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October 1998

International Decisions. European Communities - Measures Concerning Meat and Meat Products

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Recommended Citation

David A. Wirth. "International Decisions. European Communities - Measures Concerning Meat and Meat Products." *American Journal of International Law* 92, (1998): 755-759.

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opposed by the other.²¹ Judges Higgins and Kooijmans argued that the Court, after observing that the parties had not raised this point,²² should have addressed *proprio motu* whether a dispute exists relating to the line beyond Point G proposed by Cameroon. Both pointed to the absence of negotiations between the parties on that particular stretch of the maritime boundary. Judge Higgins found support for her conclusion that there is no dispute relating to the maritime boundary beyond Point G in the way Cameroon formulated the document instituting proceedings. In its Application, Cameroon asked for a delimitation of the maritime boundary “[i]n order to *prevent any dispute arising*.”²³ Judge Kooijmans pointed out that Cameroon had not formulated a specific claim on that stretch of the maritime boundary until submitting the Memorial, so that at the date of the filing of the Application, there was no claim of Cameroon that was “positively opposed” by Nigeria.²⁴

It is safe to assume that counsel for Nigeria chose not to argue this point precisely to avoid the appearance of a dispute. Because of this litigation strategy, and because the Court declined to address the issue *proprio motu* despite its observation that “Nigeria is entitled not to advance arguments that it considers are for the merits at the present stage of the proceedings,”²⁵ Nigeria’s objection was rejected by a majority of the judges. The majority was satisfied that there is a dispute on the basis that Cameroon and Nigeria had not been able to agree on the continuation of the negotiations on the maritime boundary *beyond* Point G, when, in any event, they had set out to negotiate the whole of the maritime boundary.²⁶ The majority’s holding will cause counsel in future similar cases to review their litigation strategy very carefully.

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European Communities restrictions on imports of beef treated with hormones—nontariff trade barriers—control of food additives—scientific basis for restrictions—WTO dispute settlement mechanisms—scope of review

EUROPEAN COMMUNITIES—MEASURES CONCERNING MEAT AND MEAT PRODUCTS. WTO Doc. WT/DS26/AB/R & WT/DS48/AB/R.

World Trade Organization Appellate Body, January 16, 1998.

This report of the Appellate Body of the World Trade Organization (WTO) is both the most recent development in a long-running trade battle between the United States and the European Communities and the first dispute to be addressed under a new Uruguay Round agreement concerning food safety measures.

Several directives promulgated under the authority of the European Communities (EC or Communities) prohibit the sale of meat and meat products, including foodstuffs imported into the Communities, derived from cattle treated for growth promotion purposes with any of three synthetic (trenbolone acetate, zeranol, and melengestrol acetate) or three natural hormones (oestradiol-17 β , progesterone, and testosterone). For more than a decade, the United States, where use of the same hormones is permitted for these purposes, has objected to the EC hormone ban as a nontariff barrier to trade

²¹ Slip op., para. 87.

²² *Id.*, para. 110.

²³ *Id.*, para. 16 (emphasis added).

²⁴ Slip op., Separate Opinion of Judge Kooijmans, para. 10.

²⁵ Slip op., para. 93.

²⁶ *Id.*, para. 110.

unsupported by scientific evidence.¹ At stake is an export market of approximately \$250 million per year.

The negotiation of a new Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)² in the Uruguay Round of Multilateral Trade Negotiations under the General Agreement on Tariffs and Trade (GATT) was shaped largely against the background of, and as a generic response to, the issues that emerged from the U.S.-EC dispute over beef hormones. After the entry into force of that Agreement on January 1, 1995, the United States³ and Canada,⁴ in parallel dispute settlement panel proceedings, successfully challenged the EC hormone ban. In response to the Communities' appeal, the WTO Appellate Body upheld the results in both panels. However, the Appellate Body modified the panels' reasoning in certain significant respects.

The Uruguay Round's SPS Agreement is significant for its attempt to discipline food safety measures, such as the Communities' hormone ban, that are neither facially discriminatory nor patently discriminatory as applied. The principal vehicle for accomplishing this purpose is a scientific test, which marks the first time that scientific integrity has been identified as an explicit component of the GATT/WTO multilateral regime of rules.⁵ The Appellate Body's report consequently highlights many of the issues, both explicit and implicit, raised by this new approach.

