assumptions for WTO Study	17
Dispute Settlement Procedure	20
Chapter II - WTO Dispute Settlement Case: EC-Hormones	26
Summary of the Case History	28
Case Time Table	31
Summary of Case Facts	32
Appeal Arguments of the Participants	38
Chapter III - The Effects of UEU Actions in the WTO Dispute Settlement Case: EC - Hormones	45
Cost of <i>EC-Hormones</i> Case	47
EU Delay Actions	52
Case Conclusions	57
Conclusion	59
Bibliography	64
Appendix I - List of Acronyms	67
Endnotes	68

Executive Summary

Case Study on WTO Dispute Settlement: European Communities- Hormones, Complaint by the United States

The World Trade Organization (WTO) is an international organization created to coordinate trading rules among nations. Made up of internationally negotiated trade agreements, the WTO has three main objectives: (1) to assist in the free operation of international trade; (2) to allow continued progress of liberalization of such trade through fair negotiations; and (3) to create a system for the impartial settlement of international trade disputes.

A key component of the World Trade Organization (WTO) is the Dispute Settlement Body (DSB). This body, as with the WTO itself, has only been in operation since January of 1995. The WTO, although relatively new, has made significant strides in improving the international trading system and resolving trade disputes. Unlike other international organizations, such as the International Monetary Fund (IMF) or World Bank, the WTO is not controlled by a board of directors, but instead is governed by its member nations. Given this type of arrangement, it is essential that the member nations abide by the signed agreements that govern the operation of the WTO and its Dispute Settlement Body. Otherwise the WTO cannot function as envisioned.

This research argues that the European Union (EU) is presently abusing the system through its actions in the dispute settlement case *EC- Hormones, Complaint by the United States*. Using tactics designed to delay the resolution of this dispute, the EU has increased the costs associated with the Dispute Settlement Body (DSB) and threatened the credibility of the WTO.

The first chapter, *A Historical and Structural Overview of the WTO*, provides a basic understanding of the WTO starting with the history of international trade liberalism. From the inception of the General Agreement on Tariffs and Trade (GATT) in 1947, the international trading system has become increasingly more liberalized. Through several rounds of multilateral trade negotiations, the international trading community has made significant progress in removing trade barriers. The most recent of these negotiations, the Uruguay Round, covered essentially all areas of trade and involved 125 countries. The WTO, created during the Uruguay Round, was given unprecedented powers to mediate as well as compel its membership to practice trade within the parameters of the GATT/WTO Agreements. A sound understanding of the multilateral trading system and the WTO in general provided by this chapter should assist the reader in interpreting the details of the *EC-Hormones* case and the threatening actions of the European Union.

Chapter Two, *WTO Dispute Settlement case: EC-Hormones*, introduces the WTO Dispute Settlement Body (DSB) and describes the steps required for the completion of trade disputes and the considerable time it takes to complete each stage of the process. Using the *EC-Hormones case* as an example, this chapter provides a step-by-step guide through the highly elaborate WTO dispute settlement process. *EC-Hormones* has consumed a disproportionately high amount of resources and has taken longer to resolve than any dispute case undertaken by the WTO to date. For the first time, mandated timetables were exceeded as panelists, Appellate Body members, and mediators evaluated the complicated nature of the EU trade measures in question. This has increased the strain on the structural operation of the WTO.

Chapter Three- *The Effects of EU actions in EC-Hormones*, presents evidence supporting the argument that the EU actions have strained the structural operations of the DSB and threatened the credibility of the WTO as a legitimate forum for the resolution of international trade disputes. Notwithstanding the *EC-Hormones case*, the current workload and backlog of cases are placing an administrative burden on the already resource- limited WTO. Since the WTO requires both financial and political support from its contracting members---especially powerful economic members such as the United States and the European Union---the importance of resolving disputes in short order is a high priority for the WTO. Moreover, the WTO relies heavily on the voluntary compliance from their members. Thus, the EU's refusal to comply with the Dispute Settlement Body (DSB) rulings challenges the WTO's ability to elicit compliance from its members. If the WTO cannot gain the confidence of major economic powers such as the United States, its impact on the international trading system may become limited and unworthy of continued operation.

Introduction

The most recent multilateral trade negotiation known as the Uruguay Round created the World Trade Organization (WTO) which went into operation in January of 1995. This international organization was designed to propitiate the rules of trade among nations. Growing out of the structure of its predecessor, the General Agreement on Tariff and Trade (GATT), the WTO commands increased powers to compel nations to alter their domestic trade laws when they violate the negotiated GATT/WTO Agreements. The key to the execution of this power lies in the system which resolves trade disputes known as the Dispute Settlement Body (DSB). The former process under the GATT Agreements was highly successful at reducing tariffs and other free trade barriers, although its ability to resolve trade disputes was limited due to structural inadequacies and the lack of capacity to coerce nations into removing trade measures found to be in violation of the GATT Agreements. The DSB will be key in determining the success or failure of the WTO. As with most international organizations, the WTO relies on the support, both financial as well as political, of its members to function effectively. A main reason for the creation of the WTO is so that the international trade community will have a fair and just forum for resolving disagreements between nations. Having such a forum offers advantages over negotiating the dispute bilaterally or solely between the two nations involved. Thus, nations are willing to give up a portion of their sovereignty to allow such a system to be effective. The dispute settlement process is very elaborate, but includes mandated timetables to get through the process as quickly as possible. Due to the required support of WTO contracting members, especially powerful economic

members such as the United States and European Union, the importance of resolving disputes in short order is of primary concern for the WTO.

Presently, the system is proving to operate as effectively as the Uruguay Round negotiators had hoped. However, since the system is functioning well, an increasing number of cases are being taken to the DSB for resolution. This increase is already putting administrative strains on the WTO requiring hard-to-acquire additional funds and caseload back-ups are resulting in further delay. Furthermore, the WTO has experience its first difficulty with eliciting compliance from a losing party of a trade dispute. The European Union and the United States were opponents in a trade dispute concerning a EU ban on the import of US beef containing growth hormones. The EU trade measures were found in violation of the GATT/WTO Agreements by the DSB when it ruled on the dispute case *European Communities – Measures Affecting Meat and Meat Products (Hormones), Complaint by the United States (WT/DS26)*.¹ The EU appealed, but the ruling was not overturned and they were compelled to remove their trade measures. Presently, the EU has decided not to remove their trade measures and has accepted WTO sanctioned retaliation measures from the United States. The EU has elected to use the WTO DSB to delay the removal of their trade measures and has accepted trade restrictions from the US rather than comply with the WTO ruling. This action is viewed by many experts in international trade as threatening the credibility of the WTO as an effective dispute resolution system. Without a successful dispute settlement system in place, nations revert back to resolving their dispute bilaterally. This usually involves increases in trade restriction from both parties and a movement away from free trade principles.

For the reasons listed above, the *EC-Hormones* dispute has become a pivotal case for the future of international trade. Trade liberalism has increased steadily since the first GATT negotiations in 1947. Along with this increase, dramatic economic growth has occurred throughout the world. Proponents of the WTO see this growth directly tied to trade liberalism and predict the world economy will continue to grow as long as nations commit to the principles of free trade and liberalism. Opponents of the WTO see the organization as too powerful and infringing too greatly upon the sovereignty of the governments of individual states. WTO supporters therefore, view the EU actions as a violation of their commitment to the GATT/WTO Agreements which they agreed to during the Uruguay Round of trade negotiations. David Wirth, a Political Science Professor at Washington & Lee University as well as a negotiator for the US during the Uruguay Round, views the EU actions as justifiable. Wirth believes the WTO overstepped their boundaries in the *EC-Hormones* dispute.² Key to Wirth's arguments is the role of science in international trade disputes. The EU believes that the hormones in the US beef are dangerous and want to protect their citizens. According to the SPS Agreement, which bases its risk assessment standards on the Codex Alimentarius or "the Codex," the hormones at question in this trade dispute are safe.³ Wirth sees the SPS Agreement⁴, which the DSB interpreted to rule against the EU on this matter, as too obtrusive into National Regulatory Authorities. WTO proponents simply see the SPS Agreement as another area of international trade which has been improved through the inclusion of the WTO principles. The end result of the *EC-Hormones* dispute case will indicate the direction the WTO and the international trading system is heading. Since the *EC-Hormones* case is one of the first cases taken to the WTO, its resolution will set an

important precedent. If the EU is allowed to lose the DSB ruling, but not remove their trade measure, then other nations will use similar tactics. Without compliance the WTO will not be viewed as an effective forum for trade dispute resolution. This will decrease the support for the WTO in terms of operational funds as well as confidence in the system.

This research will argue that the EU has adversely affected the WTO system in an attempt to postpone the removal of their trade measures. The EU's action have increased the strain on procedural functioning of the dispute settlement process and damaged the legitimacy and credibility of the WTO. The present situation of this dispute has put the US in a position of resolving the dispute by retaliating with its own restrictive trade counter-measures. The manner in which the EU and US are resolving their dispute could be accomplished without the help of the WTO. This is how nations attempted to resolve disputes before the WTO system. If several cases emerged in which the WTO could not compel the losing party of a trade dispute to modify or remove their trade measure, then some governments may find no real need to support the organization.

Jim Lyons, Associate General Counsel for Agriculture at the Office of the United States Trade Representative, views the present situation as potentially damaging to both parties. According to Lyons, "the retaliation measure mainly hurts the EU but does not restore the US beef industry's access to European markets."⁵

In analyzing this case, the procedures established by previous social scientists, as laid out in *Applications of Case Study Research* by Robert F. Yin, were followed. Two key principles used in this analysis are the concepts of rival hypotheses and triangulation.

In quantitative research, the rival hypothesis of a study is often called the null hypothesis which is simply the absence of the target hypothesis.⁶ Rival hypotheses in qualitative research are often difficult to discern. According to Robert Kin, the presence of a rival hypothesis in case study research can be difficult to find, but “(y)our best source is the existing literature on a topic. Does the literature on a topic readily separate into rival camp or theories?”⁷ The literature on the dispute case *EC-Hormones* suggests that there are problems with the functioning of the DSB (especially relating to resources and qualified personnel) brought on by inappropriate use of the system and delaying actions, especially concerning compliance. This will be explored in greater depth throughout this study and in particular in Chapter III. However, the literature also suggests that DSB may be functioning satisfactorily with no evidence that resource limitations are affecting its ability to carry out its mission.

The use of the DSB, including all avenues available, can be construed as a completely legitimate practice for any contracting member in good standing with the WTO. The rival hypothesis suggests that the tactics employed by the EU to delay the process may simply point to a need for new time periods for the DSB process, rather than a misuse of the DSB.⁸ This view has gained support from experts on Trade and the Environment, such as Ernst-Ulrich Petersmann, Professor of Law at the University of Geneva. Petersmann argues that the *EC –Hormones* case was important because, “the Appellate Body Report...has confirmed and strengthened the right of WTO Members to apply SPS measures necessary to protect human, animal or plant life or health, even if they deviate from relevant international standards and result in a higher SPS protection.”⁹ Petersmann goes on to suggest that international standards set by organizations such as

the Codex Alimentarius Commission of the Food and Agriculture Organization and World Health Organization (see Chapter II, page 35) are often not democratic and are subject to inappropriate influence by the government and the public. These arguments indicate added importance to the *EC-Hormones* case. The debate over the right of a nation to protect the health of their citizens judged by a WTO Appellate Body ruling becomes highly significant in terms of international organizations versus state sovereignty. These arguments opposing the main hypotheses need to be refuted to show confidence in the original hypothesis.

The second principle in successful case study research is the use of triangulation.¹⁰ Triangulation refers to the convergence of evidence supporting the main argument of the study. Having three or more sources all pointing in the same direction increases the confidence in the conclusion.¹¹ This case study evaluation uses triangulation to establish the inappropriate use of the DSB by the EU in the dispute case *EC-Hormones*. The data supporting this argument comes from a number of experts in the field of International Trade Dispute Settlement including a staff member from the Office of the United States Trade Representative. Again, to achieve confidence in the main hypothesis, the data in this study should come from several sources which support and triangulate the argument. Additionally, the terms, “acceptable” and the concept of undermining the legitimacy and credibility of the WTO used throughout this study are defined through analysis of the DSB procedures and the opinion of the aforementioned experts.

The resolution of *EC-Hormones* will have far-reaching implications. Since the case is one of the first to be completed by the WTO, its decision and compliance will set

a precedent for future cases. If the EU succeeds in undermining the credibility of the system, and nations refrain from using the WTO for dispute settlement, the future of international trade may also be affected. Without the WTO as a vital actor, nations may return to previous means of dispute negotiations including increases in tariffs to offset the effects of unfair trade restrictions. This could lead the international trading environment away from trade liberalism and more toward protectionist positions.

The *EC-Hormones* dispute case may lead to additional theoretical posturing as to the future of the international trading system. However, a brief explanation of where this research fits into current theory should add to the significance of this dispute case. The World Trade Organization obviously has a vaunted interest in trade liberalism. In their Annual Report of 1998 the WTO offered compelling evidence against any move toward protectionist policies. According to the report, there are three theoretical cases in which protectionist policies are believed to increase a country's welfare. The first of these cases is the theory that a large and powerful nation such as the US could manipulate the terms of trade with smaller nations by raising tariffs on certain goods. In an attempt to gain advantage over the importing country, the more powerful nation aims to force the smaller nation to lower prices and absorb some of the tariff. Two studies on the costs of protectionist policies on the US, Hufbauer and Elliot (1994) and de Melo and Tarr (1992), concluded that although there may be some gain from manipulating the terms of trade, the loss in economic growth for both nations due to inefficiencies without the GATT/WTO framework would outweigh any planned gains.¹²

The second argument in favor of protection policies is termed the "infant industry protectionist argument."¹³ The theory behind this argument is that developing countries

may have the potential for a comparative advantage in a certain industry but may be unable to compete as a new producer against established producers in industrial countries. The argument suggests the need for government to intervene with protective measures to allow the infant industry to progress to the point that it can compete with established industries. The WTO report argument supported by the work of Grossman and Horn¹⁴ states that these policies may not be able to protect the infant industry. In addition, there are side effects to these policies such as the problems associated with selecting which industries are deserving of protection and when to cut off protection.¹⁵ The WTO suggests that training and education measures for these industries are more appropriate than restrictive trade measures.¹⁶

The third argument disputed by the WTO concerns strategic trade policies in industries where average production costs are reduced as output increases. In such cases, a country can increase that industry's output by imposing restrictions on imports. The industry in which the government has protected will experience an increase in profits while competing foreign firms lose profits. This theory has realistic merit and the basis for the initiation of many tariffs.¹⁷ The WTO citing a study by Baldwin and Krugman (1998) suggests that these profits may not add to the country's welfare due to the loss of profits that could have been made without the policy.¹⁸ Thus, the WTO concludes that although the suggested theoretical arguments for the use of protectionist policies may produce some increase in welfare, the gains are usually small and the difficulties and expense of implementing these measures coupled with the possibility of initiating harmful policies make the commitment to liberal trade practices still the wisest course of action.

