Analysis&Perspective

The World Trade Organization, Meat Hormones, and Food Safety

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On Aug. 18, 1997, a dispute panel of the World Trade Organization (WTO) handed down a 251-page decision holding that the European Union should lift its ban on the importation of meat produced with growth hormones.[1] The panel ruled that the ban violates the new WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS). The EU Commission has appealed to the WTO Appellate Body, which will issue a final judgment in several weeks.

The WTO panel decision marked many *firsts* for the trade regime. This is the first decision under SPS and the first time that a trade panel convened a group of scientists to serve as expert witnesses. This was also the first hearing in the WTO, or its predecessor General Agreement on Tariffs and Trade, in which another government spoke on behalf of the health or environmental regulation being challenged.

The EU ban on imported meat produced with hormones (e.g., testosterone) is one component of a program that simultaneously bans the use of hormones in Europe for animal fattening. The WTO decision applies only to the import ban. Therefore, under the ruling, the EU may continue the domestic ban so long as it gives imports more favorable treatment. Doing so would be bootless, however. The unrestricted sale of American hormone-treated meat cannot easily co-exist with a continued ban on European hormone-treated meat. Thus, compliance with the WTO's decision effectively requires the EU either to permit hormones in meat production or to establish a labeling system that allows consumers to decide whether to buy meat with added hormones.

It has been widely recognized that the evidence supporting the EU hormone ban is thin. The U.S. government argues there is zero evidence that using hormones—in accordance with good veterinary practice—renders meat less safe for human consumption. The EU Commission retorts that the safety of implanting hormones is unproved. In its characterization of the facts, the panel was swayed by the U.S. government. The panel perceived this episode as one where the EU has been restricting imports of safe meat.

Background and Panel Process. The European Commission began considering a hormone ban in 1980. A ban was scheduled to go into effect in 1987, but was delayed two years in the face of criticism by the U.S. government. When the hormone ban became effective in 1989, the Reagan administration responded by imposing retaliatory tariffs on food products from Europe. Since these tariffs were obviously GATT-illegal, the Commission tried to lodge a complaint. But the Bush administration blocked the effort, as it was possible to do under GATT.

The U.S. government did not challenge the hormone ban under the GATT. The only applicable GATT discipline is Article III (National Treatment), which requires that imported products be treated no less favorably than domestic products. Because the Commission was imposing the *SAME* ban on imported meat that it already imposed on domestic meat, there was seemingly no violation of GATT's non-discrimination principle. Thus, GATT provided no legal basis for a U.S. complaint. According to one analyst, on the few occasions when GATT panels considered complaints about health standards, they "studiously avoided limiting in any way the complete discretion of sovereign governments in the area of health and safety."[2]

The legal context of the dispute changed in 1995 after the adoption of the new SPS Agreement in the Uruguay Round negotiations. The SPS Agreement contains an array of disciplines on actions governments may take to protect public health. Following several months of fruitless discussions, the U.S. government, in April 1996, asked the WTO to establish a dispute panel. The panel took over 13 months to issue its report. This is far longer than average, perhaps owing to the complexity of the dispute.

The panel was composed of one academic and two diplomats. The chair was Thomas Cottier, a professor in Switzerland specializing in international law, EU law, and trade law. Cottier had served on seven previous GATT/WTO panels. The second panelist was Peter Palecka, currently the Czech Republic's representative to the WTO. Palecka had served on two GATT/WTO panels. The third panelist was Jun Yokota who, until re-

[1] EC Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States, Report of the Panel, WT/DS26/R/USA, Aug. 18, 1997, available at HTTP://www.wto.org. Paragraph numbers referenced here come from this report. A similar complaint filed by Canada was decided the same day.

[2] Eliza Patterson, "International Efforts to Minimize the Adverse Trade Effects of National Sanitary and Phytosanitary Standards," *Journal of World Trade*, Vol. 25 (April 1990), pp. 67, 94.

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cently, was one of Japan's representatives to international organizations in Geneva.

Several governments made statements to the panel. Australia, Canada, and New Zealand supported the United States. Norway supported the EU and declared that in an era of increasing consumer concern over the safety of food, it was of utmost importance that the WTO uphold the right of each government to protect its citizens against risks from veterinary drugs and pesticides.

Pursuant to SPS Article 11, the panel sought the participation of six scientists in the proceedings. The panel chose not to ask the scientists to deliver a collective judgment, but relied on the scientists' answers to questions posed by the panel and the parties. In general, the scientists agreed that the hormones posed no risk. Yet one scientist, George Lucier of the U.S. National Institute of Environmental Health Sciences, gave more nuanced answers. For example, he stated that the "risk that would be associated by consuming meat containing [hormone] residues would be extraordinarily small" and "could be zero." (para. 6.66).

Burden of Proof. Because this was the first adjudication under the SPS Agreement, the panel initially had to ascertain which side bore the burden of proof. There is no clear indication within the SPS Agreement. The Commission asserted that the government challenging the foreign sanitary measure should have the burden of proof. The Office of the U.S. Trade Representative disagreed, arguing that the government defending a health requirement must prove conformity with SPS.

