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Nicole C. Lloyd

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# Beef Hormones Foster Animosity and Not Growth: An Analysis of the World Trade Organization Solving the United States' and European Communities' Beef Hormone Dispute

Nicole C. Lloyd\*

This article is current as of January 2006. The ultimate decision by the World Trade Organization is scheduled to be released in October of 2006.<sup>1</sup>

## I. Introduction

The United States (“U.S.”) and the European Communities<sup>2</sup> (“EC”) are at odds regarding European legislation banning American beef imports because of potential ill effects of natural and synthetic hormones used for growth promotion purposes.<sup>3</sup> The U.S. was, and continues to be, angered that its meats cannot be exported to Europe because of the EC’s ban against hormones used for growth promotion purposes among

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\* J.D. Candidate, The Dickinson School of Law of the Pennsylvania State University, 2007; B.A., University of California, San Diego (UCSD), 2004.

1. Communication from the Chairman of the Panel, *United States—Continued Suspension of Obligations in the European Communities—Hormones Dispute*, WT/DS/320/9 (Jan. 23, 2006).

2. The European Communities is the legal name of the European Union in the World Trade Organization. The countries under the European Communities umbrella are: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, and the United Kingdom. See The World Trade Organization, *Member Information: The European Communities and the WTO*, [http://www.wto.org/english/thewto\\_e/countries\\_e/european\\_communities\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm) (last visited Oct. 21, 2006).

3. See Panel Report, *European Communities—Measures Concerning Meats and Meat Products (Hormones)*, ¶¶ 3.1-6, WT/DS26/R/USA (Aug. 18, 1997) (adopted Feb. 13, 1998) [hereinafter Panel Report].

cattle.<sup>4</sup> As a result, the U.S. has lost millions of dollars due to the unavailability of the European market for U.S. beef and beef byproducts.<sup>5</sup>

The EC's directive banning hormones did not conform to sanitary policies to which World Trade Organization ("WTO") Members must adhere, thereby violating WTO policy.<sup>6</sup> After a Panel Report,<sup>7</sup> an Appellate Body Report,<sup>8</sup> and Binding Arbitration,<sup>9</sup> the WTO's Dispute Settlement Body<sup>10</sup> gave the EC fifteen months to repeal the legislation that violated WTO policy.<sup>11</sup> The EC, however, did not repeal its legislation in the fifteen-month timeframe.<sup>12</sup> In 1999, the WTO granted the U.S. the ability to suspend concessions, which allowed the U.S. to

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4. See generally First Written Submission of the United States of America, *United States—Continued Suspension of Obligations in the EC-Hormones Dispute*, WT/DS320, (Aug. 8, 2005), available at [http://www.ustr.gov/assets/Trade\\_Agreements/Monitoring\\_Enforcement/Dispute\\_Settlement/WTO/Dispute\\_Settlement\\_Listings/asset\\_upload\\_file331\\_7903.pdf](http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file331_7903.pdf) [hereinafter U.S. Submission].

5. The EC's legislation was found to impair the U.S. at a rate of \$116.8 million per year. See Recourse to Arbitration, *European Communities—Measures Concerning Meats and Meat Products (Hormones)*, ¶ 83, WT/DS26/ARB, (July 12, 1999) [hereinafter Recourse to Arbitration].

6. WTO Members must follow the guidelines of the WTO Agreement on Application of Sanitary and Phytosanitary Measures. See The World Trade Organization, *The WTO Agreement on Application of Sanitary and Phytosanitary Measures*, [http://www.wto.org/english/tratop\\_e/sps\\_e/spsagr\\_e.htm](http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm) [hereinafter SPS Agreement] (last visited Oct. 21, 2006). Not adhering to the guidelines means that a Member is violating WTO policy, including the SPS Agreement. See *id.*

7. See Panel Report, *supra* note 3.

8. See Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (adopted Feb. 13, 1998) [hereinafter Appellate Body Report].

9. See Arbitration Report, *European Communities—Measures Concerning Meats and Meat Products (Hormones)*, WT/DS26/15, WT/DS48/13 (May 29, 1998) [hereinafter Arbitration Report].

10. Settling disputes is the responsibility of the Dispute Settlement Body (the General Council in another guise), which consists of all WTO members. The Dispute Settlement Body has the sole authority to establish "panels" of experts to consider the case, and to accept or reject the panels' findings or the results of an appeal. It monitors the implementation of the rulings and recommendations, and has the power to authorize retaliation when a country does not comply with a ruling.

The World Trade Organization, *Understanding the WTO: Settling Disputes*, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/displ\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm) (last visited Oct. 21, 2006) [hereinafter *Understanding the WTO*].

11. See Arbitration Report, *supra* note 9, ¶ XLVIII. The Appellate Body and Panel Reports were formally adopted on February 13, 1998. *Id.*

12. The U.S. was granted the suspension of concessions because the EC did not repeal its legislation in the fifteen month time frame. See Recourse to Arbitration, *supra* note 5, ¶ 1; see Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 22, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter Dispute Settlement Understanding].

implement retaliatory sanctions.<sup>13</sup> Those sanctions counteracted the impairment the U.S. experienced due to the EC's hormone legislation.<sup>14</sup>

The U.S.'s retaliatory sanctions will remain in effect until the disputed measures are repealed or modified to conform to WTO policy.<sup>15</sup> After more than five years of such sanctions, however, the EC requested consultations with the U.S. in which it asserted that the U.S. "should have removed its retaliatory measures since the EC has removed the measures found to be WTO-inconsistent[.]"<sup>16</sup> The EC, the U.S., and third party countries<sup>17</sup> had their first Panel meeting in September 2005.<sup>18</sup> This meeting was historic because it was the first time the WTO allowed the general public to witness proceedings.<sup>19</sup>

This current issue can be reviewed in two ways: either by focusing on how the EC scientifically justifies its new measure, or by examining the procedural steps to ascertain which party in a dispute determines when an offending party complies with WTO policies and procedures. There is no straightforward WTO regulation that specifically establishes who decides if a previously violating Member<sup>20</sup> has repealed improper legislation, thereby making revocation of the suspension of concessions necessary.<sup>21</sup> Not only is this topic important to future WTO cases because it will likely spark an amendment to rules of dispute settlement, but it also demonstrates to the public how the WTO operates.

This Comment analyzes the procedural measures that may be available to the U.S. and EC based on various interpretations of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*<sup>22</sup> ("Dispute Settlement Understanding") while incorporating the

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13. See Recourse to Arbitration, *supra* note 5, ¶ 84

14. See *id.* ¶ 83.

15. See *id.* ¶ 39.

16. See Request for Consultations by the European Communities, *United States—Continued Suspension of Obligations in the European Communities—Hormones Dispute*, WT/DS320/1 (Nov. 8, 2004) [hereinafter EC Request for Consultations]. This is a self-asserted claim by the EC and has not been examined by a Panel. See *id.*

17. Relevant third parties are: Australia, Brazil, Canada, China, Chinese Taipei, India, Mexico, New Zealand, and Norway. See *infra* notes 135-148.

18. See The World Trade Organization, *United States—Continued Suspension of Obligations in the EC-Hormones Dispute*, [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds320\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds320_e.htm) (last visited Sept. 11, 2006).

19. See Communication from the Chairman of the Panels, *United States—Continued Suspension of Obligations in the European Communities—Hormones Dispute*, WT/DS/320/8 (Aug. 2, 2005).

20. A violating Member is the Member who has breached WTO policy. In this Comment, the violating Member is the EC.

21. See First Written Submission by the European Communities, *United States—Continued Suspension of Obligations in the EC-Hormones Dispute*, ¶ 85, WT/DS320, (July 11, 2005) available at [http://trade-info.cec.eu.int/doclib/docs/2005/september/tradoc\\_124677.pdf](http://trade-info.cec.eu.int/doclib/docs/2005/september/tradoc_124677.pdf) [hereinafter EC Submission]; see U.S. Submission, *supra* note 4, ¶ 6.

22. See Dispute Settlement Understanding, *supra* note 12.

doctrine of good faith. This Comment emphasizes that good faith is an important element of the WTO foundation even after the harshest punishment<sup>23</sup> has been set forth. Part II describes the history of this dispute, which dates back over a decade. Part II also identifies why the U.S. brought the initial dispute to the WTO and examines the outcome of this initial dispute. Part III presents the EC's argument on the new dispute surrounding the procedural issues in the process of post-suspension of concessions claims, and analyzes why the EC believes its new ban satisfies WTO obligations. Part III also presents a counterargument to the U.S.'s position. Part IV examines the current dispute as a procedural event while emphasizing the need for good faith in dispute settlement situations. Part V suggests what the future implications could be of the Panel's decisions, as well as the effect of transparency in the WTO dispute settlement process. Part VI serves as a concise conclusion.

## II. History of the Dispute

The Agreement on the Application of Sanitary and Phytosanitary Measures<sup>24</sup> ("SPS Agreement") governs basic health and safety concerns regarding food safety and animal health standards.<sup>25</sup> It sets the minimum requirements; individual countries, however, may establish higher thresholds for food safety and animal health standards if supported by scientific justification.<sup>26</sup>

Disagreements between WTO member nations are governed by the Dispute Settlement Body<sup>27</sup> under the Dispute Settlement Understanding.<sup>28</sup> Instead of unilaterally determining whether another Member has violated WTO policy, Members who believe another Member is violating trade rules may bring a claim multilaterally to the Dispute Settlement Body.<sup>29</sup>

### A. *The EC's Legislation Banning Hormones*

In 1981, the EC banned imports of meat and meat products from cattle that had been given certain hormones for growth promotion

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23. The harshest punishment is the suspension of concessions, which allows a Member to implement retaliatory sanctions. The suspension of concessions is a last resort measure. *See* Dispute Settlement Understanding, *supra* note 12, art. 22.8.

24. The SPS Agreement became effective on Jan. 1, 1995. The SPS Agreement is a part of the treaty that established the WTO. *See* SPS Agreement, *supra* note 6.