This research addresses the present situation presented in a case study of the World Trade Organization trade dispute *EC-Hormones, Complaint by the United States*. The first chapter provides a historical background of the World Trade Organization and presents the significance of this case as the initial cases of the WTO DSB set crucial precedents.

Chapter two describes in detail the Dispute Settlement process and presents the case study of the dispute case *EC-Hormones*. Chapter three will present the evidence from experts in the field of international trade and including an interview of a representative of the USTR. This evidence should show the reality of the EU actions and their effect on the future functioning of the WTO.

Chapter I - The WTO: A Historical and Structural Overview

The World Trade Organization's (WTO) dispute settlement process is critical to the successful functioning of this international organization. With so many agreements included in the WTO Charter, having a successful mechanism for resolving trade disputes is crucial for the continuation of a rule-based international trading environment. The General Agreement of Tariffs and Trade (GATT), the predecessor organization to the WTO, was highly successful in substantially reducing tariff levels and making large strides toward the liberalization of the world trading system. As an international organization comprised of multilateral agreements, the WTO continually requires the cooperation of its contracting Members (countries in the WTO membership). The support of these contracting members is essential to the continued operation of the WTO, especially support from Members with large economies such as the United States, the European Union (EU), and Germany. Recently, a few Dispute Settlement cases have reached completion and several issues have arisen as to the successful operation of the WTO's dispute settlement process. These include costs, compliance, time periods, and delay tactics. Delay tactics can be defined as actions by WTO member states that are intended to postpone rather than resolve a dispute. When a dispute is taken to the WTO Dispute Settlement Body (DSB), there are a series of stages it goes through including an Appeal process and a compliance period (Chapter II describes this process in detail). Once the Appeal process is finalized, the losing party has a fixed time period during which they are to remove or amend the trade measure or measures found to be inconsistent with their obligations under the WTO.¹⁹ This paper argues that the European Union is undermining this process through the use of delay tactics. These actions not

only increase the costs of the dispute settlement process, but, more importantly, they damage the WTO's credibility and threaten its future as an effective player in the regulation of international trade.

As in most international organizations, the WTO relies on the cooperation of its contracting Members both for financial support and for adhering to the rules set forth in the agreements. A disregard for the rules and procedures based on an unfavorable ruling from the WTO dispute settlement body can undermine the legitimacy of the WTO as a whole.

This chapter provides a background of the World Trade Organization and its predecessor organization, the General Agreement of Tariffs and Trade (GATT). It introduces the WTO's structure and how it was designed to operate. This background information is intended to provide the reader with an understanding of the processes threatened by the actions of the European Union.

The World Trade Organization (WTO) had its beginnings in the early days of the post World War II era. From 1946 through 1948, the United States and Great Britain held negotiations concerning problems affecting the world trading system. Surprisingly, both states were in complete agreement as to the problems and their potential solutions.

According to David Atkins et al, authors of *A Three-Year Review*, the leading problems affecting the system included: "quantitative restrictions [quotas], subsidies, export taxes, state trading, discrimination, and tariff reduction."²⁰ Basically, these problems dealt with restrictions on the trading system present at that time and the solutions involved eliminating, or at least reducing, these restrictions. The US and Great Britain wanted trading nations to behave more like private trading partners.²¹

Preliminary negotiations between the US and Great Britain began during the war and continued through 1945 when they produced a set of “proposals” for the establishment of the International Trade Organization (ITO). The US “issued a preliminary invitation to fifteen other countries to take part in a bilateral/multilateral negotiation for the reduction of tariffs and other barriers to trade.”²² These countries and three others convened making up the Preparatory Committee for the Havana Conference to establish the ITO. The proposals were accepted by the United Nations Economic and Social Council in 1946 and a “United Nations Conference on Trade and Development” convened. In 1947 the Geneva Session was held with two major tasks before them: first, was to produce a draft charter for consideration by the forthcoming Havana Conference, and second, to revise the Draft Agreement on Tariffs and Trade. The negotiations ended in October of 1947 with the signing of the General Agreement on Tariffs and Trade (GATT) by “contracting parties” of twenty-three countries. At the same time, these same countries were drafting the “Havana Charter” for the establishment of the ITO.

According to Atkins et al,

The Havana Charter was a comprehensive code governing the conduct of world trade. It contained both general statements of principle and specific commitments of national policy dealing primarily with national barriers to trade. It covered all types of restrictions on trade, including tariffs, preferences, internal taxation and regulation (such as quotas and related exchange matters), labor and employment, economic development and reconstruction subsidies, state trading and related matters, general commercial provision on freedom of transit, antidumping and countervailing duties, special provisions for free trade areas and customs unions, restrictive business practices, and intergovernmental commodity agreements.²³

From this excerpt it is evident that the Havana Charter was highly inclusive for its time.

In fact, much of the GATT was based on it. The GATT, however, was drafted as a

provisional agreement to bridge the countries from a trade system without rules to one with many. Therefore it was limited in scope and contained few institutional arrangements because the institutional role was to be fulfilled by the ITO. Unfortunately for its proponents, the Havana Charter had trouble getting through national legislatures, primarily that of the United States Congress, and the effort for its establishment failed. What was left for the goal of trade liberalization was the provisional GATT. Atkins described it as, “a treaty without a planned administrative organization, and which covered only part of its intended scope.”²⁴

Although the GATT was just a provisional measure, it remained the only multilateral instrument governing international tradeⁱ. Twenty-three members of the fifty who started the multilateral trade negotiations negotiated the tenants of the GATT before the Havana Charter was completed. World War II had just recently ended and these countries wanted to get an early start in trade liberalization.²⁵ Even with the limited GATT, these twenty-three countries were able to negotiate 45,000 tariff concessions affecting approximately \$10 Billion in trade. This represented almost one-fifth of the world trade at that time. The GATT remained in force for almost fifty years. Additions to the agreement were brought about in through a series of multilateral negotiation known as “Trade Rounds.” These trade rounds and the areas of trade they covered are listed in Table 1.1 below.

ⁱ World trade was also controlled by the United States as the dominant power in the international order also known as the hegemon.

Table 1.1

TRADE ROUNDS			
Year	Place/name	Subjects covered	Countries
1947	Geneva	Tariffs	23
1949	Annecy	Tariffs	13
1951	Torquay	Tariffs	38
1956	Geneva	Tariffs	26
1960-1961	Geneva (Dillon Round)	Tariffs	26
1964-1967	Geneva (Kennedy Round)	Tariffs and anti-dumping measures	62
1973-1979	Geneva (Tokyo Round)	Tariffs, non-tariff measures “framework agreements”	102
1986-1994	Geneva (Uruguay Round)	Tariffs, non-tariff measures, rules, services, intellectual property, dispute settlement, textiles, agriculture, creation of the WTO	

Source: WTO Web Site

The early trade rounds focused on further reduction of tariffs. From 1964 through 1967 in the Kennedy Round, sixty-two countries brought up the issue of anti-dumping.

Dumping is when a company exports a product at a price lower than it usually charges in its home market. Since this practice is often initiated by a private company the GATT/WTO has not judged whether it is legal or not. The anti-dumping measures, however, deal with how governments of countries can and cannot react to dumping.²⁶

During the Tokyo Round, 102 countries addressed trade barriers that did not take the form of tariffs. According to Atkins et al, the agreements reached during this round included: “Subsidies and Countervailing Measures, Technical Barriers to Trade, Import Licensing Procedures, Customs Valuation, Anti-dumping, Government Procurement, Bovine Meat Arrangements, and Trade in Civil Aircraft.”²⁷

Finally, in 1986 the Uruguay Round commenced. This was the most ambitious of all trade rounds, lasting almost eight years. For the first time, the negotiations entered into trade areas other than goods. These included trade in services and intellectual property. The Uruguay Round also dealt with market access for tropical products (a measure to assist developing countries), a streamlined dispute settlement system, and a Trade Policy Review Mechanism (TPRM). The Uruguay Round continued with each new issue negotiated and resolved until the Marrakesh Agreement established the World Trade Organization in 1994. This brought the GATT era to an end after almost a half century of provisional operation. Presently there are 135 Contracting Members of the WTO (See Table I.2).

Description of the World Trade Organization

The WTO homepage boasts that, “The World Trade Organization (WTO) is the only international body dealing with the rules of trade between nations.”²⁸ The Charter of the WTO consists of four main purposes spelled out in sections known as “Annexes.” Annex I includes three major agreements: GATT 1994 (updated from the 1948 agreement), General Agreement on Trade in Services (GATS), and Trade-Related Aspects of Intellectual Property Rights (TRIPS).

Annex II outlines a very important part of the WTO, the Dispute Settlement Mechanism. The Agreement, known as the Understanding on Rules and Procedures Concerning the Settlement of Disputes (DSU) describes a new process for handling trade disputes. The DSU is a dramatic improvement over the Dispute Resolution process under GATT.

Table I.2 - 135 Members with Dates of Entrance into the WTO.

Angola	12/01/96	Guatemala	07/21/95	Pakistan	01/01/95
Antigua and Barbuda	01/01/95	Guinea Bissau	05/31/95	Panama	09/06/97
Argentina	01/01/95	Guinea	10/25/95	Papua New Guinea	06/09/96
Australia	01/01/95	Guyana	01/01/95	Paraguay	01/01/95
Bahrain	01/01/95	Haiti	01/30/96	Peru	01/01/95
Barbados	01/01/95	Honduras	01/01/95	Philippines	01/01/95
Belgium	01/01/95	Hong Kong, China,	01/01/95	Poland	07/01/95
Belize	01/01/95	Hungary	01/01/95	Portugal	01/01/95
Benin	02/22/96	Iceland	01/01/95	Qatar	01/13/96
Bolivia	09/13/95	India	01/01/95	Romania	01/01/95
Botswana	05/31/95	Indonesia	01/01/95	Rwanda	05/22/96
Brazil	01/01/95	Ireland	01/01/95	Saint Kitts and Nevis	02/21/96
Brunei Darussalam	01/01/95	Israel	04/21/95	Saint Lucia	01/01/95
Bulgaria	12/01/96	Italy	01/01/95	Saint Vincent & the Grenadines	01/01/95
Burkina Faso	06/03/95	Jamaica	03/09/95	Senegal	01/01/95
Burundi	07/03/95	Japan	01/01/95	Sierra Leone	07/23/95
Cameroon	01/01/95	Kenya	01/01/95	Singapore	01/01/95
Central African Republic	05/31/95	Korea	01/01/95	Slovak Republic	01/01/95
Chad	10/19/96	Kuwait	01/01/95	Slovenia	07/30/95
Chile	01/01/95	The Kyrgyz Republic	12/20/98	Solomon Islands	07/26/96
Colombia	04/30/95	Latvia	02/10/99	South Africa	01/01/95
Congo	03/27/97	Lesotho	05/31/95	Spain	01/01/95
Costa Rica	01/01/95	Liechtenstein	09/01/95	Sri Lanka	01/01/95
Côte d'Ivoire	01/01/95	Luxembourg	01/01/95	Suriname	01/01/95
Cuba	04/20/95	Macau	01/01/95	Swaziland	01/01/95
Cyprus	07/30/95	Madagascar	11/17/95	Sweden	01/01/95
Czech Republic	01/01/95	Malawi	05/31/95	Switzerland	07/01/95
Democratic Republic of the Congo	01/01/97	Malaysia	01/01/95	Tanzania	01/01/95
Denmark	01/01/95	Maldives	05/31/95	Thailand	01/01/95
Djibouti	05/31/95	Mali	05/31/95	Togo	05/31/95
Dominica	01/01/95	Malta	01/01/95	Trinidad and Tobago	03/01/95
Dominican Republic	03/09/95	Mauritania	05/31/95	Tunisia	03/29/95
Ecuador	01/21/96	Mauritius	01/01/95	Turkey	03/26/95
Egypt	06/30/95	Mexico	01/01/95	Uganda	01/01/95
El Salvador	05/07/95	Mongolia	01/29/97	United Arab Emirates	04/10/96
Estonia	11/13/99	Morocco	01/01/95	United Kingdom	01/01/95
European Communities	01/01/95	Mozambique	08/26/95	United States	01/01/95
Fiji	01/14/96	Myanmar	01/01/95	Uruguay	01/01/95
Finland	01/01/95	Namibia	01/01/95	Venezuela	01/01/95
France	01/01/95	Netherlands - For the Kingdom in Europe and for the Netherlands Antilles	01/01/95	Zambia	01/01/95
Gabon	01/01/95	New Zealand	01/01/95	Zimbabwe	03/03/95
Gambia	10/23/96	Nicaragua	09/03/95		
Germany	01/01/95	Niger	12/13/96		
Ghana	01/01/95	Nigeria	01/01/95		
Greece	01/01/95	Norway	01/01/95		
Grenada	02/22/96				

Annex III outlines the Trade Policy Review Mechanism (TPRM), which establishes the first organized process for the review of trade practices by the members of the WTO. Annex IV includes additional Plurilateral Agreements, and the multilateral agreements among members which along with Annex I make-up the framework of the WTO.²⁹

The principles inherent in the WTO include promoting a trading system that includes:

- Non-discrimination- through applying Most Favored Nation Status (MFN) and national treatment principles;
- Reciprocity- by allowing automatic exchange of markets among members;
- Liberalization- through negotiating lower tariffs and bringing down other barriers and allowing progressive market opening;
- Predictability- through having countries “bind” their commitments, thereby promising not to raise barriers without compensating members if they renege;
- Fairness- through discouraging unfair competitive practices such as export subsidies and dumping (selling products below cost to gain market share);
- Helpfulness to less developed countries- by allowing more time to adjust to agreements and providing greater flexibility as well as special privileges.³⁰

The WTO also has a formal institution known as the WTO Secretariat which is headquartered in Geneva, Switzerland.³¹

Theoretical Assumptions for WTO Study

The WTO is aware of the need for a more just application of trade liberalism and also a desire for the protection of the environment (two issues of little concern to liberal ideology). The main basis for the establishment of GATT in 1948 was to reduce political intervention in international trade in the form of tariffs. Further, the WTO is clearly committed to furthering the goal of economic liberalization. As an international

organization, the WTO does attempt to impose rules on the system and to regulate international trade relations. However, the WTO also aims to promote cooperation and to resolve disputes through a process acceptable to its Members.