The panel sided with the United States. Specifically, it held that once the plaintiff government makes a prima facie case of violation, the burden shifts to the defendant government to justify its health measures.

The panel pointed to several provisions in SPS that it claimed imply a burden of proof on the country enforcing the sanitary regulation. But none of these provisions really offers much support to the panel's judgment. For example, the panel states (para. 8.60) that the SPS Agreement repeats the injunction that "Members shall ensure" that their health measures meet the requirements of SPS. Yet this injunction says nothing about which side must produce evidence in a hearing.

The assignment of burden of proof was pivotal to the U.S. government's victory. The panel concluded that the hormone ban violated three separate provisions of SPS:

- it was not based on a risk assessment;
- the level of health protection sought by the EU for hormones was inconsistent with the protection level sought for other chemicals; and
- the hormone ban was not based on an international standard.

Each of these conclusions is discussed below.

Risk Assessment. Article 5.1 of SPS requires that health-related product standards be based on a risk assessment. A risk assessment must evaluate the likelihood that adverse effects will occur. According to the panel, this provision imposes both procedural and substantive requirements.

The procedural requirement is that the regulatory action be based on a risk assessment. Although the Commission claimed that its actions were based on such an assessment, the panel held that the Commission had not submitted sufficient evidence that the competent EU institutions "took into account" the various studies submitted into evidence before the panel. To buttress its conclusion, the panel pointed to the *preambles* of the EU Hormone Directives, and noted that they did not mention scientific studies (para. 8.122).

While it is common for national courts to scrutinize the decisionmaking process of domestic administrative agencies, it is unusual for an international court to do so. One wonders what kind of proof would be needed to convince a WTO panel that Commission bureaucrats actually read a study they claim they did. The panel's attempt to draw a negative inference from the preambles seems silly, particularly since these preambles were written during the 1980s, many years before the SPS requirements went into effect.

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The second aspect of the SPS risk assessment requirement is that the measures be in substantive conformity with such assessments. According to the panel, none of the evidence indicates that "an identifiable risk arises for human health from the use of these hormones for growth promotion purposes if good practice is followed" (para. 8.142). Since the Commission could not point to any studies showing the existence of an identifiable risk, the panel concluded that the EU directives were not based on a risk assessment.

The panel acknowledged that the studies finding no risk from hormones looked only at using hormones in accordance with "good practice." While misuse of hormones might engender a tangible health risk, the panel concluded that the Commission had not performed a risk assessment of that scenario. The panel also noted that the Commission failed to provide convincing evidence that preventing the abuse of hormones is sufficiently more difficult than preventing the abuse of other veterinary drugs (para 8.154).

Although the Commission claimed that it had conducted a risk assessment, it also declared that risk assessments were not required in setting the level of health protection. Thus, from the Commission's perspective, the SPS Agreement permits governments to set "zero risk" as a regulatory goal without doing a risk assessment that finds a real risk. The panel disagreed with the Commission, and held that a goal of zero risk does not relieve a government from proving a risk from hormones greater than zero. The panel also noted that zero risk could not be achieved in practice because the Commission cannot guarantee that no illegal use of hormones will occur (Para. 8.162).

In addition, the panel considered the role of the "precautionary principle." This is a principle of soft international law, which states that where there are serious threats of harm, lack of full scientific certainty should not be used as a reason to postpone cost effective measures. Although this part of the panel's report is murky,

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the Commission seems to have asserted that the precautionary principle could provide a justification within the WTO for regulation in the absence of a risk assessment.

Nevertheless, the panel rejected this line of reasoning (para. 8.165). It stated that the precautionary principle had been incorporated into SPS Article 5.7 and therefore had no weight with respect to Article 5.1 (Risk Assessment). Article 5.7 permits governments to adopt "provisional" regulations where relevant scientific evidence is insufficient. But Article 5.7 was not being relied upon by the Commission because the EU Hormone Directives were "definitive" rather than "provisional." Therefore, the panel gave no further attention to Article 5.7 or the precautionary principle.

Regulatory Distinctions. SPS Article 5.5 requires each government to "avoid arbitrary or unjustifiable distinctions in the levels [of health protection] it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade." In interpreting this provision, a key issue is the meaning of "in different situations." Based on the submissions of the parties, the panel decided that it would compare situations involving either the same substance or the same health risk.

The Clinton administration argued that the EU violated Article 5.5 by regulating hormones differently than Carbadox, a non-hormonal, antibiotic drug. Because Carbadox and hormones are both alleged to have carcinogenic effects, the panel determined that it could compare the EU directives for these two substances. Since the EU permits the use of Carbadox for swine, but does not permit the use of growth hormones for cattle, the EU is tolerating a distinction in risk levels, the United States said.

The panel concluded that this distinction is "arbitrary or unjustifiable." Oddly the panel did not say which. Moreover, the panel does not explain why the existence of two different regulatory results is "arbitrary or unjustifiable."