25. *See id.*

26. *See id.* art. 3.3.

27. *See Understanding the WTO, supra* note 10.

28. *See* Dispute Settlement Understanding, *supra* note 12.

29. *See Understanding the WTO, supra* note 10.

purposes.<sup>30</sup> There were three directives issued by the EC against bovine imports with these hormones—first in July 1981, then in March 1988, and finally in May 1988.<sup>31</sup>

The July 1981 order prohibited substances with hormonal and thyrostatic actions<sup>32</sup> from being administered to farm animals.<sup>33</sup> The EC believed that humans could suffer adverse health affects if they consumed the meat of animals treated with those hormones.<sup>34</sup> The directive banned domestic and imported meats from the European market if any of the banned hormones were administered to the animal.<sup>35</sup> The directive had two exceptions.<sup>36</sup> The first exception was for substances administered by a veterinarian and used for “therapeutic or zootechnical purposes.”<sup>37</sup> The second exception permitted the use of five of the six contested hormones<sup>38</sup> until a “detailed examination of the effects of these substances could be carried out.”<sup>39</sup>

March 1988’s directive removed those exceptions and resulted in an increase in the number of permanently banned hormones.<sup>40</sup> This directive included prohibiting natural hormones<sup>41</sup> for “growth promotion or fattening purposes.”<sup>42</sup> It prohibited synthetic hormones<sup>43</sup> for any

30. The certain hormones are: oestradiol 17 $\beta$ , progesterone, testosterone, trenbolone acetate, zeranol, or melengestrol acetate. The first three hormones are naturally occurring hormones; the last three hormones are synthetic hormones. See Appellate Body Report, *supra* note 8, ¶ 2. In cattle, oestradiol 17 $\beta$ , when combined with progesterone or testosterone, “improve[s] their rate of weight gain and their efficiency of conversion of feed into edible tissues.” World Health Organization, Food and Agriculture Organization of the United Nations, *Joint FAO/WHO Expert Committee on Food Additives Fifty-second Meeting Summary and Conclusions*, Feb. 2-11, 1999, 11, available at [http://www.who.int/pcs/jecfa/summary\\_52.pdf](http://www.who.int/pcs/jecfa/summary_52.pdf). Trenbolone acetate mimics testosterone, zeranol mimics estradiol, and melegestrol acetate mimics progesterone. See U.S. Dep’t of Agric., Foreign Agric. Serv., *A Primer on Beef Hormones*, Feb. 24, 1999, <http://www.fas.usda.gov/itp/policy/hormone2.html>.

31. See Appellate Body Report, *supra* note 8, ¶¶ 2-3.

32. A thyrostatic action suppresses thyroid function. Thyroid hormones help regulate growth and metabolism. The CancerWEB Project, Online Medical Dictionary, <http://cancerweb.ncl.ac.uk/cgi-bin/omd?thyrostatic> (last visited Oct. 21, 2006).

33. Appellate Body Report, *supra* note 8, ¶ 3.

34. See Panel Report, *supra* note 3, ¶ 2.26.

35. Appellate Body Report, *supra* note 8, ¶ 3.

36. *Id.*

37. *Id.* Except as otherwise noted in this Comment, all of the EC’s legislation banning the hormones at issue allows meat products to be imported if the hormones were used for therapeutic or zootechnical purposes. See *generally id.*

38. The hormones are: oestradiol 17 $\beta$ , progesterone, testosterone, trenbolone acetate, zeranol. *Id.*

39. *Id.*

40. See *id.* ¶ 4.

41. Oestradiol 17 $\beta$ , progesterone, and testosterone.

42. See Appellate Body Report, *supra* note 8, ¶ 4. Fattening purposes mean that there will be more meat per cow at slaughter, and it is economically more efficient for beef production. See World Health Organization, *supra* note 30, at 11.

purpose.<sup>44</sup> Included in this directive was an explicit and strict prohibition of importation of meat and meat byproducts that were given these hormones from third party countries.<sup>45</sup> Finally, the directive of May 1988 established specific conditions allowing the trade of meat from animals that were treated with the banned hormones for “therapeutic or zoological purposes.”<sup>46</sup>

Those three directives were repealed,<sup>47</sup> and effective July 1997,<sup>48</sup> a new directive replaced the previous directives.<sup>49</sup> That new directive continued prohibiting hormones or other substances that had a thyrostatic action to farm animals.<sup>50</sup> It also maintained the proscription against selling and importing meat and meat byproducts from animals that were fed or injected with any of the banned hormones.<sup>51</sup>

### *B. Why the U.S. Brought the Initial Dispute to the WTO*

The U.S. claimed that the EC directive banning hormones<sup>52</sup> administered for growth purposes was “inconsistent with the SPS Agreement.”<sup>53</sup> Furthermore, the U.S. argued that the ban was related to sanitary measures under the SPS Agreement and that the directives:

[D]irectly and indirectly affected international trade; were not based on an assessment of risk . . .; were maintained without a sufficient scientific evidence . . .; were not justified as a “provisional” measure . . .; 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; . . . constituted a disguised restriction on international trade. . . .<sup>54</sup>

The U.S. further asserted that the EC’s directive treated American imports “less favourably than domestic production”<sup>55</sup> and that “the measures were ‘applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international

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43. Trenbolone acetate and zeranol.

44. *See* Appellate Body Report, *supra* note 8, ¶ 4.

45. *See id.*

46. *See id.*

47. *See id.* ¶ 5.

48. *See id.*

49. *See* Appellate Body Report, *supra* note 8, ¶ 5.

50. *See id.*

51. *See id.*

52. Oestradiol 17 $\beta$ , progesterone, testosterone, trenbolone acetate, zeranol, or melengestrol acetate. *See* Panel Report, *supra* note 3, ¶ 3.1.

53. *Id.*

54. *Id.* ¶ 3.2.

55. *Id.* ¶ 3.3

trade.”<sup>56</sup>

### C. *The Outcome of the Dispute*

The Panel Report concluded that the EC “acted inconsistently”<sup>57</sup> with the SPS Agreement mandates because sanitary measures were “not based on a risk assessment.”<sup>58</sup> The Panel also declared that the directives resulted in “discrimination or a disguised restriction on international trade”<sup>59</sup> by “adopting arbitrary or unjustifiable distinctions in the levels of sanitary protection[,]”<sup>60</sup> thus acting contrary with the requirements of the SPS Agreement.<sup>61</sup> It also found noncompliance with the SPS Agreement because the directive dictating the EC’s sanitary measures were “not based on existing international standards”<sup>62</sup> and had no scientific justification.<sup>63</sup> The Panel recommended that the EC “bring its measure in dispute into conformity with its obligations under the [SPS Agreement][.]”<sup>64</sup>

### D. *Amendments to the Dispute*

The EC and U.S. appealed the Panel Report’s findings.<sup>65</sup> Although the Appellate Body “uph[e]ld, modif[ied], and reverse[d]”<sup>66</sup> certain findings and conclusions of the Panel Report,<sup>67</sup> the Appellate Body ultimately “uph[e]ld[] the Panel’s conclusion that the SPS Agreement . . . applie[d] to measures that were enacted before the entry into force of the WTO Agreement but remain[ed] in force thereafter[.]”<sup>68</sup> The Appellate Body recommended conforming the EC measures in order to comply with WTO Members’ obligations under the SPS Agreement.<sup>69</sup>

In March of 1998, the EC notified the Dispute Settlement Body that “it intended to fulfill its obligations”<sup>70</sup> as a WTO Member.<sup>71</sup>

56. *Id.* (quoting General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, art. XX).

57. Panel Report, *supra* note 3, ¶ 9.1(i).

58. *Id.*

59. *See id.* ¶ 9.1(ii).

60. *See id.*

61. *See id.* ¶ 9.1.

62. Panel Report, *supra* note 3, ¶ 9.1(iii).

63. *See id.*

64. *See id.* ¶ 9.2.

65. *See* Appellate Body Report, *supra* note 8, ¶ 1.

66. *See id.* ¶ 254.

67. *See id.*

68. *Id.* ¶ 253(d). The EC’s measures were enacted before the application of the SPS Agreement and remained in force after the SPS Agreement was promulgated. *See id.* ¶¶ 2-5.

69. *See id.* ¶ 255.

70. Arbitration Report, *supra* note 9, ¶ I.



Subsequently, the EC informed the Dispute Settlement Body that it began examining “the options for compliance with a view to implementation in as short a period of time as possible, and that it would require a reasonable period of time for this process.”<sup>72</sup> The EC and U.S. tried to reach an agreement on a reasonable time for implementation of compliance measures.<sup>73</sup>

The EC lobbied for a reasonable period of four years<sup>74</sup>; two years would be dedicated to risk assessment, and the remaining two years for legislation.<sup>75</sup> The U.S., however, asserted that a mere ten months would be a reasonable period for implementing the Dispute Settlement Body’s ruling.<sup>76</sup> The U.S. contended that ten months was sufficient to remove the measure at issue and make legislative changes that would conform with the Dispute Settlement Body’s recommendations.<sup>77</sup>

Since there was disagreement regarding what constituted a reasonable period of time, the EC requested that binding arbitration under the Dispute Settlement Understanding determine that issue.<sup>78</sup> The Dispute Settlement Understanding provides that under binding arbitration, “the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report.”<sup>79</sup> The arbitrator determined that fifteen months from the date of adoption of both reports was sufficient in this case.<sup>80</sup>

*E. Retaliatory Sanctions by the U.S. against the EC for Failure to Abide by the Panel Report, Appellate Body Report, and Binding Arbitration*

In May of 1999, at the expiration of the prescribed fifteen month time limit imposed by the arbitrator, the U.S. requested that the Dispute Settlement Body authorize it to implement trade tariffs on EC imports because the latter was unable to complete implantation of the rulings.<sup>81</sup>

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71. *See id.*

72. *See id.*

73. *See id.* ¶ II.

74. *See id.* ¶ V.