In the most recent WTO Annual Report (1998), the WTO addresses three common arguments for interventionist policies that are contrary to the tenets of economic liberalization. The first of these arguments concerns a large economic power manipulating its terms of trade (TOT) in the form of tariffs to benefit the large economy at the expense of its trading partners. When a country is powerful enough to exert their power over the market, theory would suggest that by forcing trading partners to absorb some of the tariff by lowering their pre-tariff price, the larger economy would increase its welfare.³² However, according to studies addressing TOT effect, protectionist policies may increase the larger economy's welfare, but the gains are very small. Further, these gains are smaller than the larger country may have experienced by leaving the sector free of tariffs. According to a report by de Melo and Tarr (1992), there is a risk that a country attempting this type of manipulation may not have enough information and could possibly impose too high a tariff leading to excessive consumer losses in the country imposing the restriction.³³

The second argument concerns a need for protection of infant industries. According to this tenet, certain industries in developing countries may have a comparative advantage in their industry but cannot compete with established industries already present in their country. Therefore, temporary protective measures are instituted to allow the industry to grow strong enough to compete with the established industries. These temporary measures could include tax breaks or more drastic measures such as

restricting the markets of the established industries. According to the WTO, the problem with this type of intervention is that it is inefficient and may create distortions in other parts of the economy. Grossman and Horn have also shown that such policies may not be able to protect the infant industry. The WTO suggestion is to train and educate the infant industry to compete better, not to impose trade restrictions.³⁴ A further argument against this type of policy is the difficulty in the selection process (which firms deserve protection) and the possibility that the policy may become a permanent measure.³⁵

The third argument for restrictive trade policies concerns strategic trade policies in industries where average production costs are reduced as output increases. By imposing restrictions on imports, a country can increase the protected industry's output, thereby increasing its profits at the expense of the competing foreign firms. This is a realistic possibility and the basis for the initiation of many tariffs. However, according to Baldwin and Krugman (1988), the gains from such policies may not outpace the gains that could have been made without the policy. An example given is the Japanese strategic trade policy on its semi-conductor industry. Their study shows that had Japan not imposed a trade restriction, both the US and Japan would have experienced greater economic growth.³⁶

In summary, although trade restrictive policies can be successful for some protective industries, the gains are usually small. Also, the difficulties and expense of implementing these policies coupled with the possibility of initiating harmful protective policies leaves the WTO to conclude that the multilateral commitment to liberal trade policy is still best course of action.³⁷

This defense of the liberal perspective is difficult to ignore considering the enormous growth in the post-war period. This research will assume the tenants of liberalism as it relates to international trade are being proven correct. However, this research as well as the WTO does not completely agree with all aspects of liberalism.

The WTO policies toward developing nations indicate that the WTO is attempting a more just and equal international system. The fact that developing nations have a voice in the international arena indicates that progress is being made and that there is a concern for whom achieves wealth, not just that wealth is achieved. Further, environmental concerns are also a major concern at the WTO. This again indicates a departure from a complete reliance on the liberal ideology. As with many successful capitalist countries today, the WTO is attempting to blend social welfare policies with economic liberalization. Reductions in possible economic growth for issues such as the developing countries and the environment are clearly becoming an acceptable course of action in the international political economy.

Dispute Settlement Procedure

The process for resolving trade disputes is set forth in Annex 2 of the WTO Agreement negotiated in the Uruguay Round Agreements. The Understanding on Rules and Procedures Governing the Settlement of Disputes or Dispute Settlement Understanding (DSU) applies:

- 1) To disputes involving provisions of the Multilateral Trade Agreements listed in Appendix 1 of the DSU including the Multilateral Agreement on Trade in Goods in Annex 1A, the General Agreement on Trade in Services (GATS) in

Annex 1B, and the Agreement on Technical Barriers to Trade (TRIPS) in Annex 1C of the WTO Agreement; and

- 2) To disputes between WTO Members concerning their rights and obligations under the DSU. Article 23 of the DSU clearly outlines these rights and obligations stating that WTO members “shall not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this understanding.”³⁸

Once a dispute is filed with the Dispute Settlement Body (DSB) it enters the first stage of the process, consultation. Once the consultation is requested, the parties have 60 days to meet and attempt to resolve the dispute on their own. If these talks fail the parties can also request help and mediation from the WTO Director General.³⁹ If the parties do not meet or an agreement is not reached, the second stage is implemented: the establishment of a panel. The panel is to be established within 45 days of request. The defending party may block the establishment of the panel once, but at the next meeting of the DSB (which meets monthly) a panel is automatically appointed unless there is a consensus among WTO members not to establish the panel. Panels consist of three and occasionally five members usually chosen through negotiations between the parties involved. If the parties cannot agree, the panelists are selected by the WTO Director General. A panel is chosen from a permanent list of well-qualified representatives from all members of the WTO. The panelists serve “in their individual capacities” and “cannot

receive instructions from any government.”⁴⁰ The panel is to submit their report to the parties involved within six months unless there are emergency circumstances such as a complaint involving perishable good. In these cases, the time requirement is shortened to three months.

During the six-month period (or three-month period in emergency situations) the panel is to adhere to the procedural stages outlined in the DSU. Before the panel holds its first hearing, each party in the dispute presents its case in writing to the panel. At the first hearing the parties present their cases orally to the panel.

The next stage is the rebuttals. Each party submits written rebuttals and oral arguments are held at the panel’s second hearing. Once rebuttals are completed the panel may choose to “consult experts or appoint an expert review group to prepare an advisory report.”⁴¹

Once the Panel has consulted with the advisory experts, it prepares a first draft of their report (The first draft does not include findings). The two parties then have two weeks to prepare comments on the report. Then the panel submits an interim report, including findings, to the parties giving them one week to request an interim review.⁴² An interim review may include additional meetings with the parties involved. The panel then submits their final report to the parties and three weeks later to the entire WTO membership. If the panel finds that the trade measure in question violates WTO Agreements or obligations, it recommends that the measure be removed, or changed, to be considered consistent with WTO rules. The panel may also suggest how this can be done.⁴³ According to the DSU, the report becomes a ruling within 60 days unless the

members of the WTO reject it unanimously.⁴⁴ Both parties are allowed to appeal the panel's ruling which will be heard by an appeal panel.

The appeal panel is comprised of three members of a seven-member "Appellate Body". The members of this body are appointed by the DSB to four-year terms. They are to be representative of the WTO membership and they must be experts in the field of law and international trade. They must not be affiliated with any government.⁴⁵ The Appellate Body can uphold, modify, or reverse panel rulings "based on points of law such as legal interpretation --[but] they are not allowed to reexamine existing evidence or examine new evidence."⁴⁶ The DSU stipulates that the appeal process should not last more than 60 days and shall not exceed 90 days. Appeal reports must be accepted or rejected by the DSB within 30 days. As with the panel report, only a consensus of the DSB can reject an appeal report.⁴⁷

At this point in the process, the parties have received the rulings and the dispute should be brought to its planned conclusion. However, the WTO dispute settlement case, *European Communities - Measures Affecting Meat and Meat Products (Hormones)*, complaint by the United States, has initiated a different form of resolution. As explained above, once the Panel and the Appellate body have made a ruling, the losing party is required to remove the measure or measures found inconsistent with the WTO Agreements. The Dispute Settlement Body is designed with this resolution in mind. However, if the losing party does not wish to remove or modify its measures, then the DSB authorizes the winning parties to initiate retaliation measures equal to the monetary value of the inconsistent trade measure or measures. This amount is determined through mediation by the WTO.

TABLE 1.3 - Resolved WTO Dispute Settlement Cases

1. United States - Standards for Reformulated and Conventional Gasoline, complaints by Venezuela (WT/DS2) and Brazil (WT/DS4). The US announced implementation of the recommendations of the DSB as of 19 August 1997, at the end of the 15-month reasonable period of time.
2. Japan - Taxes on Alcoholic Beverages, complaints by the European Communities (WT/DS8), Canada (WT/DS10) and the United States (WT/DS11). The period for implementation was set by the Arbitrator at 15 months from the date of adoption of the reports i.e. it expired on 1 February 1998. Japan presented modalities for implementation which were accepted by the complainants.
3. United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear, complaint by Costa Rica (WT/DS24). The US announced that the measure at issue expired as of 27 March 1997.
4. Brazil - Measures Affecting Desiccated Coconut, complaint by the Philippines (WT/DS22) - no implementation issue in view of the result.
5. United States - Measure Affecting Imports of Woven Wool Shirts and Blouses, complaint by India (WT/DS33). The US announced that the measure was withdrawn as of 22 November 1996, before the Panel had concluded its work. Therefore, no implementation issue arose.
6. Canada - Certain Measures Concerning Periodicals, complaint by the United States (WT/DS31). The implementation period was agreed by the parties to be 15 months from the date of adoption of the reports i.e. it expired on 30 October 1998. Canada has withdrawn the contested measure.
7. European Communities - Regime for the Importation, Sale and Distribution of Bananas, complaints by Ecuador, Guatemala, Honduras, Mexico and the United States (WT/DS27). The period for implementation was set by arbitration at 15 months and 1 week from the date of the adoption of the reports i.e. it expired on 1 January 1999. The EC has revised the contested measures. On 18 August 1998, the complainants requested consultations with the EC (without prejudice to their rights under Article 21.5), for the resolution of the disagreement between them over the WTO-consistency of measures introduced by the EC in purported compliance with the recommendations and rulings of the Panel and Appellate Body. At the DSB meeting on 25 November 1998, the EC announced that it had adopted the second Regulation to implement the recommendations of the DSB, and that the new system will be fully operational from 1 January 1999. On 15 December 1998, the EC requested the establishment of a panel under Article 21.5 to determine that the implementing measures of the EC must be presumed to conform to WTO rules unless challenged in accordance with DSU procedures. On 18 December 1998, Ecuador requested the re-establishment of the original panel to examine whether the EC measures to implement the recommendations of the DSB are WTO-consistent. At its meeting on 12 January 1999, the DSB agreed to reconvene the original panel, pursuant to Article 21.5 of the DSU, to examine both Ecuador's and the EC's requests. Jamaica, Nicaragua, Colombia, Costa Rica, Côté d' Ivoire, Dominican Republic, Dominica, St. Lucia, Mauritius, St. Vincent, indicated their interest to join as third parties in both requests, while Ecuador and India indicated their third-party interest only in the EC request. On 14 January 1999, the United States, pursuant to Article 22.2 of the DSU, requested authorisation from the DSB for suspension of concessions to the EC in an amount of US\$520 million. At the DSB meeting on 29 January 1999, the EC, pursuant to Article 22.6 of the DSU, requested arbitration on the level of suspension of concessions requested by the United States. The DSB referred the issue of the level of suspension to the original panel for arbitration. Pursuant to Article 22.6 of the DSU, the request for the suspension of concessions by the United States was deferred by the DSB until the determination, through the arbitration, of the appropriate level for the suspension of concessions. In the panel requested by the EC, pursuant to Article 21.5 of the DSU, the panel found that, because a challenge had actually been made by Ecuador regarding the WTO-consistency of the EC measures taken in implementation of the DSB recommendations, it was unable to agree with the EC that the EC must be presumed to be in compliance with the recommendations of the DSB. In the panel requested by Ecuador, pursuant to Article 21.5 of the DSU, the panel found that the implementation measures taken by the EC in compliance with the recommendations of the DSB were not fully compatible with the EC's WTO obligations. In the arbitration, under Article 22.6 of the DSU, necessitated by the EC's challenge to the level of suspension sought by the United States (\$520 million), the arbitrators found that the level of suspension sought by the United States was not equivalent to the level of nullification and impairment suffered as a result of the EC's new banana regime not being fully compatible with the WTO. The arbitrators accordingly determined the level of nullification suffered by the United States to be equal to \$191.4 million. The arbitrator's report and the reports of the panels were issued to the parties on 6 April 1999, and circulated to Members on 9 and 12 April 1999 respectively. On 9 April 1999, the United States, pursuant to Article 22.7 of the DSU, requested that the DSB authorize suspension of concessions to the EC equivalent to the level of nullification and impairment i.e. \$191.4 million. On 19 April 1999, the DSB authorized the United States to suspend concessions to the EC as requested. The report of the panel requested by Ecuador, under Article 21.5 of the DSU, was adopted by the DSB on 6 May 1999.
8. India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, complaint by the United States (WT/DS50). The period of implementation was agreed by the parties to be 15 months from the date of the adoption of the reports i.e. it expires on 16 April 1999. India has undertaken to comply with the recommendations of the DSB within the implementation period. At the DSB meeting on 28 April 1999, India presented its final status report on implementation of this matter which disclosed the enactment of the relevant legislation to implement the recommendations and rulings of the DSB.
9. European Communities - Measures Affecting Meat and Meat Products (Hormones), complaint by the United States (WT/DS26), and Canada (WT/DS48). The period for implementation was set by arbitration at 15 months from the date of the adoption of the reports i.e. it expires on 13 May 1999. The EC has undertaken to comply with the recommendations of the DSB within the implementation period. At the DSB meeting on 28 April 1999, the EC informed the DSB that it would consider offering compensation in view of the likelihood that it may not be able to comply with the recommendations and rulings of the DSB by the deadline of 13 May 1999. On 3 June 1999, the United States and Canada, pursuant to Article 22.2 of the DSU, requested authorisation from the DSB for the suspension of concessions to the EC in the amount of US\$202 million and Can.\$75 million, respectively. The EC, pursuant to Article 22.6 of the DSU, requested arbitration on the level of suspension of concessions requested by the United States and Canada. The DSB referred the issue of the level of suspension to the original panel for arbitration.

