EC–Hormones Case

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A. Introduction

1 In *European Communities – Measures concerning Meat and Meat Products (Hormones)* ('EC–*Hormones Case*'), the Appellate Body of the → *World Trade Organization (WTO)* had to strike the proper balance between free(er) trade as generally envisaged during the → *Uruguay Round* on the one hand and national regulatory → *sovereignty* aimed at the protection of health on the other hand. It is the most important dispute decided under the Agreement on the Application of Sanitary and Phytosanitary Measures ('SPS Agreement') which is the WTO agreement on how governments of WTO members can apply food safety and animal and plant health measures.

B. Dispute Stage

1. Facts and Background

2 Through a series of directives, the European Communities ('EC'; see → *European [Economic] Community*) prohibited the administering of certain hormones for growth purposes to farm animals and the placing on the market of meat and meat products treated with such hormones. The prohibition also barred the import of foreign-produced beef administered with growth hormones into the EC which disrupted trade with Canada and the United States of America ('US') where growth hormones are commonly administered to cattle. Both Canada and the US filed complaints in the WTO dispute settlement system (→ *World Trade Organization, Dispute Settlement*; see also → *Judicial Settlement of International Disputes*; → *Peaceful Settlement of International Disputes*). After the Panel had issued its reports, all parties to the dispute appealed to the Appellate Body (see also → *International Courts and Tribunals, Appeals*).

2. Key Issues

(a) Harmonization

3 The first key issue was the interpretation of Art. 3 SPS Agreement which deals with harmonization (see also → *Interpretation in International Law*; → *Unification and Harmonization of Laws*). Art. 3.1 SPS Agreement requires WTO members to 'base' their → *sanitary and phytosanitary standards* ('SPS') measures on relevant international standards. Art. 3.2 SPS Agreement declares that SPS measures which 'conform' to relevant international standards are presumed to be consistent with the provisions of the SPS Agreement as well as those of the General Agreement on Tariffs and Trade 1994 (→ *General Agreement on Tariffs and Trade [1947 and 1994]*). Finally, Art. 3.3 SPS Agreement allows WTO members to deviate from relevant international standards to achieve a 'higher level of protection' than envisaged by the international standards subject to further conditions.

4 At first instance, the Panel read Art. 3.1 SPS Agreement together with Art. 3.2 SPS Agreement It held that Art. 3.1 SPS Agreement laid down the general rule under the SPS Agreement that WTO members must base their SPS measures on international standards with the consequence of presumption of legality provided for in Art. 3.2 SPS Agreement if the rule is complied with. Thus, in the Panel's view, for SPS measures to be based on international standards under Art. 3.1 SPS Agreement they had to 'conform to' international standards under Art. 3.2 SPS Agreement (WTO *EC:*

Measures concerning Meat and Meat Products (Hormones)—Complaint by Canada—Report of the Panel para. 8.76). From this perspective, Art. 3.3 SPS Agreement constituted an exception to the general rule that SPS measures must be based on international standards (ibid para. 9.49) with the consequence that the burden of proof was upon the member relying on the exception (ibid para. 8.58).

5 The EC appealed these interpretative rulings as flawed and the Appellate Body strongly disagreed with the characterization of Art. 3 SPS Agreement given by the Panel. The Appellate Body ruled that Art. 3.3 SPS Agreement constituted not an exception but an 'autonomous right' (WTO *EC—Measures concerning Meat and Meat Products [Hormones]—AB–1997–4—Report of the Appellate Body* ['*Report of the Appellate Body*'] para. 172). In its view, Art. 3 SPS Agreement offered three separate regulatory choices to WTO members with respect to the enactment and maintenance of an SPS measure: *a)* the WTO member can merely base a measure on international standards (>Art. 3.1 SPS Agreement); *b)* it can fully conform to such standards (Art. 3.2 SPS Agreement); or *c)* it can fully reject the international standards (Art. 3.3 SPS Agreement). In support, the Appellate Body stressed the difference in wording between 'based on' in Art. 3.1 SPS Agreement and 'conform to' in Art. 3.2 SPS Agreement. The Appellate Body maintained that the SPS Agreement does not require members to harmonize their SPS measures immediately and fully by bringing them into conformity with existing relevant international standards. Holding otherwise, the Appellate Body held, would transform previously → *soft law* international standards *uno actu* into binding norms.