75. *See id.* At the oral hearing, the European Communities reduced its reasonable time to thirty-nine months. Two years would still be dedicated to risk assessment, and the subsequent fifteen months for “any necessary legislative action thereafter.” *Id.*

76. *See id.* ¶ XV.

77. *See id.*

78. *See* Arbitration Report, *supra* note 9, ¶ II.

79. *See id.* ¶ XXIII (quoting Dispute Settlement Understanding art. 21.3).

80. *See* Arbitration Report, *supra* note 9, ¶ XLVIII. The Appellate Body and Panel Reports were formally adopted on Feb. 13, 1998. *Id.*

81. *See* Recourse to Arbitration, *supra* note 5, ¶ 1. The U.S. is allowed to request

The U.S. was essentially asking for permission to direct U.S. Customs “to impose duties in excess of [WTO] bound rates”<sup>82</sup> on certain imports, the total not surpassing \$202 million.<sup>83</sup> The Dispute Settlement Body denied the U.S.’s request and referred the issue of retaliatory sanctions to binding arbitration.<sup>84</sup>

The arbitrators’ role is to ascertain the quantitative aspect of the level of suspension and ensure that it is “*equivalent* to the level of nullification and impairment”<sup>85</sup> caused to the U.S. as a result of the EC’s legislation.<sup>86</sup> After determining a value, the U.S. could then decide which items would receive additional tariffs, as long as the total trade value did “not exceed the amount of trade impairment [found by the arbitrators][.]”<sup>87</sup>

The U.S. claimed the hormone ban impaired its exports because the ban on high quality beef treated with the six contested hormones resulted in a loss of access to the European market.<sup>88</sup> Similarly, the U.S. alleged that edible beef offal was included in the EC’s ban.<sup>89</sup> Conversely, the EC contended that the U.S. overestimated the restrictions’ effects on potential exports.<sup>90</sup>

The arbitrators found that the “total amount of nullification and impairment caused by the ban on U.S. exports of HQB[high quality beef] to be \$32,664,776.”<sup>91</sup> They found that impairment to potential exports of edible beef offal amounted to \$90,367,391.<sup>92</sup> The arbitrators concluded that the U.S. could suspend the application of tariff concessions to the EC, allowing the U.S. to implement retaliatory sanctions of \$116.8 million per year.<sup>93</sup>

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sanctions pursuant to Article 22.2 of the Dispute Settlement Understanding. *Id.*

82. *Id.* ¶ 13.

83. *Id.*

84. *See id.* ¶ 2.

85. *Id.* ¶ 20 (emphasis in original).

86. *See id.*

87. *See id.* ¶ 21.

88. *See id.* ¶ 24.

89. *See id.* ¶ 25. Beef offal consists of: brains, head meat, cheek meat, lips, salivary glands, tongue, weasand, sweetbreads, heart, liver, rumen, honeycomb, bible tripe, kidney, pancreas glands, small intestines, large intestines, testicles, pizzle, back strap, tunic tissue, skirt sinew, flexor tendon, Achilles tendon, and oxtail. *See* U.S. Meat Export Federation, *International Meat Manual—Beef*, [http://www.usmef.org/IMM/IMM\\_beef/9\\_IMM\\_Beef\\_Offal.pdf](http://www.usmef.org/IMM/IMM_beef/9_IMM_Beef_Offal.pdf). (last visited Oct. 21, 2006).

90. *See* Recourse to Arbitration, *supra* note 5, ¶¶ 31-33.

91. *Id.* ¶ 65.

92. *Id.* ¶ 71. Take this figure and subtract five percent from it to determine the amount of impairment to edible beef offal for human consumption. Five percent is estimated to be for pet food, and the EC’s legislation does not apply to pet food. The resulting number is \$84,095,731. *Id.* ¶¶ 75,78.

93. *Id.* ¶¶ 83-84.

The \$116.8 million tariff concession is only a “temporary measure of last resort”<sup>94</sup> and should be applied only until the EC fully implement the Dispute Settlement Body’s recommendations or until a “mutually agreed solution is obtained.”<sup>95</sup> The temporary suspension of concessions is allowed only until the disputed measures are conformed to WTO rules.<sup>96</sup> The suspension of concessions is a last resort measure and is implemented only when the Dispute Settlement Body’s recommendations fail to be implemented.<sup>97</sup>

### III. The New Dispute

#### A. The EC’s Argument

The EC alleges that the U.S. is wrong in continuing import sanctions against EC imports.<sup>98</sup> Accordingly, the EC avers that it has complied with WTO measures by removing the improper sanctions.<sup>99</sup> The EC asserts that the U.S. is acting against WTO policies and rules under the Dispute Settlement Understanding, and therefore, violates the standards and procedures by acting unilaterally and not multilaterally.<sup>100</sup>

The EC maintains that the U.S.’s continued suspension, in spite of the EC’s compliance with WTO measures, violates the Dispute Settlement Understanding, which holds that Member countries of the WTO can only seek compensation under the rules and procedures provided by the WTO and the Dispute Settlement Understanding.<sup>101</sup> “Unilateral actions are, therefore, contrary to the essence of the multilateral trade system of the WTO.”<sup>102</sup> The U.S.’s unilateral action “threatens the stability and predictability of the multilateral trade system.”<sup>103</sup> The EC contends that the U.S. violated the Dispute Settlement Understanding because it acted independently by continuing the suspension of concessions that were authorized in July 1999, and,

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94. *Id.* ¶ 39 (citing Dispute Settlement Understanding arts. 3.7, 21.1, 22.1, and 22.8).

95. Recourse to Arbitration, *supra* note 5, ¶ 39 (citing Dispute Settlement Understanding arts. 3.7, 21.1, 22.1, and 22.8).

96. See Recourse to Arbitration, *supra* note 5, ¶ 39.

97. See *id.* ¶ 39. The Dispute Settlement Body’s recommendation is the “*first* objective and *preferred* solution.” *Id.* (emphasis in original).

98. See EC Submission, *supra* note 21, ¶¶ 3,4,7.

99. See *id.* ¶ 3.

100. See *id.* ¶¶ 4-7.

101. See *id.* ¶¶ 27-31 (citing Dispute Settlement Understanding art. 23).

102. EC Submission, *supra* note 21, ¶ 31 (quoting Panel Report, *United States-Import Measures on Certain Products from the European Communities*, ¶ 6.14 WT/DS165/R, (July 17, 2000)).

103. *Id.*

therefore, sought to “redress unilaterally a perceived WTO violation.”<sup>104</sup>

The U.S. followed WTO rules by remedying a violation in 1998, and was awarded the right to impose tariffs as a result of the 1999 WTO decision.<sup>105</sup> The EC, however, asserts that the U.S. is unilaterally seeking redress through retaliatory sanctions of a perceived WTO violation.<sup>106</sup> The EC posits that its most recent directive should not be subject to retaliatory sanctions even though it has the same consequences as the initial directives. Although it has the same end result, the EC changed the directive at issue by obtaining scientific data in support of its claim.<sup>107</sup> The EC argues that its current directive adheres to the SPS Agreement and WTO policy, and since U.S. retaliatory sanctions have not been lifted, the U.S. is acting unilaterally.<sup>108</sup>

The EC concludes that if the U.S. determined that the EC was not complying with WTO rules, the U.S. should have requested a WTO hearing, as it did when it brought the initial dispute in the late 1990s.<sup>109</sup> The EC continuously asserts that the U.S. is obligated by the Dispute Settlement Understanding to terminate the retaliatory sanctions after the directive found to be inconsistent with WTO policy was eliminated.<sup>110</sup> Although the EC does not state how it removed the inconsistent measure in great detail, it states “that the presumption of good faith, of course, also applies for implementing measures.”<sup>111</sup>

At a minimum, the EC claims that the U.S. violated at least one article<sup>112</sup> of the Dispute Settlement Understanding because the U.S. has not abolished the additional tariffs, though the directive found to be inconsistent with WTO policy was removed.<sup>113</sup> The EC puts forth that since it notified the WTO on September 22, 2003 that it achieved compliance with the recommendations of the Dispute Settlement Body in the initial dispute, the suspension of concessions must be revoked.<sup>114</sup> The only information presented to the WTO and U.S. in the current dispute filed by the EC regarding compliance of the recommendations and rulings of the Dispute Settlement Body in 1998 and 1999 was in

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104. *Id.* ¶ 34.

105. *See id.* ¶ 41; *see discussion supra* Part II.

106. *See* EC Submission, *supra* note 21, ¶ 42.

107. *See id.* ¶¶ 144-146.

108. *See id.* ¶¶ 49-51.

109. *See id.* ¶ 51.

110. *See id.* ¶ 73.

111. *See id.* ¶ 92.

112. Dispute Settlement Understanding art. 22.8.

113. *See* EC Submission, *supra* note 21, ¶ 133.

114. *See id.* *See also* European Union, Delegation of the European Commission to the USA, *EU Complies with WTO Ruling on Hormone Beef; Calls on US and Canada to Lift Trade Sanctions, Oct. 15, 2003*, <http://www.eurunion.org/news/press/2003/2003061.htm>.

Directive 2003.<sup>115</sup>

Directive 2003 briefly explained the EC's acquiescence to the recommendations and demonstrated what scientific data led it to reassert that a proscription against oestradiol 17 $\beta$  was proper, and provisional bans of the other disputed hormones<sup>116</sup> were similarly scientifically justified.<sup>117</sup> According to an independent third party expert committee, the Scientific Committee on Veterinary Measures relating to Public Health ("SCVPH"), there is scientific validation for prohibiting those hormones.<sup>118</sup>

[T]he use of oestradiol 17 $\beta$ , with the aim of promoting growth, the SCVPH assessment is that a substantial body of recent evidence suggest that it has to be considered as a complete carcinogen, as it exerts both tumour-initiating and tumour-promoting effects and that the data currently available do not make it possible to give a quantitative estimate of the risk.