The SPS Agreement expresses a preference for multilaterally agreed, harmonized standards,⁶ which in the area of human food safety are established primarily by the Codex Alimentarius.⁷ After a lengthy and contentious debate, the Codex Commission in 1995 approved the use of two of the synthetic hormones at issue in this dispute by adopting maximum residue limitations (MRLs) for them, and concluded that no such limits were necessary for the three hormones that occur naturally.⁸ On the relationship between the EC ban and the newly established Codex standards, the WTO Appellate Body reversed the panels' conclusion that the SPS Agreement requires that national measures, such as the EC hormone ban, tightly "conform to" international standards, such as Codex MRLs. The Appellate Body consequently relaxed the required nexus

¹ See U.S. Dep't of Agriculture, Foreign Agricultural Service, Chronology of the European Union's Hormone Ban, June 26, 1996, available in LEXIS, News Library, Arcnews File.

² Apr. 15, 1994, Agreement Establishing the World Trade Organization, Annex 1A, in FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, MARRAKESH, 15 APRIL 1994, at 69 (1994) [hereinafter SPS Agreement].

³ WTO Doc. WT/DS26/R/USA (Aug. 18, 1997) (<http://www.wto.org/wto/dispute/distab.htm>) [hereinafter U.S. Panel Report].

⁴ WTO Doc. WT/DS48/R/CAN (Aug. 18, 1997) (<http://www.wto.org/wto/dispute/distab.htm>).

⁵ See generally David A. Wirth, *The Role of Science in the Uruguay Round and NAFTA Trade Disciplines*, 27 CORNELL INT'L L.J. 818 (1994) (reprinted as United Nations Environment Programme, Environment and Trade Monograph No. 8).

⁶ SPS Agreement, *supra* note 2, Art. 3, paras. 1-3. The benefits of international standards from a trade point of view are relatively obvious: producers in one country readily obtain market access to any other country applying the same standards. There has been concern, however, that multilateral standards may reflect a least-common-denominator consensus responsive to those countries that are the least aggressive in protecting public health from food-related risks.

⁷ The Codex Alimentarius Commission was created in 1962 as a joint undertaking of the UN Food and Agriculture Organization (FAO) and the World Health Organization (WHO). Membership is open to all FAO and WHO member states and now numbers more than 130. The Commission has a dual function: "protecting the health of the consumers and ensuring fair practices in the food trade." Statutes of the Codex Alimentarius Commission, Art. 1, para. (a), reprinted in CODEX ALIMENTARIUS COMMISSION, PROCEDURAL MANUAL 4 (10th ed. 1997). To this end, the Commission is specifically charged with adopting advisory multilateral "good practice" standards on such matters as the composition of food products, food additives, labeling, food-processing techniques, and inspection of foodstuffs and processing facilities. As of 1993, the Codex Commission had evaluated 187 pesticides, 523 food additives, and 57 food contaminants, and established 3,019 maximum residue limitations for pesticides. See ROGER W. MILLER, THIS IS CODEX ALIMENTARIUS (1993).

⁸ This action was taken by recorded vote—itself unusual—that was also noteworthy for being quite close: 33 in favor, 29 against, with 7 abstentions. See Dep't of Agriculture, *supra* note 1; U.S. Panel Report, *supra* note 3, para. 8.67.

between international standards and national measures that are “based on” those international standards, as specified in the SPS Agreement.⁹

The SPS Agreement identifies the circumstances under which a WTO member may adopt measures more stringent than international standards. As a first step in this process, the SPS Agreement introduces the term “appropriate level of sanitary or phytosanitary protection.”¹⁰ This concept appears at its core to be a social value choice based on national policy priorities. The Appellate Body nonetheless upheld the panels in concluding, on the basis of the SPS Agreement’s reference to the need for a “scientific justification,”¹¹ that the choice of this public health objective is subject to certain of the scientific disciplines of the SPS Agreement.¹² This is a critical juncture in the Appellate Body’s reasoning, as the Communities’ chosen level of protection was zero risk.

The Communities also challenged the panels’ determination that the EC, as the responding party maintaining the measure, was required to demonstrate its validity. The Appellate Body reversed on this point, concluding instead that the burden was on the challenging party to establish a *prima facie* case.¹³ Having determined that the hormone ban was inconsistent with the continued availability, first, of the natural hormones for therapeutic purposes in cattle and, second, of other drugs allowed for use in pigs, the panels had concluded that these disparities in regulatory approach indicated that the hormone ban amounted to discrimination or a disguised restriction on trade. The Appellate Body reversed these conclusions of the panels as well.¹⁴

Once a WTO member has determined that it desires a level of protection in excess of that provided by multilateral standards, the measures chosen must be “based on” a risk assessment.¹⁵ Significantly, the Appellate Body relaxed the panels’ interpretation of the requirement for a risk assessment, observing that the Agreement does not “require a risk assessment to establish a minimum quantifiable magnitude of risk, nor do[es the Agreement] exclude *a priori*, from the scope of a risk assessment, factors which are not

⁹ WTO Doc. WT/DS26/AB/R & WT/DS48/AB/R, paras. 157–68, & 253(g), (h) (Jan. 16, 1998) (<http://www.wto.org/wto/dispute/distab.htm>) [hereinafter Appellate Body Report].