(b) Risk Assessment

6 For the growth hormones at issue, the → *Codex Alimentarius Commission (CAC)* had abstained from recommending a prohibition. With respect to the naturally occurring hormones at issue, the CAC deemed it unnecessary to adopt a level of acceptable daily intake and maximum residue limit because, in its opinion, naturally occurring hormones produced and appearing at variable levels in human beings are unlikely to pose a risk to human health when used for growth promotion purposes in cattle in accordance with good veterinary practice. With respect to two synthetic hormones at issue, the CAC set out acceptable daily intakes and maximum residue limits. Accordingly, the EC's broad prohibition achieved a higher level of protection than envisaged by the relevant international standard under Art. 3.3 SPS Agreement. As a consequence, Art. 5.1 SPS Agreement applied which obliges WTO members to base their SPS measures on an assessment of the risks to human, animal or plant life or health.

7 At first instance, the Panel held that the EC measure was inconsistent with Art. 5.1 SPS Agreement. On appeal, the Appellate Body softened the strict interpretation of Art. 5.1 SPS Agreement given by the Panel. The Appellate Body declared that the necessity to base SPS measures on a risk assessment under Art. 5.1 SPS Agreement only meant that there must be a 'rational relationship' between the risk assessment on the one hand and the measure on the other hand or, in other words, that the risk assessment sufficiently warrants the measure in the sense that the former reasonably supports the latter (*Report of the Appellate Body* para. 193). Unlike the Panel, the Appellate Body stated explicitly that Art. 5.1 SPS Agreement did not oblige WTO members to adopt the majority mainstream scientific opinion but may also rely on divergent opinions within the scientific community. The Appellate Body also clarified that Art. 5.1 SPS Agreement did not impose any quantitative requirement and, thus, that a showing of a minimum magnitude of risk as a result of the risk assessment was not necessary as long as the existence of a risk as such could be established.

8 Nonetheless, the Appellate Body upheld the Panel's ultimate finding that the SPS measure was not based on a risk assessment and thus violated Art. 5.1 SPS Agreement. The EC was able to point to an array of monographs, individual statements of scientists, and articles which contained general evidence of the carcinogenic nature of hormones when used for growth promotion purposes for which the Appellate Body was willing to assume that they meet the minimum requirements of a risk assessment. However, the Appellate Body stressed that the EC could not pinpoint specific studies which addressed the particular risk at hand, ie, the carcinogenic or genotoxic potential of residues of those hormones in meat derived from cattle to which hormones had been administered for growth promotion purposes. On the contrary, the Appellate Body determined that most, if not all, specific evidence submitted concluded that the use of hormones for growth promotion purposes was safe if conducted in accordance with good veterinary practice. As a consequence, the Appellate Body found that the scientific evidence did not rationally support the EC import ban and concluded that the measure was not based on a risk assessment under Art. 5.1 SPS Agreement. The EC's attempt to rely on risks from violations of good veterinary practice, ie, risks flowing from abuse in the administration and use of hormones and from the problems of control and detection of hormones, likewise failed due to the absence of specific evidence relating to the deficiencies of a regime which did not provide for a total prohibition of growth hormones.