As regards the other five hormones (testosterone, progesterone, trenbolone acetate, zeranol and melengestrol acetate), the SCVPH assessment is that, in spite of the individual toxicological and epidemiological data available, which were taken into account, the current state of knowledge does not make it possible to give a quantitative estimate of the risk to consumers.<sup>119</sup>

The EC affirms that it was a "comprehensive risk assessment."<sup>120</sup>

### B. *The U.S.'s Argument*

The U.S.'s assertion that it has not violated the Dispute Settlement Understanding by maintaining retaliatory sanctions is based on the belief that the EC has not complied with the Dispute Settlement Body's

115. See generally EC Submission, *supra* note 21 (noting lack of any substantial specific reference to how the EC conducted its research and what scientific evidence allows the EC to continue banning the hormones at issue while complying with WTO rules).

116. Testosterone, progesterone, trenbolone acetate, zeranol, and melengestrol acetate.

117. See European Union, *supra* note 114.

118. The Scientific Committee concluded this in 1999, and reaffirmed its decision in 2000 and 2002. See EC Submission, *supra* note 21, ¶¶ 143-144, (quoting *Directive 2003/74/EC of the European Parliament and of the Council of 22 September 2003 amending Council Directive 96/22/EC concerning the prohibition on the use in stockfarming of certain substances having a hormonal or thyrostatic action and of beta-agonists*, available at <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32003L0074:EN:HTML> (last visited Oct. 21, 2006) [hereinafter *Directive 2003*]).

119. EC Submission, *supra* note 21, ¶ 144 (quoting *Directive 2003*, *supra* note 118).

120. See EC Submission, *supra* note 21, ¶ 145.

recommendations and rulings from 1999.<sup>121</sup> The U.S. contends that the EC, as the complainant, has the burden of proof in alleging WTO rules violations.<sup>122</sup> The U.S. avers that there is no evidence that the EC removed the embargo at the center of the original dispute or that subsequent amendments “provide[] a solution to the nullification or impairment of benefits [to the U.S.]”.<sup>123</sup> The U.S. quickly dismissed any good faith argument relied upon by the EC.<sup>124</sup> The U.S. stressed that the Dispute Settlement Understanding states that the Dispute Settlement Body’s role is to oversee the implementation of Members with policies that are not in line with WTO rules conform to the Dispute Settlement Body recommendations since concessions have been suspended.<sup>125</sup> The U.S. asserts that the EC is incorrect in claiming that the suspension of concessions could be removed without a Dispute Settlement Body judgment authorizing withdrawal of the suspension of concessions.<sup>126</sup>

The U.S. attacks the EC’s contentions that there should be a presumption of conformity to WTO obligations<sup>127</sup> and leaves several others unanswered positing instead that the EC’s argument “fails to make its *prima facie* case that the United States continues to suspend concessions in breach of DSU [Dispute Settlement Understanding] Article 22.8.”<sup>128</sup> In support of its argument, the U.S. pointed to Directive 2003.<sup>129</sup> The U.S. avers that it is an anomaly that the EC had adequate scientific information in the original proceeding to establish an outright ban on certain hormones,<sup>130</sup> but now, after more research, there is insufficient pertinent information—hence the most recent ban is only provisional.<sup>131</sup>

Furthermore, the U.S. acknowledged that the EC had not justified a provisional ban because the Dispute Settlement Understanding has specific requirements regarding provisional sanitary or phytosanitary measures.<sup>132</sup> The U.S. concluded that more than sufficient scientific

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121. See generally U.S. Submission, *supra* note 4.

122. See *id.* ¶ 102.

123. *Id.* ¶ 104.

124. See *id.* ¶ 106.

125. See *id.* ¶ 109.

126. See *id.*

127. See *id.* ¶ 116.

128. See *id.* ¶ 119.

129. See U.S. Submission, *supra* note 4, ¶ 121-122.

130. Progesterone, testosterone, trenbolone acetate, zeranol, and melengestrol.

131. See U.S. Submission, *supra* note 4, ¶¶ 121-122.

132. See *id.* ¶¶ 122-123. The U.S. asserts that a provisional ban requires the following:

(1) [T]he measure is imposed in respect to a situation where “relevant scientific evidence is insufficient.”;

(2) the measure is adopted “on the basis of available pertinent information”;

evidence exists about the five provisional hormones at issue.<sup>133</sup> Accordingly, the U.S. reasoned, the import embargo is improper under a provisional ban, and the most recent directive violates WTO rules and policies.<sup>134</sup> Therefore, since the EC has not complied with WTO rules and regulations, the EC has not removed its WTO inconsistent directive.

### C. *Third Parties*

Although Canada is technically a third party<sup>135</sup> to the dispute between the EC and the U.S.,<sup>136</sup> Canada remains a strong proponent of the American position because of Canada's on-going case with the EC.<sup>137</sup> Canada coordinated its argument with its North American neighbor to "ensure that . . . [their] positions are coordinated."<sup>138</sup> Canada states that it will work closely with the U.S. throughout the dispute for "close cooperation and mutual assistance."<sup>139</sup>

Australia,<sup>140</sup> Brazil,<sup>141</sup> China,<sup>142</sup> Chinese Taipei,<sup>143</sup> India,<sup>144</sup>

(3) the Member which adopted the measure "seek[s] to obtain the additional information necessary for a more objective assessment of risk"; and

(4) the Member which adopted the measure "review[s] the . . . measure accordingly within a reasonable period of time". [sic]

U.S. Submission, *supra* note 4, ¶ 123 (citation omitted).

133. See U.S. Submission, *supra* note 4, ¶ 124.

134. See *id.* ¶¶ 122-129. The U.S. reasserts that the panel in the original dispute told the EC that the EC must base hormone bans on risk assessment. *Id.* ¶ 148.

135. Request to Join Consultations from Canada, *United States—Continued Suspension of Obligations, European Communities—Hormones Dispute*, WT/DS320/2 (Nov. 22, 2004). A third party is a Member of the WTO who is not one of the parties to the dispute, but who wants to be part of the settlement process because "it has a substantial trade interest in consultations" and the "claim of substantial interest is well-founded." Dispute Settlement Understanding, *supra* note 12, art. 4.11. For rights of third parties, see *id.* art. 10.

136. Technically, they are two different proceedings because Canada and the U.S.'s dispute have different case numbers in the WTO. The U.S.'s number is WT/DS320, while Canada's is WT/DS321. See World Trade Organization, Index of dispute issues, [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_subjects\\_index\\_e.htm#hormones\\_meat](http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#hormones_meat) (last visited Sept. 11, 2006).

137. See *id.*

138. International Trade Canada, *WTO Panel Cases to Which Canada is a Party—Canada—EU—Beef Hormones—An UPDATE*, (Aug. 11, 2005), [http://www.dfait-maeci.gc.ca/tna-nac/dispu/update\\_hormones-en.asp](http://www.dfait-maeci.gc.ca/tna-nac/dispu/update_hormones-en.asp).

139. *Id.*

140. See Request to Join Consultations from Australia, *United States—Continued Suspension of Obligations European Communities—Hormones Dispute*, WT/DS320/4 (Nov. 22, 2004). See also World Trade Organization, *United States—Continued Suspension of Obligations European Communities—Hormones Dispute, Third Parties*, [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds320\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds320_e.htm) (last visited Oct. 21, 2006) [hereinafter *Third Party Membership*].

141. See *Third Party Membership*, *supra* note 140.

142. See *id.*

143. See *id.*

Mexico,<sup>145</sup> New Zealand,<sup>146</sup> and Norway<sup>147</sup> are also third parties to the dispute.<sup>148</sup> Australia, however, contends that the dispute should be decided as a procedural event,<sup>149</sup> which bolsters the EC's view. Australia claims that once a violating party alerts the retaliating party that it is now in compliance, the latter must cease reprisal or initiate a WTO Panel review for multilateral scrutiny.<sup>150</sup> It would be inconsistent with WTO policy for a party to bring its own measures up for examination because that would "constitute[] an implicit unilateral determination of inconsistency by the complainant and undermine[] the presumption that Members act in good faith in taking action to comply with DSB [Dispute Settlement Body] recommendations and rulings."<sup>151</sup>

#### IV. Analysis

##### A. *Should the WTO Examine the Issue as a Procedural Event or Should the WTO Examine the EC's Compliance with the Dispute Settlement Body's Recommendation?*

Although it is the U.S.'s position that this case should focus on the substantive issue of whether the EC removed the measure that was inconsistent with WTO obligations,<sup>152</sup> the underlying issue in the current dispute is how to determine whether a Member has complied with WTO obligations.<sup>153</sup> Who determines if a Member has complied? Can a

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144. *See id.*

145. Request to Join Consultations from Mexico, *United States—Continued Suspension of Obligations European Communities—Hormones Dispute*, WT/DS320/4 (Nov. 23, 2004). *See also* Third Party Membership, *supra* note 140.

146. *See* Third Party Membership, *supra* note 140.

147. *See id.*

148. *See id.*

149. As opposed to substantive claims. The EC brought this dispute mainly for compliance reasons, and NOT to make substantive claims that the inconsistent measure has been removed. However, the U.S.'s argument predominantly focuses on the substantive claim, namely that the EC's most recent provisional measure has not removed the WTO inconsistent measure. Australia frames the issue to be decided as: "does the DSU [Dispute Settlement Understanding] provide that a Member's announcement of its compliance with DSB [Dispute Settlement Body] recommendations and rulings triggers an obligation on a retaliating Member to either (i) cease retaliation or (ii) initiate a new process for a multilateral determination of compliance." Third Party Submission of Australia, *United States—Continued Suspension of Obligations in the EC-Hormones Dispute*, ¶ 4, WT/DS320 (Aug. 19, 2005), available at [http://www.dfat.gov.au/trade/negotiations/disputes/downloads/320\\_ec\\_hormones\\_submission.pdf](http://www.dfat.gov.au/trade/negotiations/disputes/downloads/320_ec_hormones_submission.pdf) [hereinafter Australia Submission].