¹⁰ *E.g.*, SPS Agreement, *supra* note 2, Art. 3, para. 3, Art. 5, paras. 3–6, & Annex B, para. 3(c). Noting that “[m]any Members . . . refer to this concept as the ‘acceptable level of risk,’” paragraph 5 of Annex A defines “[a]ppropriate level of sanitary or phytosanitary protection” as “[t]he level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory.”

¹¹ The Agreement explains that

there is a scientific justification if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection.

SPS Agreement, *supra* note 2, Art. 3, para. 3 n.2.

¹² Appellate Body Report, *supra* note 9, paras. 173–77 & 253(i).

¹³ *Id.*, paras. 97–109 & 253(a). This ruling may be particularly important for regulatory schemes, such as those for food additives and human drugs in the United States, that require the manufacturer to demonstrate safety rather than the Government to demonstrate harm.

¹⁴ *Id.*, paras. 210–46 & 253(m). In reaching this conclusion, the Appellate Body did, however, affirm the panels’ finding that these differences in level of protection were “unjustifiable” within the meaning of the SPS Agreement. *Id.*, para. 235.

¹⁵ SPS Agreement, *supra* note 2, Art. 5, para. 1. Paragraph 4 of Annex A to the Agreement defines “risk assessment” as follows:

The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages, or feedstuffs.

susceptible of quantitative analysis by the empirical or experimental laboratory methods commonly associated with the physical sciences.”¹⁶ Similarly, the Appellate Body reversed the panels’ conclusion that the risk assessment must in fact have been taken into account in framing the measure.¹⁷ The “based on” test does, however, demand a rational substantive relationship, subject to review by panels, between the risk assessment and the measure adopted.¹⁸ The Appellate Body affirmed the panels’ conclusion that the EC hormone ban did not satisfy this requirement.

The Appellate Body, as had the panels, then proceeded to consider the scientific validity of the evidence proffered by the Communities in support of the hormone ban. Unlike much municipal administrative law, the SPS Agreement, as the Appellate Body noted, contains no standard for review of expert determinations by administrative bodies of WTO members. Notwithstanding the official U.S. contemporaneous interpretation suggesting deference,¹⁹ cited by the Communities, the Appellate Body declined to identify any such standard of review for panels to apply.²⁰

On the other hand, the Appellate Body’s review of certain scientific evidence analyzed by the panels proved to be highly deferential to the panels. The Appellate Body declined to reverse the panels’ determinations unless those findings amounted to “deliberate disregard of evidence or gross negligence amounting to bad faith,”²¹ or “deliberate disregard or distortion of evidence.”²² In the end, the Appellate Body upheld all the panels’ findings with respect to scientific integrity, although it believed that the panels had “sometimes misinterpreted” the evidence.²³ This result concentrates substantial, virtually unreviewable discretion on questions of science in the dispute settlement panels.

Last, the Appellate Body rejected the proposition that the SPS Agreement should be read against the background of a “precautionary principle,” which counsels governmental authorities to err on the side of protection in formulating public policy in contexts

¹⁶ Appellate Body Report, *supra* note 9, para. 253(j). See also *id.*, paras. 180–87. The Appellate Body noted:

In most cases, responsible and representative governments tend to base their legislative and administrative measures on “mainstream” scientific opinion. In other cases, equally responsible and representative governments may act in good faith on the basis of what, at a given time, may be a divergent opinion coming from qualified and respected sources. By itself, this does not necessarily signal the absence of a reasonable relationship between the SPS measure and the risk assessment, especially where the risk involved is life-threatening in character and is perceived to constitute a clear and imminent threat to public health and safety.

Id., para. 194.

¹⁷ *Id.*, paras. 180–91 & 253(k). This point is important because the “based on” standard, as well as the other obligations in the Agreement, applies to measures put in place before the SPS Agreement’s entry into force. *Id.*, paras. 126–30 & 253(d).

¹⁸ *Id.*, paras. 192–93 & 253(l).