Source: WTO Web Site

Although this type of resolution is allowed for in the Dispute Settlement Understanding, experts such as John Jackson, currently Professor of Law at Georgetown University as well as Yntema Professor of Law Emeritus at the University of Michigan have argued that this is not how the process was intended to function and may undermine the credibility of the WTO.⁴⁸

The European Union (EU) is the first contracting Member to accept retaliatory measures in lieu of removal of the affected measures. This form of resolution can be construed as a disregard for the tenants upon which the WTO was created. If other member states follow the lead of the EU and accept retaliation for lost cases rather than revising their trade measures, this could undermine the effectiveness of the WTO and lead to lack of support from current contracting Members. The next chapter will introduce the WTO Trade Dispute *EC-Hormones, Complaint by the United States* and describe how the EU used procedures within the WTO Dispute Settlement Understanding (DSU) as well as other actions outside of the WTO Dispute Settlement mechanism to delay removing trade policies inconsistent with the agreements under the WTO.

Chapter II - WTO Dispute Settlement Case: EC-Hormones

Chapter I provided background information on the World Trade Organization and its predecessor organization, the General Agreement of Tariffs and Trade (GATT). Chapter I also introduced the WTO's enforcement arm, the Dispute Settlement Body (DSB), and described how the dispute settlement process is designed to operate. This background should provide sufficient background for the description of the WTO Dispute Settlement process.

This chapter uses the case: *European Communities – Measures Concerning Meat and Meat Products (Hormones)* to illustrate how the mechanics of the dispute process work. This chapter also raises the question as to whether the actions of the losing party in this case, in pursuit of its objectives, misused the system through delaying tactics, and as a result damaged the credibility of the WTO as an effective player in the resolution of international trade disputes. Chapter III will analyze this last point in considerable detail.

Analysis of the *EC-Hormones* case will show how tactics, such as delay, employed by the EU can potentially damage the dispute settlement process. At what point do such actions undermine the ability of the WTO to settle international trade disputes? Further, how will these actions affect the credibility of the WTO as an international actor? This Chapter addresses the following question:

*Are the actions taken by the European Union in **EC- Measure Concerning Meat and Meat Products (Hormones)** delaying the dispute settlement process and increasing the transaction costs of the WTO Dispute Settlement Body to the extent of undermining the established function of the World Trade Organization?*

The Dispute Settlement Body (DSB) of the World Trade Organization (WTO) has been in operation since 1995. The DSB is the mechanism established as a key component of the WTO by the Uruguay Round of multilateral trade negotiations in 1994 to resolve international trade disputes (See Chapter I for discussion of the Uruguay Round negotiations).

Among the primary functions of the WTO is to enforce adherence to trade agreements established by previous multilateral trade negotiations represented by the texts of the General Agreement on Tariffs and Trade (GATT). The GATT era (1948-1994) was extremely successful in reducing tariffs and promoting liberalization of international trade. However, GATT was only a provisional system with a “limited field of action.”⁴⁹

The establishment of the World Trade Organization with its increased enforcement powers brought high hopes for a successful international body able to enforce rules of trade between nations. Early indications show that the WTO has achieved some successes. However, the WTO only came into force in January of 1995 and the total number of completed cases is still relatively small. In terms of compliance by the losing party, the list of successful resolutions is even smaller.

As of July 1999, a total of nine cases had reached the stage where both the Panel and Appellate Body rulings had been completed. Of these nine cases, eight involved the United States, five as a complainant and three as a respondent.

The dispute case, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, offers an excellent case for demonstrating not only the full dispute settlement process, but also the time required for a case to reach a conclusion in terms of

compliance. Compliance can be defined as the actions of the losing to bring their policy or policies, found to be inconsistent with the GATT Agreements, in line to the satisfaction of the WTO as well as the complaining parties.

The actions taken by the European Union⁵⁰ prior to the establishment of the WTO illustrate how a nation, whose trade policies are challenged, can draw out the process through a series of delaying tactics (This dispute originated in 1987, some seven years before the WTO was formally established). Once the WTO was established, and a Panel convened under the new dispute settlement process, the longest and most resource intensive dispute case in the short history of the WTO began. Whether or not the European Union elected to delay the process, knowing that it would eventually lose the dispute does not change the end result. This case has placed considerable strain on the WTO.

Summary of the Case History

Starting in the 1970s, consumers in the EU started to be concerned over the use of growth hormones in livestock. Partly due to the illegal use of dethystilboestraol (DES) in veal production, and the occurrence of hormonal irregularities in adolescents in Italy, the EU began drafting legislation banning certain growth hormones except for therapeutic or zoo-technical purposes. The legislation resulted in the following Directives of the Council of Ministers:

- ◆ Council Directive 81/602/EEC of July 31, 1981;
- ◆ Council Directive 88/146/EEC of March 7, 1988; and
- ◆ Council Directive 88/299/EEC of May 17, 1988.

These directives all relate to “an EU prohibition of the import of meat and meat products derived from cattle where either the natural hormones: oestradiol-17 β ,

progesterone or testosterone, or the synthetic hormones: trebolone acetate, zeranol or melengestrol acetate (“MGA”), have been administered for growth promotion purposes.”⁵¹ These six hormones are legal in the United States, but were made illegal in the EC starting in 1981.

The United States first raised this issue in March of 1987 during the early stages of the Uruguay Round of multilateral trade negotiations. Arguing that the three Council Directives were not supported by scientific evidence and were in violation of the Agreement on Technical Barriers to Trade (TBT) Agreement, the US requested the establishment of a “technical expert group (“TEG”) pursuant to Article 14.5 of the TBT Agreement. The TBT Agreement was signed by 102 nations during the Tokyo Round of multilateral trade negotiations. The EU denied the US’ request stating that the use of growth promotion hormones was a process and production method (PPM) and, thus, was not subject to the TBT Agreement.⁵² The EU instead requested the establishment of a Panel to evaluate the case.

The case went unresolved, and in 1989, the United States “introduced retaliatory measures in the form of 100 per cent ad valorem duties on a list of products imported from the European Communities.”⁵³ The EU then requested the establishment of a Panel to address the US duties, but the US blocked this action.⁵⁴ The US and the EU formed a joint task force to address the problem in 1989. The task force was only able to reduce the list of products subject to the US retaliation. When the US requested that the matter be addressed under the newly formed Dispute Settlement Body, the WTO convened a Panel to hear the case and the US withdrew its retaliation measures (see Box 2.1).

Box 2.1 - Executive Case Summary

The EC- Hormones dispute case began in the 1970s when European consumers became concerned over the possible effects of growth hormones used on livestock. In response to this concern, the EC Council of Ministers began to legislate restrictions on certain growth hormones and their uses. The Council of Ministers implemented three Council Directives. The first of these restrictions, Council Directive 81/602/EEC, went into effect on July 31, 1981 and the last, Council Directive 88/299/EEC, went into effect May 17, 1988. The US first raised the issue in March of 1987 at the Tokyo Round of multilateral trade negotiations arguing that these restrictions were in violation of the Technical Barriers to Trade Agreement (TBT Agreement). When the EC refused to amend their restrictions, the US introduced retaliatory measures in the form of 100 per cent ad valorem duties on a series of products from the EC. The dispute continued unresolved until the formation of the World Trade Organization and its Dispute Settlement Body in January of 1995. A dispute Panel was established on May 20, of 1996.

The Panel, following Dispute Settlement Body procedures, met with the appropriate parties, heard arguments, and listened to testimony from scientific experts regarding the use of hormones. The Panel issued its final report on January 30, 1997, ruling that the EC restrictions were in violation of the Agreement on the Application of Sanitary and Phytosanitary (SPS) Measures, Articles 5.1, 5.5, 3.3, and 3.1.

The EC and US both appealed this ruling filing their appellee's submissions in October of 1997. The Appellate Body received written arguments, heard oral arguments, and eventually issued its report on January 16, 1998. As pursuant to their power, the Appellate Body upheld, modified and reversed certain aspects of the findings of the Panel. The Appellate Body ruled that the EC measures were in violation of Article 5.1 of the SPS Measures and recommended that the DSB instruct the EC to bring their Council Directives in line with the requirement of that agreement. However, the Appellate Body reversed a portion of the Panel's rulings which allowed the EU to conclude that their measures could continue provided they could scientifically support the measures in a new risk assessment.

The fifteen-month compliance period (the time the EU was allowed to bring its measures in conformity with the SPS Agreement) expired in July of 1999. The EU is currently preparing new studies on the risk associated with the growth hormones, hoping the WTO reassess the EU position on their restrictive measures. The US was granted permission by the WTO Arbitrator to impose retaliatory measures in the form of 100% tariffs on the EU on like products to the sum of \$116 million per year. The Office of the United States Trade Representative remains unsatisfied with the EU actions and contends that the EU cannot defer compliance to conduct a risk assessment

Case Time Table

In January 1996, the United States requested Consultations with the European Communities, as directed by Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). This is the first step in the dispute settlement process. The process is set up with hopes of having the case settled “out of court” at all stages.⁵⁵

The Consultation stage requires that the parties talk to each other to see if an agreement can be reached. In this case, the dispute was joined by Australia on February 2, 1996 and then by Canada on February 8, 1996.⁵⁶ These negotiations failed; so on April 25, 1996 the United States requested the establishment of a Panel. The Panelists for the *EC- Hormones* case were selected by the DSB on May 20, 1996 and consisted of: Chairman, Mr. Thomas Cottier, and Panelists, Mr. Jun Yokoto and Mr. Peter Palecka.

According to the WTO Agreement, each side in the dispute must submit its arguments in writing prior to the first hearing of the Panel. At the first hearing the complaining party, the defending party, and those countries that have announced an interest in the case present their arguments. The parties then prepare rebuttals in writing and present them orally at the Panel’s second hearing.

In this case, the Panel met with the principal parties on 10 October and 11 November 1996.⁵⁷ On the 27th of November, the Panel Chairman, Mr. Cottier, informed the Dispute Settlement Body (DSB) that the Panel would be unable to issue its report within the allotted six months time period.⁵⁸ The Panel issued its interim report on May 7, 1997.

As allowed by Article 15.2 of the Dispute Settlement Understanding (DSU), the EU submitted in writing a request for “the Panel to review precise aspects of the interim report prior to circulation of the final report”, and an additional meeting with the Panel was convened.⁵⁹ The Panel held its final meeting with the parties on June 4, 1997, and the Panel issued its final report to the WTO membership on June 30, 1997.

Summary of Case Facts

The Panel for the *EC-Hormones* case dealt with the ban on meat and meat products found in the aforementioned EC Council Directives.⁶⁰ The United States argued that these directives were inconsistent with, but not limited to, the General Agreement 1994 (GATT), Article III or Article IX; the Agreement of Sanitary and Phytosanitary Measures (SPS) Articles 2,3 and 5; the Agreement on Technical Barriers to Trade (GATS), Article 2; and the Agreement on Agriculture, Article 4.⁶¹

Article III of the GATT deals with “National Treatment on Internal Taxation” which basically restricts contracting parties from taxing or applying any other form of “internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.”⁶² Therefore, the US argued that the EU measures were inconsistent with GATT Article III because they discriminated against the imports of “like” meat and meat products (Article III.2) and prohibited the importation and sale of certain meat and meat products while permitting the sale of like domestic meat (Article III.4). In short, the EU measures were inconsistent with the GATT Agreement by treating US products less favorably than similar domestic products.

The US also claimed that these measures were inconsistent with Article I.1 of GATT because “*they failed to accord to imports from the United States the advantages,*

favours, privileges or immunities granted to like animals and meat originating in the territories of other countries.”⁶³ Finally, the US argued that the EU could not invoke GATT Article XX (General Exceptions) especially Article XX(b) which states that aside from the requirement that measures do not,

*constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”, nothing in the GATT Agreement should prevent the adoption of measures which are “necessary to protect human, animal or plant life or health.*⁶⁴

The US claimed that the EU had offered no evidence to support its directives on the grounds of health.⁶⁵ The US further argued that the Council Directives were sanitary measures and were subject to the SPS Agreement; that they directly and indirectly affected international trade; and that they were not based on “an assessment of risk”. The US thus argued that the Council Directives were inconsistent with Article 5.1 of the Agreement.

According to the text of the SPS Agreement found in *Legal Instruments – Results of the Uruguay Round (1994) of the Marrakesh Agreement Establishing the World Trade Organization*, the SPS Agreement applies to sanitary measures (i.e. food safety and animal and plant health regulations) (Annex 1A). No trade measure falling under the SPS Agreement should create unnecessary obstacles to trade. The US further argued that the EU measures:

- ◆ Were maintained without sufficient scientific evidence in contravention of Article 2.2;
- ◆ Were not justified as a “provisional” method under Article 5.7;
- ◆ Breached Articles 2.2 and 5.6 in that they were not based on scientific principles;

- ◆ Were not applied only to the extent necessary to protect human life or health and were more trade-restrictive than required to achieve the appropriate level of sanitary protection;
- ◆ Arbitrarily or unjustifiably discriminated between Members where identical or similar conditions prevailed in contravention of Article 2.3;
- ◆ Constituted a disguised restriction on international trade in breach of Article 2.3;
- ◆ Contravened Article 3.1 because they were not based on the relevant international standards, guidelines or recommendations and that this departure from international standards was not justified by Article 3.3; and
- ◆ Were based on arbitrary or unjustifiable distinctions in the levels of protection in different situations, resulting in discrimination or a disguised restriction on international trade in contravention of Article 5⁶⁶

This host of arguments thoroughly lists the alleged violations under the SPS Agreement. In sum, the US argued that the EU measures were not based on accepted international standards of scientific evidence and arbitrarily imposed on the US as a discriminatory and/or disguised restriction on international trade. Further, according to the international standards, nothing in the measures could be construed as meeting the requirement for exemptions, such as being necessary for the protection of human life or health.