150. *See id.* ¶¶ 4-5.

151. *Id.* ¶ 6.

152. U.S. Submission, *supra* note 4, ¶¶ 7, 8, 9.

153. *See* EC Request for Consultations, *supra* note 16 (noting the EC request to the



Member fairly assess its own measures? Can a Member that is opposed to the measure's result evaluate whether the disputed conduct complies with WTO standards in a fair and just manner? The answers to all of those inquiries culminate to determine the appropriate time—and decision maker—for revocation of the suspension of concessions. Those are all questions which need to be analyzed through the WTO dispute settlement process. The flowchart of dispute settlement procedures literally stops when the dispute arrives at the retaliation phase.<sup>154</sup> The procedural issue involving beef hormones is the EC's main argument.<sup>155</sup> Therefore, the Panel should not overlook who initiated the review and the procedural issue.

1. Has the U.S. Violated the Dispute Settlement Understanding?

a. Dispute Settlement Understanding Article 23

The relevant article of the Dispute Settlement Understanding states that Members seeking redress of a violation of obligations 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.”<sup>156</sup>

The EC's argument that the U.S. violated this article because it acted unilaterally when it determined that the EC's most recent measure did not conform to WTO policy is potentially well founded. When the U.S. initiated the original dispute in 1996,<sup>157</sup> it brought the claim forward in a manner that the Dispute Settlement Body could multilaterally assess whether the EC violated WTO policy.<sup>158</sup> That action by the U.S. demonstrated that the U.S. understood how the Dispute Settlement Understanding functions in a conflict situation. The article is being contested because it can work for or against both members depending on how the facts are applied to the article.<sup>159</sup>

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Panel was for primarily procedural issues, and focuses on the scientific issue behind Directive 2003's self-assessed compliance determination).

154. *Understanding the WTO*, *supra* note 10.

155. *See* EC Submission, *supra* note 21, ¶¶ 24.

156. Dispute Settlement Understanding, *supra* note 12, art. 23 (emphasis added).

157. *See generally* Panel Report, *supra* note 3.

158. *Id.*

159. Article 23 works in favor of the EC if it is determined that Directive 2003 is a new measure; while the article works for the U.S. if it is deemed that Directive 2003 is the same measure that the Dispute Settlement Body previously determined violated WTO obligations. *See* Dispute Settlement Understanding, *supra* note 12, Article 23; *see also*

Directive 2003 is a newer measure that is technically a separate ban from the prior disputed measures.<sup>160</sup> Because this article applies to the current situation,<sup>161</sup> the U.S. infringed this WTO obligation when it determined a violation occurred without consulting the Dispute Settlement Body.<sup>162</sup> Although the U.S. alleges that this is the same measure,<sup>163</sup> the EC notified the U.S. that Directive 2003 was a new provisional guideline that complied with the SPS Agreement,<sup>164</sup> and therefore, satisfied WTO obligations.<sup>165</sup> Once the EC implemented its new measure, the U.S. had a duty to bring that measure to the Dispute Settlement Body for multilateral review.<sup>166</sup> Accordingly, only then would the U.S. be allowed to re-implement retaliatory sanctions.<sup>167</sup>

b. Dispute Settlement Understanding Article 22.8

Both the U.S. and EC agree that “Article 22.8 of the DSU [Dispute Settlement Understanding] does not specify how the removal of the WTO inconsistency is determined.”<sup>168</sup> Article 22.8 provides in relevant part that:

The suspension of concessions or other obligations shall be

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EC Submission, *supra* note 21, ¶¶ 27-61; U.S. Submission, *supra* note 4, ¶¶ 165-202.

160. See Directive 2003, *supra* note 118.

161. See Dispute Settlement Understanding, *supra* note 12, art. 23. See also EC Request for Consultations, *supra* note 16.

162. The U.S. contends that it did not determine that a violation occurred because it asserts that the Dispute Settlement Body found that a violation occurred in the original dispute. The U.S. alleges that Directive 2003 is just a new name applied to the same measure at issue in the original case. See EC Submission, *supra* note 21, ¶ 19.

163. See U.S. Submission, *supra* note 4, ¶¶ 8, 31. U.S. Submission states that “the ‘amended’ prohibition simply preserves the status quo of the EC’s original hormone ban by maintaining an import prohibition on meat and meat products from cattle treated with the six hormones for growth promotion.” See U.S. Submission, *supra* note 4, ¶ 31.

164. See *id.* ¶ 16.

165. See EC Submission, *supra* note 21, ¶ 17. The EC would be in compliance with WTO obligation because Directive 2003 fully adheres to the Dispute Settlement Body’s recommendations and rulings. Additionally, Directive 2003 is based on a comprehensive risk assessment and only temporary in nature. *Id.*

166. A Member cannot determine if an infraction has occurred, only the Dispute Settlement Body can reach such a conclusion. See Dispute Settlement Understanding, *supra* note 12, art. 23.

167. Technically, the U.S. would not be re-implementing the retaliatory sanctions. It might be considered a different reprisal because it is operable as a result of the impairment suffered by the U.S. due to the most recent directive. However, if the impairment were found to cause the same economic harm as the previous directive, then the monetary amount allowed in retaliatory sanctions would remain the same. Therefore, it would technically be a new suspension of concessions, but it would have the same appearance as the previous suspension of concessions. See generally Dispute Settlement Understanding, *supra* note 12, art. 22.

168. EC Submission, *supra* note 21, ¶ 85; see U.S. Submission, *supra* note 4, ¶ 6.

temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement *has been removed*, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a *mutually satisfactory solution is reached*.<sup>169</sup>

Article 22.8, relating to Article 21.6, states that the “DSB [Dispute Settlement Body] shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where . . . concessions or other obligations have been suspended but the recommendations to bring a new measure into conformity with the covered agreements have not been implemented.”<sup>170</sup> It, however, does not state or imply that it is the duty of the Dispute Settlement Body to determine when the recommendations have been implemented.<sup>171</sup> The Dispute Settlement Body cannot follow the EC throughout the process of conforming to WTO obligations, which in this case requires either abolishing the directives or conducting more research so that the directives are supported by scientific methods respecting the SPS Agreement. It is also noteworthy that while the majority of the Dispute Settlement Understanding articles are not passive, Article 22.8 declares that the “measure found to be inconsistent with a covered agreement has been removed.”<sup>172</sup> That language does not state who determines if the measure has been removed.

Unfortunately, the Dispute Settlement Understanding has no text or relevant analysis in other cases that is straightforward enough to determine how the suspension of concessions ends when the violating Member asserts that it is no longer in violation of WTO policies.<sup>173</sup> The suspension of concessions permitted the U.S. to implement high tariffs

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169. Dispute Settlement Understanding, *supra* note 12, art. 22.8 (emphasis added). The remainder of Article 22.8 continues as follows:

[I]n accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

*Id.*

170. Dispute Settlement Understanding, *supra* note 12, art. 22.8

171. *See id.* (noting the passive voice and lack of delegation to determine who decides when conforming measures have been implemented).

172. *Id.*

173. *See id.*; *see also* EC Submission, *supra* note 21, ¶ 85; *see also* U.S. Submission, *supra* note 4, ¶ 6; *see also* EC Request for Consultations, *supra* note 16; *see also* The World Trade Organization, Understanding the WTO: Settling Disputes, the Panel Process, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp2\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm) (last visited Sept. 11, 2006).

on imported goods from the EC as a retaliatory sanction.<sup>174</sup> The text of the Dispute Settlement Understanding duly acknowledges that suspension of concessions is temporary and is to be used only as a last resort.<sup>175</sup>

The U.S. claims it has not breached Article 22.8 because the EC has not removed the inconsistencies of the EC's ban and no solution of the impairment of benefits to the U.S. has been attained.<sup>176</sup> The U.S., however, fails to realize that it is possible that the EC removed the inconsistencies because additional scientific research was conducted and proved that consuming hormone-treated products results in adverse health effects.<sup>177</sup> The outcome could be the same negative impairment on the U.S.,<sup>178</sup> but the EC would comply with WTO obligations if more scientific research were conducted.<sup>179</sup>

The relevant language in the Dispute Settlement Understanding allows problems to be solved by a mutually satisfactory conclusion.<sup>180</sup> In this current dispute, however, that is not a possibility because both primary parties are uncompromising in their respective positions.<sup>181</sup> The U.S. believes it must only remove its retaliatory sanctions when there is a multilateral decision that a Member conforms to WTO obligations,<sup>182</sup> although it acknowledges that Members may resolve disputes bilaterally.<sup>183</sup> The U.S. will not be able to make the EC accept that the disputed hormones are healthy,<sup>184</sup> and the EC seems unwilling to allow one or two hormones at issue into its markets.<sup>185</sup>

The EC would rather have a provisional ban on the hormones and conduct more research instead of allowing meats injected with hormones into its markets until laboratory tests conclusively prove that the

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174. See Recourse to Arbitration, *supra* note 5, ¶ 13.

175. See *id.* ¶ 39.

176. See U.S. Submission, *supra* note 4, ¶ 104.

177. It is presumed that the U.S. failed to realize this because its brief did not account for such a discrepancy. See *generally id.* Lack of argument that WTO consistent legislation by the EC could have the same results on the U.S.

178. It would be plausible to have the same negative economic impairment on the U.S. because the EC meat consuming market would still be closed to the American beef export market even if the measure prohibiting hormone treated beef were in compliance with WTO obligations.

179. Further research in line with the SPS Agreement would allow a provisional ban, and therefore, would be consistent with WTO obligations.

180. See Dispute Settlement Understanding, *supra* note 12, art. 22.8.

181. See *generally* U.S. Submission, *supra* note 4 and EC Submission, *supra* note 21 (noting that each is not willing to back away from their respective arguments).