(c) Relevance of the Precautionary Principle

9 The EC also claimed that its import ban was based on the precautionary principle (→ *Precautionary Approach/Principle*) and was consistent with the SPS Agreement if the latter was interpreted as incorporating the former. However, both the

Panel and the Appellate Body rejected the EC's argument. The Appellate Body noted that the precautionary principle was, in fact, reflected in some provisions of the SPS Agreement, notably Art. 5.7 which allows provisional measures in the presence of scientific uncertainty subject to strict conditions and which the EC had explicitly declined to invoke. Nonetheless, in the absence of a textual basis, the Appellate Body fully agreed with the Panel that the precautionary principle could not override specific obligations under the SPS Agreement. For this reason, the Appellate Body was able to avoid a holding on the disputed issue of whether the principle had become a general principle of general or → *customary international law* as suggested by the EC (see also → *General International Law [Principles, Rules and Standards]*; → *General Principles of Law*).

C. Implementation Stage

10 In 1998, an arbitrator acting under Art. 21.3 (c) Understanding on Rules and Procedures Governing the Settlement of Disputes ('DSU') determined 15 months as a reasonable period for the EC to implement the ruling (see also → *World Trade Organization, Enforcement System*). After the expiration of the reasonable period without implementation, the EC objected to the level of suspension proposed by Canada and the US. The matter was again referred to Art. 22.6 DSU . In 1999, the arbitrators determined the level of nullification suffered by Canada to be equal to CDN$11.3 million and the level of nullification suffered by the US to be equal to US$116.8 million and the Dispute Settlement Body authorized the suspension of → *concessions* to the EC by Canada and the US in the respective amounts which were used accordingly by Canada and the US.

D. Resumption of Litigation

11 In 2003, 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 ('EC Directive 2003/74') entered into force which, in effect, reaffirmed the ban on Canadian and US imports. The EC claimed to have now fully implemented the ruling in the *EC–Hormones Case* and demanded the lifting of the sanctions imposed by Canada and the US. Canada and the US took the position that this directive did not implement the ruling in the *EC–Hormones Case* and, therefore, was still inconsistent with the SPS Agreement. In their view, there was still no scientific basis for the import ban. After → *consultation*[s] among the parties failed, the EC demanded a new panel which was established accordingly in 2005. Since the EC initiated the dispute settlement mechanism, the cases against Canada and the US were assigned new case numbers and bear the official title 'Continued Suspension of Obligations in the EC Hormones Dispute'. In March 2008, the Panel found in both cases that the new EC measure was still inconsistent with Arts 5.1 and 5.7 SPS Agreement. At the time of writing, the panel reports are on appeal.

E. Assessment

12 At present, the *EC–Hormones Case* remains one of the highly controversial disputes not only among the parties but also within academe and → *civil society*. One side accuses the Appellate Body of giving too much leeway to subjective and scientifically unjustified anxieties which may allow protectionist measures. The other side sees in the Appellate Body's report a prostration before monetary interests at the cost of national regulatory sovereignty in the field of health protection. In particular, the SPS Agreement has been criticized as being blind with respect to culturally-related decisions, democratic arguments, and consumer interests, and as not sufficiently incorporating the precautionary principle.

13 Basically, while the Appellate Body generally showed more respect for regulatory sovereignty in sensitive areas such as SPS measures by seriously cutting back many of the Panel's legal findings, it upheld the Panel's basic conclusion that the EC's import ban is not based on a risk assessment under Art. 5 SPS Agreement . Thus, the Appellate Body requires as a threshold matter the demonstration of an objective risk, no matter how small, by scientific evidence specifically addressing the problem at issue. One can bewail this interpretation on the assumption that these questions should be decided locally and not globally and that Art. 5.1 SPS Agreement constitutes 'bad law'. However, Art. 31.1 → *Vienna Convention on the Law of Treaties (1969)* ([concluded 23 May 1969, entered into force 27 January 1980] 1155 UNTS 331) which represents customary international law and is binding upon the Appellate Body by reference in Art. 3.2 DSU unambiguously declares that a treaty (see also → *Treaties*) must be interpreted in → *good faith (bona fide)*. And without the requirement of a demonstration of a specific risk under Art. 5.1 SPS Agreement, WTO members may easily escape their obligations under the SPS Agreement and act in a protectionist manner.

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