The EU defended its position in a step-by-step manner, arguing that the analysis of the violations under the SPS Agreement and the TBT Agreement should only take place if the Panel found violations under the GATT Articles. The EU based its first defense on the argument that the products in question (livestock on which growth hormones were used) were not “like” other livestock. Then the EU argued that even if the Panel ruled that the livestock were “like” products, “imported products were not given ‘less favorable treatment’ than domestic products.”⁶⁷ Thus, the measures would not violate GATT Article III.4 and further, even if the Panel found that they were

inconsistent, the measures were protected by the power of a Member to implement a policy which protects human or animal health according to Article XX (b).⁶⁸

In defense of the alleged violation of Article I of GATT, the EU argued that the issue was not brought up in the Consultation Phase of the process and was not mentioned in the Panel's terms of reference. The EU went on to argue its case with regards to the SPS Agreement. According to the EU, the measures met all of the SPS requirements that the US alleged were in violation.⁶⁹ The EU argued that it did perform all the scientific and risk assessment tests, but because the EU decided on a higher standard of hormone limits than the US for its measures, the US believed them to be trade restrictions. The EU also claimed that all meat and meat products, foreign and domestic, sold in the EU market were treated the same and thus the measures could not be construed as a direct or indirect restriction on international trade.⁷⁰ As for the alleged violations of the TBT Agreement, the EU declined to respond to the allegations stating that their measures fell under the jurisdiction of the SPS Agreement.⁷¹

As pursuant to the working procedures of the DSU, after the major parties of the complaint offered their arguments, the third parties to the dispute, Canada, Australia, Norway, and New Zealand, submitted their arguments.⁷² Three of these countries, Canada, Australia, and New Zealand offered arguments consistent with those of the United States. Canada and Australia argued that the EU measures were in Violation of the SPS Agreement and further this agreement was of equal status to that of the GATT both being contained in Annex 1A of the WTO Agreement.⁷³ New Zealand claimed that,

no evidence had been produced of an appreciable risk of adverse health effect arising from the use of any of the substances. Even if it were shown

*that there was an appreciable risk, The European Communities would be required to demonstrate that the import ban was necessary to address it.*⁷⁴

Norway, however, argued in favor of the EU position that a nation has the right to establish its own level of protection and that the SPS Agreement did not require members to scientifically prove the extent of the risk on which the restrictive measures were based.⁷⁵ After these arguments were offered, the Panel elected to consult scientific experts to review the EU ban on hormone use to see if it was “based on scientific principles and on a risk assessment, and if there was sufficient evidence to support the ban.”⁷⁶ Basically, the experts were consulted to help the Panel decide whether or not the EU ban was legitimate according to present science.⁷⁷ The experts selected included:

Dr. Francois André, Laboratoire des dosages hormonaux, France;

Dr. Dieter Arnold, Deputy Director, Federal Institute for Health Protection of Consumers and Veterinary Medicine Germany;

Dr. George Lucier, Environmental Toxicology Programme, National Institute of Environmental Health Services, United States;

Dr. Jock McLean, University of Swinburne, Pro Vice Chancellor, Division of Science, Engineering and Design, Swinburne University of Technology, Australia;

Dr. Len Ritter, Executive Director, Canadian Network of Toxicology Centres, University of Guelph, Canada; and

Dr. Alan Randell of the Codex secretariat.

These experts were selected from a list provided by the Codex Commission secretariate, and/or nominated by the parties involved in the dispute. The experts were then asked a series of questions concerning the safety and scientific basis for the use of growth promotion hormones.⁷⁸

The United States and The European Communities, pursuant to Article 15.2 of the DSU, requested the Panel to review the interim report issued on May 7, 1997. The US, the EU and Canada⁷⁹ were involved in an interim review meeting to discuss additional points raised in the comments as well as others raised during the meeting. The Final Report was issued on August 18, 1997 and was circulated to all members.⁸⁰ The Panel concluded the following:

- (i) The European Communities, by maintaining sanitary measures which are not based on a risk assessment, acted inconsistently with the requirement contained in Article 5.1 of the Agreement on the Application of Sanitary and Phytosanitary Measures.
- (ii) The European Communities, by adopting arbitrary or unjustifiable distinctions in the levels of sanitary protection it considers to be appropriate in different situations which result in discrimination or a disguised restriction on international trade, acted inconsistently with the requirements contained in Article 5.5 of the Agreement on the Application of Sanitary and Phytosanitary Measures.
- (iii) The European Communities, by maintaining sanitary measures which are not based on existing international standards without justification under Article 3.3 of the Agreement on the Application of Sanitary and Phytosanitary Measures, acted inconsistently with the requirements contained in Article 3.1 of that Agreement.

Both the EU and the US (Canada as well) were permitted to appeal this ruling and they did so on October 6, 1997 and October 9, 1997, respectively. Pursuant to Rule 22 and 23(3) respectively, the US and Canada filed their appellee's submissions (written arguments for the appeal) and Canada filed their submission on October 20, 1997. The parties met for the oral hearing on November 4 and 5 of 1997. This hearing was held to allow the parties to present their arguments and respond to questions by the "Members of the Division hearing this appeal."⁸¹

Appeal Arguments of the Participants

The arguments of all parties to this dispute can best be summarized by listing the issues raised by the appeal. According to the Appellate Report, the issues raised include the following legal issues:

- (a) Whether the Panel correctly allocated the burden of proof in this case;
- (b) Whether the Panel applied the appropriate standard of review under the SPS Agreement;
- (c) Whether, or to what extent, the precautionary principle is relevant in the interpretations of the SPS Agreement;
- (d) Whether the provisions of the SPS Agreement apply to measures enacted before the date of entry into force of the WTO Agreement;
- (e) Whether the Panel made an objective assessment of the facts pursuant to Article 11 of the DSU;
- (f) Whether the Panel acted within the scope of its authority in its selection and use of experts, in granting additional third party rights to the United States and Canada and in making findings based on arguments not made by the parties;
- (g) Whether the Panel correctly interpreted Article 3.1 and 3.3 of the SPS Agreement;
- (h) Whether the EC measures are “based on” a risk assessment within the meaning of Article 5.1 of the SPS Agreement;
- (i) Whether the Panel correctly interpreted and applied Article 5.5 of the SPS Agreement; and
- (j) Whether the Panel appropriately exercised “judicial economy” in not making findings on the consistency of the EC measures with Article 2.2 and Article 5.6 of the SPS Agreement.⁸²

The first issue (a) concerned the burden of proof, mainly which party has the job of proving that the measure in question does or does not meet the requirement stated in the SPS Agreements. The Panel ruled that the EU as the party who implemented the

measure has the burden of proof. The EU argued this was an incorrect allocation and the US defended the ruling.

The second issue (b), concerned the standard of review which basically describes the standard by which the Panel judged the EU hormone-limiting measure. The Panel judged the measure by the evidence given by the experts which for the most part upheld the standard set by the *Codex Alimentarius Commission* relating to food additives (“Codex Standards”).⁸³ The EU argued that countries should be allowed to set their own standards if they are stronger than the international standards and that the Panel should have applied a “reasonable deference standard of review”.⁸⁴ The US argued that the standard of review used by the Panel was completely supported by the both the GATT and SPS Agreements.

In the issue concerning the precautionary principle (c), the EU attempted to use this principle as justification for their measure supporting their view of risk levels in the use of growth hormones. The US argued that the Panel was correct in ruling that this principle cannot override the rules contained in the SPS Agreement.

Issue (d) was the EU argument that the Panel erred in its ruling that SPS Agreement does apply to trade measure enacted before it was put into force. The US claimed that the EU completely misread the SPS Agreement in this matter and the Panel was correct in its ruling.

The fifth issue (e), deals with the EU’s claim that the Panel failed to make an “objective assessment of the facts” provided by the Panel of experts. The US argued that according to Article 17.6 of the DSU, the review of the factual findings of the Panel is beyond the scope of the Appellate Body.⁸⁵

Issues (f), (I), and (j) concern the procedures used by the Panel. Mainly, the EU argued that the Panel erred in not accepting the scientific evidence offered by the EU in favor of establishing the expert review group. The US countered by arguing that the procedures questioned by the EU have not been based on any textual defense and that any objections should have been made during the Panel process.⁸⁶

Finally, issues (g) and (h) concerned the EU's argument that the Panel failed to adhere to Articles 3.1 and 3.3 of the SPS Agreement which dealt with the incorrect interpretation of the term "based on".⁸⁷ The US argued that the Panel did adhere to the listed Articles and since the EU measures do not conform to the Codex standards, even under the broad definition proposed by the EU, the argument is invalid.⁸⁸

Appellate Body Conclusions

The Appellate Body report was finally decided on January 16, 1998 and adopted on February 13, 1998. The conclusions are best summarized as the Appellate Body listed them. According to the Appellate Body Report, under the Findings and Conclusion section, the Appellate Body:

- (a) Reverses the Panel's general interpretive rulings that the SPS Agreement allocates the evidentiary burden to the Member imposing an SPS measure, and also reverses the Panel's conclusion that when a Member's measure is not based on an international standard in accordance with Article 3.1, the burden is on that Member to show that its SPS measure is consistent with Article 3.3 of the SPS Agreement;
- (b) Concludes that the Panel applied the appropriate standard of review under the SPS Agreement;
- (c) Upheld the Panel's conclusions that the precautionary principle would not override the explicit wording of Articles 5.1 and 5.2, and that the precautionary principle has been incorporated in, inter alia, Article 5.7 of the SPS Agreement;

- (d) Upheld the Panel’s conclusion that the SPS Agreement, and in particular Articles 5.1 and 5.5 thereof, applies to measures that were enacted before entry into force of the WTO Agreement, but that remain in force thereafter;
- (e) Concludes that the Panel, although it sometimes misinterpreted some of the evidence before it, complied with its obligation under Article II of the DSU to make an objective assessment of the facts of the case;
- (f) Concludes that the procedures followed by the Panel in both proceedings – in the selection and use of experts, in granting additional third party rights to the United States and Canada and in making findings based on arguments not made by the parties – are consistent with the DSU and the SPS Agreement;
- (g) Reverses the Panel’s conclusion that the term “based on” as used in Articles 3.1 and 3.3 has the same meaning as the term “conform to” as used in Article 3.2 of the SPS Agreement;
- (h) Modifies the Panel’s interpretation of the relationship between Articles 3.1, 3.2, and 3.3 of the SPS Agreement, and reverses the Panel’s conclusion that the European Communities by maintaining, without justification under Article 3.3, SPS measures which are not based on existing international standards, acted inconsistently with Article 3.1 of the SPS Agreement;
- (i) Upheld the Panel’s findings that a measure, to be consistent with the requirements of Article 3.3, must comply with, inter alia, the requirements contained in Article 5 of the SPS Agreement;
- (j) Modifies the Panel’s interpretation of the concept of “risk assessment” by holding that neither Articles 5.1 and 5.1 nor Annex A.4 of the SPS Agreement require a risk assessment to establish minimum quantifiable magnitude of risk, nor do these provisions exclude a priori, from the scope of a risk assessment, factors which are not susceptible to quantitative analysis by empirical or experimental laboratory methods commonly associated with the physical sciences;
- (k) Reverses the Panel’s finding that the term “based on” as used in Article 5.1 of the SPS Agreement entails a “minimum procedural requirement” that a Member imposing an SPS measure must submit evidence that it actually took into account a risk assessment when it enacted or maintained the measure;

- (l) Upheld the Panel’s finding that the EC measures at issue are inconsistent with the requirements of Article 5.1 of the SPS Agreement, but modifies the Panel’s interpretation by holding that Article 5.1, read in conjunction with Article 2.2, requires that the results of the risk assessment must sufficiently warrant the SPS measure at stake;
- (m) Reverses the Panel’s findings and conclusions on Article 5.5 of the SPS Agreement; and
- (n) Concludes that the Panel exercised appropriate judicial economy in not making findings on Article 2.2 and 5.6 of the SPS Agreement.⁸⁹

The interpretations of these conclusions have created additional disputes between the EU and the United States. Both parties interpreted the Appellate Body ruling as a victory. The US viewed the conclusions as a ruling instructing the EU to immediately remove their Council Directives that were the focus of the dispute.⁹⁰ The EU, however, claimed the decision allowed them one year to produce risk evidence that supports their ban on the growth producing hormones.⁹¹

The Appellate Body did rule against the EU writing, “*The Appellate Body recommends that the Dispute Settlement Body request the European Communities to bring the SPS measures found in the 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.*”⁹²

Thus, an implementation period was established. The parties could not agree on a time period. The EU wanted 39 months, while the US demanded 10 months. The director-general appointed an arbitrator who decided the period of fifteen months.

At the center of the interpretation dispute was the Appellate Body Findings and Conclusion (h) which reversed the Panel’s conclusion that the EU violated Article 3.3 of

the SPS Agreement by maintaining an SPS measure that was not based on existing international standards.⁹³ In other words, the Appellate body upheld the EU's right to establish standards that go beyond those of the international standards provided the more stringent standards are supported by scientific evidence. This has opened the door for the EU to claim that the Appellate Body has ruled that they can keep their ban provided they can produce scientific evidence on the risks of growth promoting hormones.⁹⁴

The Arbitrator's Report, however, ruled that the introduction of a new risk assessment produced by the EU did not qualify as "particular circumstances" justifying a longer compliance period due to the requirement of such an assessment being present as of January 1, 1995 when the SPS Agreement went into effect. This ruling has not forced the EU to consider compliance, however. On 13 April 1999 the EU breached the arbitration period of fifteen months.

The EU then sought arbitration to determine the amount of retaliation, in monetary terms, the US and Canada are entitled. According to the USTR press release of July 12, 1999, "WTO arbitrators found today that the European Union's ban on U.S. beef and beef products has resulted in lost annual U.S. exports of beef to the EU in the amount of 116.8 million."⁹⁵ Three days later the USTR released the final list of products on which the United States would impose 100 percent *ad valorem* duties.⁹⁶

Apparently, the EU seems content to allow retaliation measures from the US and Canada rather than to remove its restrictive trade measures. Although the actions by the EU are allowed for in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), resolutions to disputes in this manner are clearly less

desirable than full compliance.⁹⁷ The EU has been accused of ignoring their obligations to the WTO and threatening the Dispute Settlement process as a whole.⁹⁸

Regardless of the final outcome, this dispute case as a whole has been extremely time-consuming and costly. Since this case is one the first WTO Dispute Settlement cases, the resolution will likely set a precedent for future cases. This makes the resolution of the *Hormones* case crucial. Without the willingness of the WTO membership to comply with their obligations under the GATT/WTO Agreements, the effectiveness of the DSB may soon resemble that of its predecessor, the GATT Dispute Resolution Body.⁹⁹ The WTO DSB has the procedural power to induce its members into complying with its rulings. However, it has no facility to force compliance. According to Judith Hippler Bello,

The WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheon or tear gas. Rather, the WTO—essentially a confederation of sovereign national governments—relies upon voluntary compliance. The genius of the GATT/WTO system is the flexibility with which it accommodates the national exercise of sovereignty, yet promotes compliance with its trade rules through incentives.¹⁰⁰

The next chapter will explore how the EU's actions in regards to *EC- Hormones* have been a detriment to the integrity and credibility of the WTO.