182. See U.S. Submission, *supra* note 4, ¶ 113.

183. See *id.* at 31 n.120.

184. See generally EC Submission, *supra* note 21 (noting the EC's steadfast opinion).

185. See *generally id.* (noting its unwavering point of view on wanting all five hormones banned provisionally).

hormones have negative effects on humans.<sup>186</sup> Similarly, the U.S. will not yield to removing the retaliatory sanctions until its beef products are allowed in the EC.<sup>187</sup> If the U.S. had eliminated its reprisals after the EC's most recent directive was implemented, the U.S. could analyze the new economic impairment. This new economic impairment could be less than the previous economic impairment because of new export markets, such as Japan, that are consuming large quantities of meat.<sup>188</sup>

The language of the Dispute Settlement Understanding also permits removing the suspension of concessions when a Member finds a way to stop the detriment to the impaired Member.<sup>189</sup> However, that option does not apply in this case because the new EC ban does not nullify the impairment to the U.S. economy.<sup>190</sup>

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186. See generally Directive 2003, *supra* note 118 (inferring that if the EC did not want to ensure that the hormones negatively affect humans, the EC would have repealed its legislation completely).

187. See generally U.S. Submission, *supra* note 4 (inferring that if the U.S. wanted to remove its retaliatory sanctions, it would have repealed them upon the EC's notification of compliance).

188. See Reuters Press, *New Rules for the U.S. Beef Market*, Dec. 5, 2005, available at <http://www.msnbc.msn.com/id/10339091/> [hereinafter Reuters]. Nearly one third of U.S. beef exports ended up in Japan, making it the largest exportation market for beef. Statistic is for 2003, the most recent available export year of beef to Japan. See *id.* New markets could lower the amount of beef and beef byproducts available to export to the EC. With fewer products available to export to the EC (assuming there was no ban on American beef), the monetary amount by which the U.S. is impaired is lessened. Although the U.S. implemented retaliatory sanctions in 1999 before Japan banned American beef, the current argument prepared by the U.S. was written during a harsh time for the American meat market, and could be a reason for such unwillingness by the U.S. to remove sanctions. See Press Release, Sen. Allard Hails Reopening of Japanese Market to U.S.-Produced Beef (Dec. 12, 2005), available at [http://allard.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease\\_id=231560&Month=12&Year=2005](http://allard.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=231560&Month=12&Year=2005) [hereinafter Sen. Allard] (stating "[t]his is great news for our export economy and Americas for beef producers."). Sen. Allard worked for two years trying to allow U.S. beef into Japan. "Japan was the largest importer of American Beef with imports totaling \$1.7 billion in 2003." *Id.* See also Press Release, Craig, Crapo Seek to Reopen Japanese Beef Market (Oct. 26, 2005), available at <http://craig.senate.gov/releases/pr102605a.cfm> (stating that the ban has seriously harmed Idaho beef producers. Japan's ban negatively affects the American beef industry and farm economy). Beef exports to Japan were \$1.7 billion before Japan banned American beef, which is far greater than the impairment caused by the EC legislation.

Japan banned American beef for fear of the so-called Mad Cow Disease:

The United States has been prohibited from exporting beef to Japan since December of 2003, when the Japanese forbid the importation of U.S. beef following the discovery of a single case of Bovine Spongiform Encephalopathy (BSE), or Mad Cow Disease, here in the United States. Before the border closure, Japan was largest importer of American Beef with imports totaling \$1.7 billion in 2003.

Sen. Allard, *supra*. Although this reason is different from the EC's motives for banning American beef, it nonetheless means that it is not a viable market for U.S. beef exports.

189. See Dispute Settlement Understanding, *supra* note 12, art. 22.8.

190. Although Directive 2003 is temporary, the provisional ban on U.S. hormone

Therefore, to eliminate the temporary suspension of concessions, the EC must demonstrate that the measure found to be inconsistent with a covered agreement has been removed.<sup>191</sup> For a successful EC claim in this matter, it must continue demonstrating to the U.S. and the Dispute Settlement Body, alike, that good faith plays a positive role in the dispute settlement process.

## 2. Good Faith is Vital

Should it matter that the Dispute Settlement Body never revoked its authorization for the U.S. to have retaliatory sanctions? How much weight in the dispute should be given to the EC's argument that it has repealed the old directive that violated WTO obligations?

Although the WTO never specifically demanded that the U.S. remove the retaliatory sanctions, the WTO also never explicitly granted the U.S. permission to continue the suspension of concessions.<sup>192</sup> The Dispute Settlement Understanding clearly articulates that once a violating Member conforms to WTO obligations, sanctions are no longer allowed.<sup>193</sup> To determine which Member's perspective is the best in deciding if a violating Member is now in compliance, the argument must rest on good faith.

The question at issue remains: who decides if a Member has complied with WTO obligations and when does their decision occur? The EC avers that it has implemented the Dispute Settlement Body recommendations because it removed its old WTO inconsistent ban.<sup>194</sup> The EC replaced its old ban with a provisional ban that it asserts is scientifically justified.<sup>195</sup>

Alternatively, the U.S.'s argument that it has not acted in violation

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treated beef nonetheless means that the EC is not a realistic market for American beef exports.

191. See Dispute Settlement Understanding, *supra* note 12, art. 22.8. From a pure textual standpoint, with the aforementioned two solutions ruled out in this case, in order for the suspension of concession to be against WTO policy, the EC will have to prove that the old inconsistent measure has been removed. See *id.*

192. Binding arbitration resulted in the level of suspension of concessions. However, it granted only the suspension of concessions in the amount of \$116.8 million per year. See Recourse to Arbitration, *supra* note 5, ¶¶ 82-84. It did not specify for how many years the suspension would last, or how it would be revoked. See *id.*

193. See Dispute Settlement Understanding, *supra* note 12, art. 22.8.

194. See generally EC Submission, *supra* note 21 (implementing the Dispute Settlement Body recommendations would mean that the EC eliminated the measure that was inconsistent with WTO obligations. Therefore, removing the old directive that was found to be against WTO obligations allowed the EC to be in compliance with WTO obligations).

195. EC Request for Consultations, *supra* note 16.

of its WTO obligations by continuing retaliatory sanctions<sup>196</sup> would be very strong if the Dispute Settlement Body concludes that it is up to the impaired Member to determine whether the violating Member has met Dispute Settlement Body recommendations. If this occurs, the U.S. arguably would not find that the EC has implemented Dispute Settlement Body recommendations. That finding, however, would not solve the problem of multilateral review of compliance<sup>197</sup> recommendations. The U.S. also holds that the Dispute Settlement Body should determine whether a violating Member has complied with Dispute Settlement Body recommendations and rulings.<sup>198</sup> If the U.S. were to decide whether the EC implemented the Dispute Settlement Body recommendations, then that would be a unilateral decision. Multilateral review would not occur in the situation that the U.S. proposes,<sup>199</sup> because it would no longer be the Dispute Settlement Body's determination if concessions can be suspended. Instead, it would be the U.S. concluding that retaliatory sanctions could still apply.<sup>200</sup>

The WTO's regulations for dispute settlement do not allow what the U.S. refers to as the "negative consensus rule"<sup>201</sup>—a term describing "Members found to have breached their obligations from avoiding the consequences of their actions by blocking what would otherwise be the consensus-based decision-making of the DSB [Dispute Settlement Body]."<sup>202</sup> The U.S. jumps ahead to a sad conclusion by proposing that the EC's position of Article 22.8 would allow violating Members to block impaired Members from suspending concessions.<sup>203</sup> The injured Member would not be able to suspend concessions because the violating Member would immediately allege that it was now in compliance.<sup>204</sup>

However, that is a conclusion showing that any remnant of good faith is lacking in the system between Members, specifically the EC and U.S. Ultimately, the U.S. will not be content with any resolution adopted by the EC that limits American beef exports into the foreign markets.

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196. See U.S. Submission, *supra* note 4, ¶¶ 1-10.

197. See *id.* ¶ 109. However, the U.S. is incorrect to say that Article 22.8 is concerned with multilateral review of compliance. Literally, the article reads that it is concerned with multilateral review of implementation of Dispute Settlement Body recommendations, NOT of compliance. See *Dispute Settlement Understanding, supra* note 12, art. 22.8.

198. See U.S. Submission, *supra* note 4, ¶ 109.

199. See *id.* ¶¶ 25-26.

200. It appears that the U.S. proposed that the impaired Member, here the U.S., should be the entity that determines when a previously violating Member has come into compliance with its WTO obligations. See EC Submission, *supra* note 21, ¶¶ 4-5.

201. U.S. Submission, *supra* note 4, ¶ 110.

202. *Id.*

203. See *id.* ¶ 111.

204. See *id.*

Although the U.S. is at liberty to disagree with the EC's most recent provisional ban, the former does not have to find it to be a suitable solution. Upon implementation, the U.S. was free to bring the issue for review to the WTO, and have a neutral third party review the measure multilaterally.<sup>205</sup>

If the EC were found to be in violation of WTO procedures, the U.S. could then petition the WTO to grant it the ability to suspend concessions.<sup>206</sup> In that situation, the U.S. would likely have the same retaliatory sanctions as the current ones because the new measure has the same negative result on the U.S. economy.<sup>207</sup> The U.S., however, should not be permitted to avoid that step. The current U.S. proposal is that the U.S. does not believe that the EC has made its *prima facie* case of compliance with WTO obligations.<sup>208</sup> The U.S. independently determined that it would continue implementing the retaliatory sanctions "because that authorization has never been revoked".<sup>209</sup>

Making it mandatory for the U.S. to abide by the policy proposed by the EC could strengthen the U.S.'s theory that the most recent measure remains nonconforming. The WTO might become irritated if the EC consistently implemented new measures that were not different from its previous measures. WTO reaction to the EC's lack of good faith to try to resolve its measure's compliance could be greatly unfavorable to the EC. Not only would that be advantageous to the EC to have its most recent measure reviewed multilaterally, but it would likely bolster the U.S.'s reputation in the global environment. A multilateral review would be favorable to the EC because after the WTO settles a dispute multilaterally, other Members should be confident that the EC's directive at issue truly adhered to WTO regulation, and it is more than just self-assessed compliance. The U.S. would then be perceived as the good-guy who follows Dispute Settlement Understanding procedure, as opposed to an intransigent bully who will not budge if it does not get its way.