¹⁹ Uruguay Round Agreements Act, Statement of Administrative Action, *reprinted in* H.R. DOC. NO. 103-316, at 656, 746 (1994), *reprinted in* 1994 U.S.C.A.N. 4040, 4105:

It is clear that the requirement in the [SPS] Agreement that measures be based on scientific principles and not be maintained “without sufficient scientific evidence” would *not* authorize a dispute settlement panel to substitute its scientific judgment for that of the government maintaining the sanitary or phytosanitary measure. For example, by requiring that a measure be based on scientific principles (rather than, for instance, requiring that a measure be based on the “best” science) and not to be maintained without sufficient scientific evidence (rather than, for instance, requiring an examination of the “weight of the evidence”), the [SPS] Agreement recognizes the fact that scientific certainty is rare and many scientific determinations require a judgment among differing scientific views. The [SPS] Agreement preserves the ability of governments to make such judgments.

²⁰ Appellate Body Report, *supra* note 9, paras. 100–19 & 253(b).

²¹ *Id.*, para. 138.

²² *Id.*, para. 139.

²³ *Id.*, para. 253(e).

characterized by conditions of scientific uncertainty.²⁴ Instead, observed the Appellate Body, a version of the precautionary principle is embodied in the text of the SPS Agreement itself, which specifies the relevant requirements.

Both U.S. cattle exporters²⁵ and executive branch officials²⁶ expressed dissatisfaction with the EC decision to conduct further studies in response to the Appellate Body's report.²⁷ A subsequent arbitrator's report pursuant to the WTO's dispute settlement procedures, however, declined to allow the Communities additional time to perform such tests, on the theory that the SPS Agreement requires a scientific justification as of the date of its entry into force.²⁸ These subsequent developments may nonetheless reveal a weakness in the SPS Agreement's fundamental reliance on science. Science is an ongoing search for knowledge against a constantly shifting, evolving background that, in controversial regulatory areas, by its very nature may well require operative decisions at new frontiers. This report is unlikely definitively to resolve significant policy questions about the efficacy from a trade point of view, and the legitimacy from a public health perspective, of scientific tests employed in the adversarial, adjudicatory setting of dispute settlement under a trade agreement.

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Application of Fifth Amendment to U.S. Constitution in international context—fear of foreign prosecution as ground for invoking privilege against self-incrimination—relevance of growing international law enforcement cooperation—role of U.S. judiciary in foreign relations

UNITED STATES v. BALSYS. 118 S.Ct. 2218.
U.S. Supreme Court, June 25, 1998.

Resolving a long-open question, the U.S. Supreme Court held in this 7-2 decision that a witness in a domestic proceeding may not invoke the constitutional privilege against self-incrimination if the witness fears that the testimony may be used in a prosecution outside the United States. Although grounded in domestic law, the three opinions in *Balsys* reveal tension between the judiciary's traditional deference to the political branches in foreign relations matters and its concern over the risk that individuals subject to prosecution abroad will suffer deprivation of liberty because of that deference.

Lithuanian native Aloyzas Balsys had immigrated in 1961 and become a U.S. resident alien. Decades later, the Office of Special Investigations (OSI), established within the U.S. Department of Justice to effect the denaturalization or deportation of suspected Nazi war criminals, began investigating whether Balsys, contrary to statements on his immigration papers, had taken part in Nazi persecutions during World

²⁴ *Id.*, paras. 120–25 & 253(c).

²⁵ See Testimony of Dana R. Hauk, Chairman, International Markets Committee, National Cattlemen's Beef Association, *Review of the 1999 WTO Multilateral Negotiations on Agricultural Trade—Europe: Hearing Before the House Comm. on Agriculture*, 105th Cong., 2d Sess. (Mar. 18, 1998), available in LEXIS, News Library, Curnws File.

²⁶ See Gregory Viscusi, *U.S. Wants Quick End to Europe's Hormone Beef Ban*, COM. APPEAL, Mar. 7, 1998, at B10, available in LEXIS, News Library, Curnws File (quoting Agriculture Secretary Dan Glickman as "frustrated" with EC response to Appellate Body's report).

²⁷ See *E.U. Sets New Studies on Beef Hormone Risk*, J. COM., Mar. 12, 1998, at 4A.

²⁸ See EC Measures Concerning Meat and Meat Products (Hormones), Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Doc. WT/DS26/15 & WT/DS48/13, paras. 39–42 (May 29, 1998) (<http://www.wto.org/wto/dispute/distab.htm>).

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