Chapter III - The Effects of UEU Actions in the WTO Dispute Settlement Case: EC - Hormones

Contracting parties of the World Trade Organization (WTO) continue to use the Dispute Settlement Body (DSB) as a legitimate means to resolve their trade disputes. Several countries have turned to the WTO as a venue to have their trade disputes resolved in a fair and just manner. The results of these early cases will undoubtedly set precedents for future disputes. For this reason, the DSB strives to handle its cases with utmost care. One particular difficult case is *European Communities – Measures Concerning Meat and Meat Products (Hormones)*. This longstanding dispute demonstrates how long the process can take, irrespective of mandatory time-lines for these cases. The *EC-Hormones* case shows the difficulty of implementation when the parties disagree on the obligations of the defending party. According to Reif and Florestal, dispute cases such as *EC-Hormones* and *EC - Bananas* have challenged the dispute settlement process and “[s]uch challenges are likely to continue to arise, particularly in politically-important cases and/or ones involving complicated issues of fact and/or law.”¹⁰¹ Further discussion on this issue and others will follow as this chapter analyzes the actions taken by the EU in the *EC-Hormones* case in an attempt to defend a trade policy that was determined by the DSB to be inconsistent with GATT and WTO agreements.

The EU has succeeded in postponing the removal of this trade barrier that was ruled to be in violation of the Agreement on Sanitary and Phytosanitary measures (SPS Agreement). It has now been more than three years since the DSB ruled that the EU action with regard to these meat products is inconsistent with the SPS Agreement. This trade barrier has been in effect in some form for nearly two decades. This is raising questions as to EU’s commitment to the multilateral trading system, and also the role of

the WTO in this type of international trade dispute. Both the Panel Report and the Appellate Body Report have ruled against the EU, recommending that they remove their ban on meat products containing hormones, a trade restriction that the DSB determined is inconsistent with the SPS Agreement negotiated during the Uruguay Round of Multilateral Trade Negotiations.

Having lost both the initial ruling and the appeal, the EU then requested additional time to comply. They wanted to complete an additional risk assessment in hopes that additional scientific evidence would support the rationale for their ban on these meat products. The Arbitration Report denied this request stating that the risk assessment should have been submitted by January 1, 1995 when the SPS Agreement went into force.¹⁰²

The losing party is required to issue status reports to keep the DSB aware of its progress in implementing the DSB rulings and recommendations. On April 16, 1999, the EU issued its fourth status report to the DSB. Having missed the compliance deadline, the EU Permanent Delegation of the European Commission has prepared a report for the Council and European Parliament, “setting out the options to be considered.”¹⁰³

For the WTO, the *EC-Hormones* case offers the challenge of being both political and complex; this makes its resolution crucial as a precedent for future disputes. This chapter will show that if the WTO cannot elicit compliance from the EU, the *EC-Hormone* case could undermine the legitimacy and credibility of the DSB, and call into question the value of the WTO as a whole.

Cost of *EC-Hormones* Case

The EU, in defense of its position, instigated a process that consumed vast amounts of WTO resources. The use of the DSB for the purpose of delay is inappropriate and should not be encouraged. The particular nature and complexity of the *EC-Hormones* case makes the unfavorable nature of this course of action clear. The caseload at the WTO is growing exponentially as more and more countries turn to it to resolve disputes. According to Debra P. Steger, Director of the Appellate Body Secretariate of the WTO,

*(t)here are currently sixteen cases before panels, with three panel requests outstanding that may be established at the next DSB meeting. The Appellate Body is currently considering one panel report under appeal, but three more panel reports have been issued to the parties to the dispute and could be appealed shortly.*¹⁰⁴

With the growing responsibilities of the WTO DSB, the amount of resources available for handling the caseload has become an important issue. Some WTO experts have argued that the present resources are adequate to handle the increase in cases, indicating the existence of one rival hypothesis to this study. If resources allocated to the WTO DSB are in fact adequate, then the EU actions with regard to the *Hormones* case are not endangering the functioning of the system, at least with regard to the timeliness and quality of the DSB's actions. According to C. Christopher Parlin,¹⁰⁵ presently counsel in the international trade practice group at Winthrop, Stimson, Putnam & Roberts, the resource burden can be divided into three areas of concern – “the Appellate Body, the panelists, and the Secretariate staff.”¹⁰⁶ In Parlin's opinion, there is no evidence to suggest that the allocated resources are inadequate to handle the present responsibilities.¹⁰⁷ He points out that there are other solutions available to remedy any

foreseen problems with the functioning of the DSB. Increasing WTO resources is not the only possibility. According to Parlin, the design of the system is more at fault than the resource limitations. The key to Parlin's solution is the altering of "unreasonably short" time limits during the Panel and Appellate process.¹⁰⁸ As for the Secretariat staff, Parlin acknowledges that the workload of the division staffers and Secretariat lawyers is "heavy and demanding"; however, there is still no indication that the staff is lacking in expertise or is performing ineffectively.¹⁰⁹ Parlin suggests that although there are some parts of the WTO that are overburdened, there are also places where resources are being underutilized. Performing a managing audit would indicate where funds could be most effectively deployed and, together with an accompanying shift of personnel, would solve most of the WTO's resource problems.¹¹⁰

The arguments offered by Mr. Parlin, however, are not widely accepted. Other WTO experts see the situation as much more severe. According to Andrew Stoler,¹¹¹ "the system is in danger of collapse at current resource levels and both the Secretariat and developed country Members must increase the resources they devote to dispute settlement in the near future."¹¹² Stoler's views are in line with those of Debra Steger, Director of the Appellate Body Secretariat. Steger argues that the DSB has been able to cope with the pressures of the first thirty months of operation, but, with the quickly growing caseload, there will be serious operational problems with the system in the near future.¹¹³ Steger focuses much of her argument on the strain that translation requirements have put on the WTO. Translation problems have already caused delays with the release of panel reports, most of which are several hundred pages in length. With the need to translate these reports in three official languages and distribute them to the entire WTO

membership, the shortage of sufficiently trained translators has pushed complicated cases such *EC-Hormones* well past the mandated timetables. Stoler and Steger also focus on the costs of the Appellate Body in which a large portion of its budget goes for transportation and living expenses of Appellate Body staff who must be in Geneva for extended periods. Much of these expenses have been covered by a trust fund created by the Committee on Budget, Finance and Administration to handle the appeals. The replenishment of this fund has come from “extraordinary surplus accounts that are extremely unlikely to exist again in the future.”¹¹⁴ A serious problem is thus viewed as eminent, especially due to the reluctance of major supporters to the WTO, such as the US and Germany, to increase their contribution to the WTO budget. According to Stoler, the US State Department’s Bureau of International Organization Affairs favors a “Zero Nominal Growth” (ZNG) budget. This type of budget would require the WTO to function on the exact amount as the previous year, absorbing inflation increases through reduced expenditures. Stoler concludes his views by calling on developed countries, and specifically the United States, to ensure the continued effective operation of the WTO DSB. According to Stoler, “[r]esource constraints are already hampering the functioning of the system and the outlook for the future is not at all encouraging.”¹¹⁵

Stoler introduced another key argument that threatens the functioning of the WTO: the need for support from major contracting parties. This lack of support further challenges the success of the WTO. The WTO requires, as an international organization, support from its contracting parties. Support from major contributors such as the United States is crucial to the effective functioning of the DSB.¹¹⁶ If countries continue to use the WTO DSB with no commitment to adhere to its rulings, such as the case with the *EC-*

Hormones case, the result will be an under-funded WTO in the very near future. The principal effects of an under-funded WTO include: 1) Delays in meeting time table requirements, 2) Personnel shortages both in number and expertise, 3) Decrease in quality of Panel and Appellate Body Reports, and 4) Translation shortages in a number of languages and time.

Most WTO experts have agreed that problems with the DSB are evident now and will increase in the future. The EU's inappropriate use of the WTO DSB has exasperated this situation and damaged the legitimacy and credibility of the process as a whole.

The complicated nature of the *EC-Hormones* case required that timetables be extended to allow the Panel and Appellate Body time to analyze the scientific data and to evaluate the arguments of the parties. Additional time was also required to consider the parallel but separate complaint by Canada.

The DSU allots six months to complete the Panel Report; for emergency rulings, the panel aims for three months. Under certain conditions, the panel can request more than six months to complete the report, but "in no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months."¹¹⁷ In the *EC-Hormones* case, the panel was established on July 2, 1996 and the panel report was circulated to the WTO Members on August 18, 1997.¹¹⁸ This is over thirteen months since the panel was formed.

Secondly, the Appellate Body is required under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) to complete its review within ninety days. The Report of the Appellate Body was circulated to the WTO Members on

January 16, 1998 almost five months after the circulation of the Panel Report. This is the only case where the Appellate Body failed to meet the established time period.

Obviously, this was a complicated case; however the effects on the WTO remain substantial. The costs associated with this lengthy case include panelist expenses, Appellate Body expenses, hiring of scientific experts to advise the panel, and huge reports requiring substantial translation costs.

The length of this case, as well as the total number of cases submitted to the WTO, have made it difficult to find qualified personnel for panel positions. Steger suggests that, “the caseload is putting pressures on the ability of the Secretariat and the parties to find persons with adequate expertise to serve as panelists.”¹¹⁹ As for the Appellate body, these members were originally envisioned to be only part-time employees of the WTO and were not even supposed to reside in Geneva. The reality, however, indicates that these members are working full-time and their obligations to the WTO do not permit them to pursue outside financial interests.¹²⁰

The increased caseload is putting a burden on the Panelist and Appellate Bodies to finish their work with the quality the GATT and WTO have produced in the past. This problem has not been evident to date; but with the expected accession of China and Russia to the WTO, the problem may be right around the corner.¹²¹

The final problem associated with an under-funded WTO is the inability to translate panel and appellate reports and distribute them to all parties on time. According to Stoler, “the problem (funding limits) is particularly acute with respect to translation of the documents related to the dispute...”¹²² He further adds that translation requirements have increased twenty percent annually, but the budget has not been permitted to increase

proportionately.¹²³ As the above examples have illustrated, the WTO Dispute Settlement process has recently come under a variety of pressures. As evident by the increased number of cases taken to the WTO compared to its predecessor the GATT, the WTO has created an increased confidence in the Dispute Settlement process. This increase in demand calls for discretion in determining which cases truly need the process. The question remains as to whether the EU actually used this process as a tactic to postpone removal of their inconsistent ban. Regardless of intention, the costs to the WTO remain the same. Further, after being instructed to remove their trade measures by the Appellate body and Arbitration, the EU continues to refuse to remove the ban, accepting retaliation tariffs instead. This may be the most damaging action taken by EU. Refusing to comply with the WTO rulings could well set a precedent that will undermine the credibility of the WTO as an effective international forum for the resolution of trade disputes.

EU Delay Actions

The EU clearly pursued a strategy to delay resolution of this dispute before the official WTO process began and, after the DSB ruled on the case, the EU chose not to comply with the ruling, electing instead for alternative measures to resolve the case. After the Appellate Body ruling was issued, the EU employed another delay tactic. They requested an extraordinary lengthy compliance period in order to prepare an additional “risk assessment.”¹²⁴ The EU claims that additional scientific evidence will show that the hormones used by the US in beef cattle can be harmful. However, according to August Schumacher, US Department of Agriculture Under Secretary for Farm and Foreign Agriculture Services:

*The international community has been studying the use of growth promotants in cattle for decades and has concluded that these approved and licensed products are safe when used in accordance with good veterinary practice. Both the EU Lamming Committee and the 1995 EU Conference on Growth Promotants concluded that there is no public health risk from consuming beef from hormone treated animals. All six approved hormones have been used without negative effects on public health in the US and many other countries for decades.*¹²⁵

James Lyons, Associate General Counsel for Agriculture at the United States Trade Representative and closely involved with the *EC-Hormone* case, noted that the EU had no justification for its assertion that part of the period provided to implement the DSB's recommendations should be allotted for the preparation of an additional risk assessment. The EU's claim that time to conduct additional risk assessments should be built in to the implementation period was rejected by an arbitrator on May 29, 1999. Lyons clearly believes the EU effort was an attempt to delay removal of the hormone ban.¹²⁶

In a meeting held between the US and the EU on March 3-4, 1999, the EU indicated it was awaiting the results of their risk assessment which will not be completed until the end of the 1999 at the earliest, and probably not until well into the year 2000.¹²⁷ The EU request for a 39-month implementation period was an attempt to delay the removal of the hormone ban. The EU had no justification for delaying compliance until risk assessment was completed.

The EU is made up of 15 countries consisting of 350 million consumers making it the largest multi-nation trading bloc in the world. In order to act on the hormone ban, the EU needs a mandate from its members, which takes time. However, the EU received the Appellate Body Ruling in February of 1998, but did nothing relating to this obligation for over a year.¹²⁸ The refusal to remove

the illegal trade measures after losing their WTO dispute settlement case strongly suggests that the EU has no desire to comply with the decision. Further, it can be argued that the EU exhibited bad faith from the onset, and had no intention of altering their trade policy before entering into the dispute settlement process. In any event, the EU's actions have affected the WTO DSB negatively and may undermine the WTO's ability to resolve future dispute settlement cases.

When the EU's fifteen-month compliance period expired on May 13, 1999, the US requested permission from the WTO to suspend trade concessions to the EU in accordance with WTO procedures.¹²⁹ On June 2, 1999, the EU submitted a letter objecting to the amount of retaliation the US sought and requested arbitration to resolve the issue.¹³⁰ The EU offered compensation as pursuant to the Dispute Settlement Resolution Article 22.1. However, the US argued that the EU's offer of approximately \$100 represented only the amount of trade the EU measures affected in the mid-1980's.