The EC's proposal regarding a violating Member's determination of self-compliance would not result in an "endless loop of litigation"<sup>210</sup> if

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205. The Dispute Settlement Understanding clearly states that if a Member is concerned that another Member is in violation of a WTO policy, the former may bring a claim. See Dispute Settlement Understanding, *supra* note 12, art. 4.

206. *Id.* art 22.

207. It is irrelevant whether European markets are closed to U.S. beef exports if the reason conforms to WTO obligations or not. If the market is closed to hormone treated beef exports, economic impairment would be the same whether the markets are closed for reasons that are with or without observance of WTO commitments.

208. See U.S. Submission, *supra* note 4, ¶ 119.

209. *Id.* at ¶ 2.

210. See *id.* ¶¶ 2, 96.



the Members applied it in good faith.<sup>211</sup> An endless loop of litigation could occur just as easily if the impaired Member determined whether the violating Member has complied with WTO obligations. In a situation where an injured Member decided if a defaulting Member complied with WTO obligations, unending litigation might occur in the scenario where the former would consistently deny the latter's request to remove sanctions. That would make it necessary for the violating Member to bring the disagreement to the Dispute Settlement Body. The doctrine of good faith provides a solution to the endless loop of litigation nightmare because the Member's loss of credibility would not be worth the possible gain. The EC's proposal of self-determined compliance would most likely be used sporadically and in good faith.<sup>212</sup>

The Panel is likely to recognize the argument advocating the good faith presumption.<sup>213</sup> The EC provides previous WTO decisions where good faith was mentioned.<sup>214</sup> Those Dispute Settlement Body's decisions embody the element of good faith because they stated that Members are: "*presumed* to act in conformity with their WTO obligations[;]"<sup>215</sup> "Members of the WTO should not be assumed, in any way, to have continued previous protection or discrimination through the adoption of a new measure. This would come close to a presumption of bad faith[;]"<sup>216</sup> "where there has been a finding of non-compliance with WTO rules and a Member adopted a replacement measure, that Member cannot be assumed to have continued the previous prohibited practice."<sup>217</sup> The EC further provides that "the presumption of good faith, of course, also applies for implementing measures."<sup>218</sup> The U.S. responded to the EC's argument by presenting a single case, which seems to not be completely on point with the issue in the current dispute, stating:

[T]here is normally no presumption of inconsistency attached to a Member's measures in the WTO dispute settlement system. At the

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211. *See id.*

212. It would be used periodically because this situation only occurs when the Dispute Settlement Body has determined that a Member was in violation of WTO obligations and after the suspension of concession has been granted to the impaired Member.

213. Multinational trade is based upon good faith. *See* Dispute Settlement Understanding, *supra* note 12, art. 3.10. Additionally, the EC offered previous WTO decisions where the Dispute Settlement Body commented on the importance of good faith. E.C Submission, *supra* note 21, ¶¶ 87-94.

214. E.C Submission, *supra* note 21, ¶¶ 87-94.

215. *Id.* ¶ 88 (citation omitted).

216. *Id.* ¶ 89 (citation omitted).

217. *Id.* ¶ 90 (citation omitted).

218. *Id.* ¶ 92.

same time, we also are of the view that the failure, as of a given point in time, of one Member to challenge another Member's measures cannot be interpreted to create a presumption that the first Member accepts the measures of the other member as consistent with the WTO Agreement.<sup>219</sup>

The U.S. argues that this cited case "highlighted that there is simply no basis in the WTO Agreement for the EC's argument that it is presumed compliant with its obligations absent a finding against its measures."<sup>220</sup> The U.S., albeit in a footnote in its submission, simply passed by the idea that: "the EC appear[ed] to believe that the concept of good faith would operate only in favor of the EC and either believe no other Member would be able to avail itself to the concept of good faith, or ignores that it would apply with respect to the United States."<sup>221</sup> That argument, however, does not fully dismiss the good faith claim and solve the current case. If the U.S. is acting in good faith, that still does not resolve the problem of determining when a previously violating Member attained compliance with WTO obligations. That issue would inevitably be brought to the WTO. Although the U.S. makes an excellent point, it has been the country with the power to continue implementing retaliatory sanctions. Aside from initiating a review by the Dispute Settlement Body, the EC is at the mercy of the U.S. to determine whether or not the latter would remove its reprisal. Therefore, the presumption of good faith should apply more to the previously violating Member because that party is at the mercy of the Member imposing retaliatory sanctions to resolve the dispute.

The Dispute Settlement Understanding specifically mentions good faith in the body of the document, stating that "the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in *good faith* in an effort to resolve the dispute."<sup>222</sup> What remains to be decided is what degree of good faith the Panel will recognize as satisfactory. It will be important for the Panel to determine if a Member loses good faith credibility after that Member previously violated a WTO policy. While Members should always act in good faith, occasionally, a Member's ability to act in good faith may be overshadowed by self-interest that it is too hard for the Member to see that it lacks good faith. That situation, however, should be rare because of the extreme negative effects of the result. If a Member were to bring a

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219. U.S. Submission, *supra* note 4, ¶ 117 (citation omitted).

220. *Id.* ¶ 118.

221. *Id.* at 32, n. 124.

222. Dispute Settlement Understanding, *supra* note 12, art. 3.10 (emphasis added).

cause of action to the Dispute Settlement Body and not observe good faith because that Member were so intent on boosting its economic situation, the Panel would be very disenchanted with that Member. Such animosity toward the Member would not play favorably in subsequent unrelated disputes. The WTO is an entity that should be respected, and its policies should not be subservient to a Member's self-interest.

Time management<sup>223</sup> tends to favor the EC's position that the violating Member who has repealed its WTO inconsistent measure should be the one to determine if it has achieved compliance, and then notify the impaired Member. The latter would have to remove its retaliatory sanctions upon the former's compliance.<sup>224</sup> If the impaired Member observed there was not actual compliance with WTO obligations, it could immediately notify the WTO and submit a request for Panel consultations.<sup>225</sup> That would probably occur quickly because the impaired Member would want to continue receiving the economic benefits of the retaliatory sanctions. That process did not happen in this case.<sup>226</sup>

Because there is no regulation in the Dispute Settlement Understanding governing the procedural path of dispute settlement after a suspension of concessions has been granted,<sup>227</sup> the EC waited over two years after it announced plans to implement measures that it satisfied the Dispute Settlement Body recommendations to have its claim reviewed multilaterally.<sup>228</sup> This delay is explained because the EC is still awaiting the U.S.'s consideration of Directive 2003's compliance with WTO obligations.<sup>229</sup> Since the U.S. refused, the EC was forced to ask for a WTO review.<sup>230</sup>

a. Self-assessed compliance would not violate the second sentence of Article 22.8

Self-assessed compliance would not void the second sentence in

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223. A timely resolution of problems is important to the WTO; "prompt settlement is essential if the WTO is to function indefinitely." *Understanding the WTO*, *supra* note 10. See Dispute Settlement Understanding, *supra* note 12, art. 3.3.

224. See Dispute Settlement Understanding, *supra* note 12, art. 22.8.

225. See *id.* art. 4.

226. See EC Request for Consultations, *supra* note 16.

227. See The World Trade Organization, Understanding the WTO: Settling Disputes, The Panel Process, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp2\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm) (last visited Sept. 11, 2006).

228. See Directive 2003, *supra* note 118. Directive 2003, the vehicle through which the EC asserted that it is in compliance with WTO policy, was "published and entered into force on 14 October 2003." EC Request for Consultations, *supra* note 16.

229. *Id.*

230. *Id.*

Article 22.8.<sup>231</sup> Although the Dispute Settlement Body provides surveillance during implementation,<sup>232</sup> once a party complies with WTO obligations the Dispute Settlement Body ceases to monitor performance.<sup>233</sup> The EC's proposed manner of solving the issue would not violate the second sentence of Article 22.8 because the text implies that once the Dispute Settlement Body recommendations are implemented, the Dispute Settlement Body no longer monitors the situation.<sup>234</sup> The Dispute Settlement Body can monitor a Member while it tries to comply with the recommendations.<sup>235</sup> It, however, would be very difficult for the Dispute Settlement Body to pinpoint exactly when that Member followed recommendations.

Implementing the recommendations would mean that the Member technically has complied with WTO obligations.<sup>236</sup> Either the impaired Member or the violating Member in the dispute will have to be the one to determine when the violating Member complies with WTO obligations. If a Member does not believe that the violating Member has complied, the former should then be free to request consultations from the Dispute Settlement Body for multilateral review of the disputed measure.

*B. Should the U.S. Cease to Resent the EC and Repeal the Retaliatory Sanctions After Six Years?*

Meats injected with hormones are not only at issue in the EC, but there is a growing demand for hormone-free organic meats in the U.S. as well.<sup>237</sup> Americans concede that there could be enough scientific evidence in the upcoming years to show the negative effects caused by the hormones at issue.<sup>238</sup> The U.S. is expending valuable time and

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231. The second sentence of Article 22.8 states that:

In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

Dispute Settlement Understanding, *supra* note 12, art. 22.8.

232. *Id.*

233. *See id.*

234. *See id.*

235. *See id.*

236. *See id.* Article 22.8 implies that a Member complies with WTO obligations when it implements Dispute Settlement Body recommendations. *See id.*

237. Joe Garner, *For Many, Organic Beef a Natural Selection; Growing Segment of Market Finds it's What's for Dinner*, ROCKY MOUNTAIN NEWS (Denver), Jan. 13, 2006, at A18. Organic meat does not contain growth hormones. *Id.*

238. Debra Gordon-Hellman, Editorial, *Fight Cancer with Prevention*, BIRMINGHAM NEWS, Dec. 25, 2005, at 2B, proposing that there needs to be more research into genetically modified food to determine if consuming products with the hormones are

resources on sanctions on the European market while only collecting pennies for the punishment.<sup>239</sup> Approximately \$116.8 million is not sufficient compensation for the U.S. when compared to the animosity it is breeding with the EC. The U.S. should think twice before antagonizing “one of the United States’ strongest strategic partners”<sup>240</sup> with the retaliatory sanctions.

Because this current dispute is open for public viewing,<sup>241</sup> the U.S. may not want to back down from its position. U.S. concessions could demonstrate that the U.S. is willing to walk away from some issues that are economically insignificant. The U.S. may not want to establish a precedent of giving up on disputes and withdrawing retaliatory sanctions. This could be a slippery slope for the U.S.<sup>242</sup> It would be best for the U.S. to comply with the recommendations this current Panel will find. If the Panel holds in favor of the EC’s position that a Member’s compliance is determined by a good-faith self-assessment, the U.S. would be encouraged to remove the retaliatory sanctions for a few years until the expiration of the provisional ban. From there, the U.S. could wait to see what new EC measures are implemented. Then, if the U.S. determines the subsequent EC directives violate WTO obligations, the U.S. would be free to request a hearing before the WTO.

## V. Future Implications

The U.S. recognizes that particular procedures in post-suspension of concession situations do not currently exist in the Dispute Settlement Understanding.<sup>243</sup> Panels are not allowed to legislate;<sup>244</sup> they may only apply the agreements written in the text of the Dispute Settlement Understanding itself.<sup>245</sup> It is within the Panel’s discretion, however, to interpret the agreements written in the text of the Dispute Settlement Understanding,<sup>246</sup> which could permit the Panel to decide the issue of

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linked to cancer.

239. The U.S. imposes sanctions of up to \$116.8 million per year. Recourse to Arbitration, *supra* note 5, ¶¶ 83-84.

240. *European Union Profile*, STATES NEWS SERV., Oct. 4, 2005.

241. See Communication from the Chairman of the Panels, *United States—Continued Suspension of Obligations in the European Communities—Hormones Dispute*, WT/DS/320/8 (Aug. 2, 2005).

242. If the U.S. withdrew from this issue, other countries could try to take advantage of the U.S. by implementing measures that might not greatly affect the U.S. economy, but nonetheless contravene WTO principles.

243. See U.S. Submission, *supra* note 4, at ¶ 169.

244. See *id.* ¶ 169.

245. See *id.*

246. See *id.* The U.S. states that “[p]anels however are not authorized to legislate, but rather are to apply the covered agreements as written, not as one party would like them to be written.” *Id.*

procedure in post-suspension of concession situations. That problem is of great importance to resolve. Whatever the outcome of this current dispute, it will no doubt have an effect on possible changes in the text of the Dispute Settlement Understanding.

This is an on-going battle for all the parties, and the issue is brought forth to the public's attention for the first time in the WTO setting.<sup>247</sup> This awareness will most likely attract more people to the underlying hormones issue, which could make the dispute even more provocative.

Transparency in this proceeding will make it a key proceeding to follow, as all observers for WTO policies will recognize this monumental decision to waive secrecy in the WTO. The previous closed-door policy "provide[s] fodder for legitimate criticisms of the WTO."<sup>248</sup> Transparency in WTO proceedings could make skeptics of the WTO's legitimacy compel Members involved in disputes to comply with WTO obligations and Dispute Settlement Body recommendations even more quickly than they are today. An open-door policy could strengthen world trade and pressure Members to resolve disagreements more quickly. The EC, in its oral statement to the Panel, duly noted that the prospect for transparency "will change nothing about the intergovernmental nature of the WTO."<sup>249</sup> The EC reiterated the importance of transparency by stating that the opportunity of the public to see the WTO in action:

[M]ay help against the misperceptions that exist in civil society regarding WTO dispute settlement . . . in particular of the doubts that have been voiced about the unbiased, proper and fair manner in which panels conduct these trade dispute. Today, the public can see with its own eyes that WTO panelists are highly professional, impartial and objective, and that they accord the parties a full opportunity to present their positions.<sup>250</sup>

Third party opinions could be crucial to the outcome of this dispute.<sup>251</sup> The procedural post-suspension of concessions posture is a

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247. Frances Williams, *WTO Opens Hearing to Public*, FIN. TIMES (London), Sept. 13, 2005, at 10.

248. Editorials, *The First Peek at the WTO*, WASH. TIMES, Sept. 16, 2005, at A20.

249. Oral Statement by the European Communities in the First Substantive Meeting, *United States—Continued Suspension of Obligations in the EC-Hormones Dispute*, WT/DS320, ¶ 2, (Sept. 12, 2005), available at [http://trade.ec.europa.eu/doclib/docs/2005/october/tradoc\\_125515.pdf](http://trade.ec.europa.eu/doclib/docs/2005/october/tradoc_125515.pdf).

250. *Id.*

251. Third parties have rights. See Dispute Settlement Understanding, *supra* note 12, art. 10. Furthermore, articles 10.1 and 10.2 demonstrate that the input from third parties who have a "substantial interest" in the dispute before a panel will be taken into account. *Id.* That may influence the panel's opinion as well as illustrate that third party outlook, inputs, and values are important to the WTO in settling disputes. That adds even more to

new area that might result in new legislation. Hence, the WTO made the correct decision when it showed a strong interest in third party opinions. Canada, the major third party in this dispute,<sup>252</sup> is important because it contributes and bolsters the U.S.'s position.<sup>253</sup> The U.S., standing alone, provides a strong argument, but its weakness is that its outlook is the view of only one country. Meanwhile, the EC can be seen as compiling the support of its twenty-five members.<sup>254</sup> Canada not only provides the U.S. with support,<sup>255</sup> it also inadvertently adds another important factor to the U.S.'s position—namely that another country is advocating what some might perceive as the opinion of a single stubborn country.

China, Australia, and Brazil's views on the matter are very important to the WTO because the Panel requested each third party member to comment on China and Australia's positions.<sup>256</sup> The Panel specifically asked China and Brazil to further explain their interpretations of suspension of concessions.<sup>257</sup> That request illustrated that the WTO is trying to fully understand those countries' perspectives. Therefore, the WTO decision remains undecided.

It is significant that Australia addresses the current issue as a procedural matter more in favor of the EC's argument of good faith and the procedural matter that follows the implementation of new measures.<sup>258</sup> From a self-interest standpoint, a country such as Australia<sup>259</sup> would mostly prefer to have limited prohibitions on exportation of meats for pure economic interest. Thus, Australia, a large exporter of beef products,<sup>260</sup> strongly supports the EC's procedural proposal.<sup>261</sup> This advocacy demonstrates that countries that could be

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credibility of multilateral review.

252. See International Trade Canada, *WTO Panel Cases to Which Canada is a Party—Canada—EU—Beef Hormones—An UPDATE*, (Aug. 11, 2005), [http://www.dfait-maeci.gc.ca/tna-nac/disp/update\\_hormones-en.asp](http://www.dfait-maeci.gc.ca/tna-nac/disp/update_hormones-en.asp).

253. *Id.*

254. The European Union is composed of twenty-five nations. See Warren Giles, *WTO Opens Hearings on Modified Meat to the Public*, *TORONTO STAR*, Sept. 13, 2005, at C07.

255. See International Trade Canada, *WTO Panel Cases to Which Canada is a Party—Canada—EU—Beef Hormones—An UPDATE*, (Aug. 11, 2005), [http://www.dfait-maeci.gc.ca/tna-nac/disp/update\\_hormones-en.asp](http://www.dfait-maeci.gc.ca/tna-nac/disp/update_hormones-en.asp).

256. Australian Government Department of Foreign Affairs, Panel Questions to Third Parties, (Aug. 19, 2005), [http://www.dfat.gov.au/trade/negotiations/disputes/320\\_321\\_panel\\_questions\\_190905.html](http://www.dfat.gov.au/trade/negotiations/disputes/320_321_panel_questions_190905.html).

257. *See id.*

258. See Australia Submission, *supra* note 149, ¶ 4.

259. Australia is a major exporter of beef; its exports supply half of the Japanese beef market. See *Japan Lifts US and Canadian Beef Ban*, *LLOYD'S LIST INT'L*, Dec. 15, 2005, available at 2005 WLNR 20081929.

260. *See id.*

261. See Australia Submission, *supra* note 149, ¶ 4.

economically affected in a negative manner by the hormone ban support the EC's self-assessment determination and good faith arguments in the WTO dispute setting.

## VI. Conclusion

The underlying beef hormone dispute has been an issue between the U.S. and EC for years.<sup>262</sup> Although the goal of the Dispute Settlement Understanding is to provide solutions to quarreling Members in a relatively short period, this dispute was not resolved in a timely fashion. If good faith does not play a role in determining whether a Member complies with WTO policy in a post-suspension of concessions dispute, that Member will be punished for future legislation that possibly adheres to WTO mandates. An impaired Member should not be able to reap the economic benefits of continuing the application of retaliatory sanctions against the previously violating Member when the latter asserts it is now in compliance.

An impaired Member will not be satisfied with a violating Member's conformity unless such acquiescence wholly favors the impaired Member. This will likely never occur. The impaired Member will always want to wait for the other Member to implement a more favorable policy. Ultimately, the only way to expedite the process in a post-suspension of concessions phase is to trust that the previously violating Member acts in good faith when it asserts it is in compliance with WTO policy. Although this case has taken years to resolve, hopefully the Dispute Settlement Body will decide what amendments to the Dispute Settlement Understanding during this disagreement are necessary. Ultimately, a decision regarding who determines when a violating Member conforms and complies with WTO policy is overdue.

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262. The dispute over beef hormones between the U.S. and EC has fostered animosity at least as long as the initial request for consultations of the Dispute Settlement Body in January of 1996, if not longer. See Request for Consultations by the United States, *European Communities—Measures concerning Meat and Meat Products (Hormones)*, WT/DS26/1 (Jan. 26, 1996).