According to Lyons, this offer was unacceptable to the US for two main reasons. One was the fact the figures were 14 years old disregarding the fact that US exports of beef to other markets have increased significantly during that period, but more importantly, this compensation proposed by the EU would take the form of an increase in quotas allowed for beef which did not contain hormones. Unless the quotas were significantly increased there would be little economic incentive to attract the US Beef industry.¹³¹ The Arbitration report concluded: "For the reasons set out above, the arbitrators determined that the level of nullification or impairment suffered by the United States in the matter *European Communities – Measures Concerning Meat and Meat Products (Hormones)* was **US\$ 116.8 million** per year."¹³²

The retaliation is permitted by the WTO rules; however, many WTO experts do not view this type of resolution as a success. According to James Lyon, in the short term the retaliation measures against the EU will likely only hurt the affected EU industries and not help the US Beef Industry.¹³³

The WTO was established to reduce trade restrictions, not mediate fair retaliation measures. According to the DSU, these retaliation measures are intended to be “temporary measures” but the text never adequately defines “temporary.” This omission allows countries such as the EU to use these measures for a significant amount of time.¹³⁴ Having a case of such importance resolved in this manner is contrary to the principles upon which the WTO was founded. The US’ position on acceptance of retaliation (Article 22.1 of the DSU) was offered in the Statement of Administrative Action (SAA) to the Uruguay Round Agreements Act (URAA). The statement read, “Article 22.1 makes clear that compensation is intended to be temporary *and that full implementation of a panel or Appellate Body recommendation is the preferred result.*”¹³⁵ Further, United States Trade Representative (USTR) Charlene Barshefsky claims that the US use of these retaliation measures were the a “course of last resort.”¹³⁶ The US interprets full compliance as bringing inconsistent trade measures in line with the GATT/WTO Agreements. In WTO cases in which the US was a losing party, it has removed or let expire all trade measures found to be in violation by the WTO DSB.¹³⁷ According to the above USTR press releases, the US presently views the WTO as an important international actor and would prefer full compliance with all its rulings.

The action taken by the EU in the compliance stage of the *EC-Hormone* case may prove to be the most devastating to WTO legitimacy. For the first time in the five-year history of the WTO, a defending party has refused to comply with the recommendation of the WTO Dispute Settlement Body to remove the disputed trade policy (See Table 1.3). The EU's refusal to remove their trade ban could have far-reaching implications on the future functioning of the WTO. Experts in GATT/WTO processes offer additional arguments. Timothy Reif, an Adjunct Professor of Law at Georgetown University, claims that if the drafters of the WTO Agreements intended for full implementation to be preferred they could have said just that in the Agreements.¹³⁸ However, Professor Jackson, currently a Professor of Law at Georgetown University, argues that the DSB leaves non-implemented cases on their agenda which indicates that ultimately full implementation is a requirement.¹³⁹ Regardless of how the WTO finally rules on this implementation measure, the damage done to its status as a legitimate and proficient international trade organization remains. The WTO may be in a precarious situation considering its reliance on the political and financial support of major contracting parties such as the United States. The WTO may need for the DSB to function more effectively in regards to compliance or support from the US and other powerful nations could be withdrawn. The EU actions initiated retaliation measures from the US. Although this maneuver is allowed for in the DSU, the US would not need a WTO to resolve a dispute in this manner. Perhaps the EU will rethink their position and resolve the dispute with the US before its actions prove to be a serious detriment to the future of the WTO as a vital international actor. This has occurred before in the WTO with the US resolving its dispute with Japan over automobile parts.¹⁴⁰ Lyons stated that the US has offered to

compromise by labeling the beef they export as “Produced in the US” or even “Containing growth hormones” so as to allow the EU consumers to decide whether or not they want the hormone beef. The EU, however, has presently made no attempt to resolve the dispute in this fashion since the representatives at a recent meeting of March 3-4, 1999 claimed they had no authority to respond to such a compromise.¹⁴¹

Case Conclusions

This chapter has demonstrated that the WTO has been put in a precarious situation due to the defiance of the EU in the *EC-Hormones* dispute case. With the GATT/WTO experts concerned with the problems arising with the procedural functioning of the DSB, a dispute case that threatens the support of a major economic power such as the US cannot bode well for an international organization in its early operation. According to Andrew Stoler,

*The overwhelming bulk of the responsibility for ensuring that the WTO Secretariat and Appellate Body have the resources they need in order for the dispute settlement system of the WTO to function effectively rests with the United States and other developed country Members of the organization. Resource constraints are already hampering the functioning of the system and the outlook for the future is not at all encouraging.*¹⁴²

This statement is a clear warning against the type of actions taken by the EU.

The EU has disregarded their commitment to the principles embodied by the WTO over a trade measure unsupported by the international community. The need for a successful dispute settlement system is crucial to the WTO and the fostering of international trade liberalism. Heather Forton, a representative of the Canadian Department of Foreign Affairs and International Trade, adds:

*The panel process is an important aspect of that dispute settlement system. Notwithstanding the procedural or technical difficulties which have arisen in the context of various panel proceedings ... Members of the WTO have confidence in the system and it is critical that this confidence be maintained to ensure that the dispute settlement system is used to preserve the strong rules-based multilateral trading system.*¹⁴³

Again, the experts agree on the importance of a successful DSB.

The problems that have arisen with the procedural aspect of the DSB have caused many GATT/WTO experts to state warnings against under-funding the WTO DSB.

Solutions to these problems have circled around increasing the budget and increasing the time requirements. However, as mentioned above, the budget increases are not politically popular and increasing the time allotments may decrease the confidence in the system as a whole. These problems have not necessarily affected the DSB as of yet, but according to Kingery, “these are probabilities rather than possibilities.”¹⁴⁴ Kingery sees the WTO in a position to move forward with its goals if it can successfully alleviate the present problems. However, “the procedural maneuvering by parties to slow or stall the dispute settlement process” remains a key obstacle.¹⁴⁵ This study has shown the importance of alleviating this problem if the WTO is to remain an integral forum for the resolution of international trade disputes and the promotion of international trade liberalism.

Conclusion

With the establishment of the World Trade Organization (WTO) and its powerful Dispute Settlement mechanism in 1995, a new forum has been created for addressing international trade disputes. With its increased strength, the Dispute Settlement Body now possesses significant ability to coerce states into abiding by the international agreements they have signed. A key purpose of this international organization is to remove the political aspect from the process in which disputes are resolved.¹⁴⁶ The WTO hopes to replace political maneuvers with the structured dispute settlement process established by GATT/WTO Agreements.

Pursuant to this process, trade disputes taken to Dispute Settlement Body (DSB) must proceed through a series of stages with mandated timetables. The DSB process is designed to achieve fair and timely resolutions to international trade disputes. Since the WTO relies on the support of its Members for operational funds and for voluntary compliance with its rulings, time delays are undesirable. Presently, a significant increase in the amount of cases taken to the WTO has created a back-load. This places a strain on the process, creating delays and increasing the likelihood that the quality of the case reports will suffer.

Another important issue facing the WTO is the potential for the losing party in a dispute to misuse the process through delaying tactics. This has occurred in the dispute case *EC- Hormones, Complaint by the United States*. In this potentially precedent-setting case, the European Union (EU) has been unwilling to remove restrictive trade measures judged by the DSB to be in violation of GATT/WTO Agreements. Instead, the EU has employed a series of delay tactics and has chosen to accept retaliation measures in lieu of

eliminating these restrictive measures. Most experts believe these actions by the EU are damaging the effectiveness and credibility of the dispute settlement process and the WTO as a whole.

This research has shown compelling evidence that in the *EC-Hormones* case, the EU, by attempting to delay the removal of a restrictive trade measure, has increased the strain on procedural functioning of the dispute settlement process and has damaged the legitimacy and credibility of the WTO. Although this case has not been totally resolved, the research has shown that the WTO's credibility has been adversely affected. The WTO's Panel Report, Appellate Body Report, and the Arbitration Report all ruled against the EU in this matter. Notwithstanding, the EU has ignored the recommendations of these bodies, and continues to pursue a course of action contrary to the intent of the GATT/WTO Agreements. Besides the rulings and the fact that the scientific evidence involved in this case resulted in the longest dispute case handled by the WTO to date, the EU has refused to remove their ban even past the expiration of the fifteen-month arbitrated compliance period.

Not all experts agree that WTO credibility has been significantly damaged by the actions of the EU in this case. While most experts view the EU actions as delay tactics, some do not see them as subverting the WTO dispute settlement process as a whole.¹⁴⁷ However, this research has shown that the DSB already shows evidence of procedural strain. According to Kingerly, procedural problems are probabilities rather than possibilities, and WTO appears to be in a position to move forward except for one key obstacle: "the procedural maneuvering by parties to slow or stall the dispute settlement process."¹⁴⁸

Presently, the EU continues their delay by waiting for the completion of an additional risk assessment. This risk assessment is being prepared by the EU in hopes of offering further scientific evidence that would support for their ban on certain meat hormones. However, preparation of this additional risk assessment is not an acceptable course of action under WTO Dispute Settlement procedures. The EU's request for an extended compliance period failed as the Report of the Arbitrator refused to grant the EU additional time to complete this assessment.

The compliance period expired on May 13, 1999, but the EU has refused every offer by the US, including compromises. Instead, the EU has resolved to accept WTO sanctioned retaliation measures by the US, instead of removing their ban.

Although the framers of the WTO foresaw this situation, resorting to such actions cannot be seen as a victory for the system, as full compliance was the goal of the Dispute Settlement Understanding (DSU).¹⁴⁹ According to experts in the field of international trade and one personal interview conducted for this study, the EU actions appear to be undermining the functioning of the WTO. Procedural problems with the DSB are the main concern of the experts regardless of their position on the hormone ban.

A significant threat to the WTO occurs when a major economic power such as the EU refuses to abide by the obligations to which they had previously agreed when the organization was established.

With the *EC- Hormone* case as a precedent, the probability that other states will abuse the dispute settlement process increases. US Trade Representative Charlene Barshefsky stated publicly that the actions by the EU bring into question their

commitment to a multilateral trading system. Yet the EU continues to fight for its right to restrict the hormone-tainted beef.

As a result of this research, cautious inference can be made concerning the present performance of the WTO dispute settlement process as it pertains to the Agreement on Sanitary and Phytosanitary measures (SPS Agreement). Responses from other nations similar to that of the EU may not be far behind. Without a credible system of rules in place to govern international trade, the world's trading environment will become much more complicated.

At stake in this situation are the principles of trade liberalism. Liberal trade theory is basically the argument for the removal of state instituted trade barriers and policies that inhibit the free functioning of the international market. The main goal of the WTO is to provide a forum for trade disputes guided by international law. Without an international framework to govern this process, some other form of international economic order will take its place.

The most likely options for nations in a system without respected trade rules are protectionism and bilateral negotiations. In such a system, trade disputes will most likely be resolved in favor of the most powerful economic state and fairness may be delegated to secondary importance. Tariffs and restrictive trade policies may also become more popular as states attempt to manipulate the system in various ways in hopes of gaining the greatest advantage. However, according to the several studies as well as the WTO, these types of manipulations often result in less of an advantage and lower generation of wealth. Even in cases where a powerful economic power has the ability to harm foreign

production and protect domestic interests, the result is often lower profits for both nations.¹⁵⁰

Considering the short existence of the WTO, very little study has been completed on the effectiveness of this international organization and, in particular, its Dispute Settlement Body. Supporting or refuting evidence for this research, however, may be forthcoming. Concurrently, the EU and the United States have been involved in another trade dispute involving EU measures restricting the sale of US Bananas. From the preliminary reports, it appears that the EU has utilized similar tactics and continues to ignore the rulings as agreed under the GATT/WTO. Regardless of fault, the continued actions by the EU increasingly threaten the WTO and add to its already growing pressures. Along with WTO budget problems, translation difficulties, and personnel shortages, the *EU- Hormones* case will surely promote future research into the successful role of the WTO as a vital actor in the international economic order.

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Appendix I - List of Acronyms

- DSB Dispute Settlement Body. The part of the World Trade Organization responsible for the resolution of international trade disputes.
- DSU Understanding on Rules and Procedures Governing the Settlement of Disputes. This is the set of Articles of the World Trade Organization explaining the procedural functioning of the Dispute Settlement Body.
- EC European Community. Economic unification of European states established in 1967 and continued until 1993.
- EU European Union. Economic Unification of European states established in 1993 and presently continuing.
- GATT General Agreement of Tariffs and Trade. Informal Organization based on a contract between 123 governments. The chief objective of GATT was to provide and secure a predictable trading environment and continue to open markets in order to promote worldwide economic growth. Contract rules and obligations were developed through a series of multilateral trade negotiations starting in 1948 and continuing until 1994.
- GATS General Agreement on Trade in Services.
- PPM Process and Production Method. Area of trade concerning products based on process and production methods which are not covered under GATT/WTO Agreements.
- SPS Agreement Agreement on Sanitary and Phytosanitary Measures. Agreement referring to procedures or requirements used by governments to protect human life, animal or plant life or health risks arising from the spread of pests and disease, or from additives or contaminants found in food, beverages, or feedstuffs.
- TBT Agreement Agreement on Technical Barriers Trade. Agreement that deals comprehensively with product standards, technical regulations and conformity assessment procedures. Attempt to distinguish which technical measures are designed to achieve legitimate goals and which are disguised trade barriers.
- TEG Technical Expert Group. Groups of experts formed to advise and inform the Dispute Settlement Panels and Appellate Bodies.
- WTO World Trade Organization. International Organization (successor to the GATT formed in 1995 as a result of the Uruguay Multilateral Trade Negotiations).
- ZNG Zero Nominal Growth. Economic Policy in which an organization operates on a fixed budget from year to year without even an increase that keeps pace with inflation.

Endnotes

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- ¹ This dispute case will hereafter be referred to as *EC-Hormones*.
- ² David Wirth Personal Interview. May 10, 1999.
- ³ According to the WTO Panel Report on the EC-Hormones case paragraph II.12, the Codex Alimentarius Commission is a joint advisory body (FAO and WHO) established to ensure the health safety of consumers and to ensure fair practices in food trade through the creation and establishment of food standards. The Codex Alimentarius or “the Codex” for short is thus a collection of internationally adopted food standards presented in a uniform manner.
- ⁴ The SPS Agreement is the Agreement on Sanitary and Phytosanitary Measures. This Agreement refers to procedures or requirements used by governments to protect human life, animal or plant life or health risks arising from the spread of pests and disease, or from additives or contaminants found in food, beverages, or feedstuffs.
- ⁵ James Lyons Personal Interview. April 16, 1999.
- ⁶ Robert K. Yin Applications in Case Study Research. London: Sage Publications, 1993: 60.
- ⁷ Yin 60
- ⁸ Steger, Debra P. *Key Procedural Issues: Resources; Comments*. The International Lawyer Fall 1998: 876.
- ⁹ Ernst-Ulrich Petersman, The GATT/WTO Dispute Settlement System: International Law, International Organizations, and Dispute Settlement. (London: Kluwer Law International Ltd., 1997) 936.
- ¹⁰ Yin 69.
- ¹¹ Yin 69.
- ¹² Hufbauer, G.C. and K.A. Elliot. Measuring the Costs of Protection in the United States. Washington D.C.: Institute for International Economics, 1994. And de Melo, J and D. Tarr. A General Equilibrium Analysis of US Foreign Trade Policy, Cambridge: MIT Press, 1992.
- ¹³ World Trade Organization Annual Report, 1998, 41
- ¹⁴ Grossman, G.M. and H. Horn. *Infant Industry Protection Reconsidered: The Case of Informal Barriers to Entry*. Quarterly Journal of Economics 103. 1998:767-787.
- ¹⁵ WTO Annual Report 1998, 42.
- ¹⁶ WTO Annual Report 1998, 42.
- ¹⁷ WTO Annual Report 1998, 42.
- ¹⁸ WTO Annual Report 1998, 42
- ¹⁹ Failure to meet the required time period authorizes the winning party to use retaliation measures. These are usually trade tariffs on like products equal to the monetary damage of the inconsistent trade measure. The use of retaliation measures is discussed in more detail in Chapter III.
- ²⁰ Atkins, David Atkins et al. A Three-Year Review: Ed. Dr. Steve Suranovic.

(Washington, DC: George Washington U., Elliot School of International Affairs, 1998):

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²¹ Atkins et al 1.

²² Atkins et al 1.

²³ Atkins et al 2.

²⁴ Atkins et al 2.

²⁵ <http://www.wto.org/wto/about/basics.htm>, “Roots: from Havana to Marrakesh,” last updated January 14, 1998.

²⁶ <http://www.wto.org/wto/about/facts1.htm>, “The Agreements” last updated February 5, 1998.

²⁷ Atkins et al 4.

²⁸ <http://www.wto.org/wto/about/facts4.htm>, “Basics” last updated February 5, 1998.

²⁹ Atkins et al 5.

³⁰ <http://www.wto.org/wto/about/basics.htm>, “Basics” last updated February 5, 1998.

³¹ Atkins et al 5.

³² WTO Annual Report 1998 41.

³³ J. de Melo and D Tarr, *A General Equilibrium Analysis of US Foreign Trade Policy*. Cited in WTO Annual Report 1998.

³⁴ WTO 42.

³⁵ WTO 42.

³⁶ Baldwin and Kruger cited in WTO Annual Report 1998.

³⁶ Baldwin and Kruger cited in WTO Annual Report 1998.

³⁷ WTO 42.

³⁸ DSU, Article 23 para. 1

³⁹ “About the WTO: Settling Disputes,” <http://www.wto.org/wto/dispute/bulletin.htm>.

⁴⁰ “About the WTO: Settling Disputes,” <http://www.wto.org/wto/dispute/bulletin.htm>.

⁴¹ “About the WTO: Settling Disputes,” <http://www.wto.org/wto/dispute/bulletin.htm>.

⁴² “About the WTO: Settling Disputes,” <http://www.wto.org/wto/dispute/bulletin.htm>.

⁴³ “About the WTO: Settling Disputes,” <http://www.wto.org/wto/dispute/bulletin.htm>.

⁴⁴ “About the WTO: Settling Disputes,” <http://www.wto.org/wto/dispute/bulletin.htm>.

⁴⁵ DSU, Article 17 paras. 1-3.

⁴⁶ “About the WTO: Settling Disputes,” <http://www.wto.org/wto/dispute/bulletin.htm>.

⁴⁷ DSU, Article 17 para. 14.

⁴⁸ Jackson, John. *Performance of the System IV: Implementation. Comments. The International Lawyer* Fall 1998: 792.

⁴⁹ “About the WTO: Settling Disputes,” <http://www.wto.org/wto/dispute/bulletin.htm>
Last updated February 13, 1998.

⁵⁰ The European Communities established in July of 1967 formally changed to the name European Union on November 1, 1993 during the process of the EC- Hormones dispute case. The EU continued to negotiate this case without interruption and unless otherwise explained, the term EU will be used with the exception of the title of the dispute settlement case, EC-Hormones.

⁵¹ Bernan’s Annotated Reporter. *WTO Dispute Settlement Decisions: European Communities – Measures Concerning Meat and Meat Products (Hormones) Report of the Appellate Body*. (1998): 285.

⁵² Under the Tokyo Round Agreement on Technical Barriers to Trade (TBT Agreement), the use of process and production methods (PPM) were only restricted if they were used to circumvent the TBT Agreement.

⁵³ US Panel Report para. 2.35.

⁵⁴ Under the former GATT Dispute Resolution Body, the establishment of a Panel had to be approved by a consensus vote of the contracting members. Thus, any one country could block the establishment of a Panel. Under the WTO Dispute Resolution Understanding, a country can block the establishment of a Panel once, but when the DSB meets a second time, the appointment cannot be blocked (unless there is a consensus not to form the Panel).

⁵⁵ “About the WTO: Settling Disputes,” <http://www.wto.org/wto/dispute/bulletin.htm>.

⁵⁶ World Trade Organization. *EC Measure Concerning Meat and Meat Products (Hormones) Complaint by the United States*. Complaint by the United States WT/DS26/R/USA “the US Panel Report” 18 Aug. 1997: para. 1.2.

⁵⁷ US Panel Report, para. 1.8.

⁵⁸ US Panel Report para. 1.9.

⁵⁹ World Trade Organization. *Understanding on Rules and Procedures Governing the Settlement of Disputes*. Para. 15.2.

⁶⁰ Bernan’s 285.

⁶¹ US Panel Report, paras 1.4 and 3.1.

⁶² General Agreement on Tariff and Trade(GATT Text), Article III. Para.1,2.

⁶³ US Panel Report, para 3.3.

⁶⁴ GATT Text, Article XX. para. b.

⁶⁵ US Panel Report, para 3.3.

⁶⁶ US Panel Report, para 3.3.

⁶⁷ US Panel Report, para 3.4.

⁶⁸ US Panel Report, para 3.4.

⁶⁹ US Panel Report, para 3.6.

⁷⁰ US Panel Report, para 3.6.

⁷¹ The SPS Agreement applied to sanitary measures or in other words food safety and animal and plant health regulations while the TBT Agreement applies to technical negotiations and standards, as well as testing and certification procedures. No trade measure falling under either Agreement should create unnecessary obstacles to trade.

⁷² For third party submissions see US Panel Report, Section V.

⁷³ US Panel Report, para V.13.

⁷⁴ US Panel Report, para V.25.

⁷⁵ US Panel Report, para V.19.

⁷⁶ US Panel Report, para VI.1.

⁷⁷ The legal basis for the establishment of such “advisory technical expert groups can be found in Article 13.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and the rules relevant to the establishment and procedures of such a group can be found in Appendix 4 of the DSU.

⁷⁸ The detailed responses of these experts can be found in the *EC-Hormones* Report of the Panel, section VI.

⁷⁹ Canada requested a Panel be established as well, and the DSB decided to have the Panel composed of the same members and conduct the procedures parallel with the US-EU Panel.

⁸⁰ Bernan's, 275

⁸¹ Bernan's 287.

⁸² WTO Appellate Body Report, para. 96.

⁸³ Report of the Panel, para. 8.56.

⁸⁴ Bernan's, 285.

⁸⁵ Bernan's 296.

⁸⁶ Bernan's 297.

⁸⁷ Appellate Body Report, para. 22.

⁸⁸ Bernan's, 296.

⁸⁹ Appellate Body Report, para.253.

⁹⁰ See *WTO Backs U.S. in Hormone Treated Beef*, AAP Newsfeed, Jan. 17, 1998 cited in *Revenge of the Push-Me, Pull You: The Implementation Process Under the WTO Dispute Settlement Process* by Timothy M. Reif and Marjorie Florestal.

⁹¹ See *EC Welcomes WTO Decision to Allow Ban on Hormones*, Chemical Bus. Newsbase, Feb. 10, 1998 cited in *Revenge of the Push-Me, Pull You: The Implementation Process Under the WTO Dispute Settlement Process* by Timothy M. Reif and Marjorie Florestal.

⁹² World Trade Organization. *EC Measure Concerning Meat and Meat Products (Hormones) Complaint by the United States* WT/DS26/AB/R. "Appellate Body Report" 16 Jan. 1998: para. 255.

⁹³ Bernan's 276.

⁹⁴ Timothy M. Reif. and Majorie Florestal. "*Revenge of the Push-me, Pull-You: The Implementation Process under the WTO Dispute Settlement Understanding*," The International Lawyer Fall 1998: 800.

⁹⁵ United States Trade Representative Press Release. July 12, 1999.

⁹⁶ United States Trade Representative Press Release. July 19, 1999.

⁹⁷ Jackson, John. "*Performance of the System IV: Implementation: Comments*," The International Lawyer Fall 1998: 792.

⁹⁸ United States Trade Representative Press Release. May 14, 1999.

⁹⁹ The GATT Dispute Resolution Body was designed with goals similar to those of the WTO DSB. However, the rules of its procedural functioning limited its ability to elicit compliance from its members. The WTO DSB was created to overcome these limitations.

¹⁰⁰ Bello, Judith Hippler. In "*Revenge of the Push-me, Pull-You: The Implementation Process under the WTO Dispute Settlement Understanding*," The International Lawyer Fall 1998: 762.

¹⁰¹ Timothy M. Reif. and Majorie Florestal. "*Revenge of the Push-me, Pull-You: The Implementation Process under the WTO Dispute Settlement Understanding*," The International Lawyer Fall 1998: 756.

¹⁰² Julio Lacarte-Muró (WTO Arbitrator), *EC Measure Concerning Meat and Meat Products (Hormones) Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes*. IV.41.

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- ¹⁰³ Permanent Delegation to the European Commission. *Status Report by the European Communities*.
- ¹⁰⁴ Steger 874.
- ¹⁰⁵ C. Christopher Parlin is also Adjunct Professor at the Georgetown University School of Law and during the Uruguay Round negotiations, Mr. Parlin represented the United States in negotiating the Dispute Settlement Understanding.
- ¹⁰⁶ Parlin, C. Christopher. "WTO Dispute Settlement: Are Sufficient Resources Being Devoted to Enable the System to Function Effectively," The International Lawyer. Fall 1998: 864.
- ¹⁰⁷ Parlin, 864-65.
- ¹⁰⁸ Parlin, 864-65.
- ¹⁰⁹ Parlin 865.
- ¹¹⁰ Parlin 866.
- ¹¹¹ Andrew I. Stoler is the Deputy Chief of Mission in the United States Mission to the World Trade Organization. He represents the United States on the WTO Committee on Budget, Finance and Administration.
- ¹¹² Parlin quoted in Steger 873.
- ¹¹³ Steger 874.
- ¹¹⁴ Stoler, Andrew L. "Key Procedural Issues: Resources; Comments," The International Lawyer Fall 1998: 879.
- ¹¹⁵ Stoler 880.
- ¹¹⁶ Steger 880.
- ¹¹⁷ DSU, Art. 12 para. 8.
- ¹¹⁸ US Panel Report para 1.10.
- ¹¹⁹ Steger 875.
- ¹²⁰ Steger 875.
- ¹²¹ Kinglerly, John. "Future Challenges: The Proposed Accession of China, Russia, and Others; Presentation Summary and Comments," The International Lawyer. Fall 1998: 884.
- ¹²² Stoler 878.
- ¹²³ Stoler 878.
- ¹²⁴ James Lyons Personal Interview. April 16, 1999.
- ¹²⁵ Schumacher, Jr., August. Statements to US Senate panel on US Agricultural Trade with EU, China. March 15, 1999.
- ¹²⁶ James Lyons Personal Interview. April 16, 1999.
- ¹²⁷ Permanent Delegation of the European Commission. Status Report by the European Communities to the Chairman of the Dispute Settlement Body. March 8, 1999.
- ¹²⁸ James Lyons Personal Interview. April 16, 1999.
- ¹²⁹ USTR Press Release, *United States to Request Authorization to Retaliate in the Amount of \$202 Million*. May 14, 1999.
- ¹³⁰ 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. July 12, 1999. 1.
- ¹³¹ James Lyons Personal Interview. April 16, 1999.

¹³² 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. July 12, 1999. 18.

¹³³ James Lyons Personal Interview. April 16, 1999.

¹³⁴ Reif, Timothy M. and Majorie Florestal. “*Revenge of the Push-me, Pull-You: The Implementation Process under the WTO Dispute Settlement Understanding*,” The International Lawyer Fall 1998: 761.

¹³⁵ Uruguay Round Agreements Act, Statement of Administrative Action. H.R. Doc. No. 103-316, 103d Cong. 2d Sess. 1016 (1994) (emphasis added). As quoted in Timothy M. Reif and Majorie Florestal. “*Revenge of the Push-me, Pull-You: The Implementation Process under the WTO Dispute Settlement Understanding*,” The International Lawyer Fall 1998: 756.

¹³⁶ USTR Press Release, *United States to Request Authorization to Retaliate in the Amount of \$202 Million*. May 14, 1999.

¹³⁷ See United States – Standards for Reformulated and Conventional Gasoline, complaint by Venezuela (WT/DS2) and Brazil (WT/DS4), United States - Restrictions on Cotton and Man-Made Fibre Underwear, Complaint by Costa Rica (WTDS24) and United States – Measures Affecting Imports of Woven Wool Shirts and Blouses, Complaint by India(WT/DS33).

¹³⁸ Reif, Timothy. “*Performance of the System IV: Implementation. Comments*,” The International Lawyer Fall 1998: 792.

¹³⁹ Jackson, John. “*Performance of the System IV: Implementation. Comments*,” The International Lawyer Fall 1998: 792.

¹⁴⁰ Aware that the case could put a strain on the WTO ability to resolve such a complicated dispute, the US and Japan resolved the dispute without the help of the WTO.

¹⁴¹ James Lyons personal interview, April 16, 1999.

¹⁴² Stoler 880.

¹⁴³ Forton, Heather G. “*Performance of the System II: Panel Adjudication*,” The International Lawyer Fall 1998: 742.

¹⁴⁴ Kinglerly 885.

¹⁴⁵ Kinglerly 885.

¹⁴⁶ WTO Homepage. “About the WTO.”

¹⁴⁷ Parlin, C. Christopher. *WTO Dispute Settlement: Are Sufficient Resources Being Devoted to Enable the System to Function Effectively*. The International Lawyer. Fall 1998: 864.

¹⁴⁸ Kinglerly 885.

¹⁴⁹ Jackson, John. *Performance of the System IV: Implementation. Comments*. The International Lawyer Fall 1998: 792.

¹⁵⁰ J. de Melo and D Tarr, *A general Equilibrium Analysis of US Foreign Trade Policy*. Cited in WTO Annual Report 1998