In order to be a violation of SPS Article 5.5, the regulatory distinctions must "result in discrimination or a disguised restriction on international trade." During the debate on the Uruguay Round, many commentators said this language erects a high hurdle for finding an SPS violation. It was said that no health regulation, neutral as to country of origin, would be adjudged discriminatory or a disguised restriction. The ease with which a WTO panel jumped this hurdle, in its first attempt, should give pause to those who portrayed Article 5.5 as innocuous.

The panel found that the EU directives resulted in "discrimination or a disguised restriction on international trade." It did not say which.

The panel lists four reasons for this finding.

First, the hormone ban "restricts international trade" because non-qualifying meat is not importable into the EU. Second, the legislative history of the EU directives suggests that the European Commission had goals other than health considerations in mind—such as removing barriers to trade within Europe and increasing meat consumption.[3] Third, the ban on hormones "de facto discriminates against U.S. meat" because meat with added hormones constitutes a large portion of the U.S. meat supply. Fourth, the EU permits Carbadox in the pork meat sector where there are no domestic surpluses at the same time that it prohibits hormones in the bovine meat sector where there are domestic surpluses.

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None of these reasons justify the panel's conclusion. On the first point, the issue should not be whether there is a trade ban, but whether this ban is discriminatory or a disguised restriction. The panel presents no evidence that the hormone ban is either. On the second point, the panel does not explain why other EU policy goals, such as more internal trade, are discriminatory or disguised. On the third point, all product standards have differential impact on exporting countries since each country has a different structure of production. It is unclear whether the panel is suggesting that differential impact alone triggers an SPS violation. If so, this has significant implications for the WTO-legality of thousands of product standards. On the fourth point, if the EU has both a pork meat sector and a bovine meat sector and regulates them differently, the supply and demand conditions in each sector would seem barely relevant to SPS law.

In addition to considering the United States' complaint, the panel also considered a parallel Article 5.5 complaint by Canada that went beyond Carbadox. Canada's complaint concerned: the difference between the regulation of hormones and the microbial growth promoter olaquindox; the difference between the regulation of natural hormones administered for growth and the same hormones when present normally; and the difference between the regulation of synthetic hormones administered for growth and natural hormones present normally. The panel reached the same conclusion as it did for Carbadox.

The application of Article 5.5 by the panel is a significant development in the international supervision of domestic health standards. Previously, GATT and WTO panels scrutinized taxes or regulations on "like" products, sometimes finding differing taxes or regulations to be a violation of world trade rules. But the hormone panel takes a giant step by comparing differing regulations on *unlike* products—for example, hormones and Carbadox. The implications of this new approach are profound. If carcinogens A and B are of equal health risk, the panel seems to be saying that a government may not ban A without also banning B.

[3] The panel also states that the legislative history shows that the EU sought "more favorable treatment to domestic producers" (para. 8.212). Yet the panel cites no evidence for this.

Harmonization. The SPS Agreement favors the use of international product standards. For food safety, this means harmonization to the standards promulgated by the Codex Alimentarius Commission. Because the EU standards are more stringent than Codex for five of the six hormones at issue, SPS Articles 3.1 and 3.3 forbid such unilateral standards unless they are consistent with all other provisions of SPS.

Since the EU directives were found to be inconsistent with Article 5.1 (Risk Assessment) and Article 5.5 (Regulatory Distinctions), the panel also found them to be inconsistent with Articles 3.1 and 3.3.

It is interesting to note that the panel's interpretation differs from the Clinton administration's explanation to the U.S. Congress in 1994. According to the administration's report, "Article 3.3 affirms the right of each government to maintain or adopt S&P [SPS] measures more stringent than the relevant international standard if there is a scientific justification or as a consequence of the level of [health] protection a government determines to be appropriate."Although the panel's approach is not clear, it seems to be saying that a scientific justification would not be enough to permit a national food safety standard more stringent than an international standard.[4]

The panel also considered whether the goal of zero risk from hormones qualifies as an "appropriate" level of protection. Because the Commission had not presented evidence of an actual risk, the panel concluded the Commission could not exercise its preference for zero risk. Furthermore, the panel stated (para. 8.171) that even if there had been an identifiable risk, the EU measure would still have had to pass the test of Article 5.5. So contrary to the official explanation of the Clinton administration, a government determination in favor of a zero risk level would not, in itself, be enough to permit a food safety standard different from the Codex level.

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Even in the absence of an international standard, governments may have difficulty in maintaining their chosen health standards. One of the six chemicals at issue in this case is the synthetic hormone MGA, which has no Codex standard. Just as it did with the other five hormones, however, the panel declared that the Commission had not met its burden of proving to the panel that the MGA standard was based on a risk assessment. The panel also found that MGA is regulated differently from natural hormones. Therefore, the panel concluded that the MGA standard violated Articles 5.1 and 5.5 of SPS.

[4] Message of the President of the United States, House Doc. 103-316 (1994), p. 747.

The panel's analysis of MGA demonstrates that the requirement to base health regulation on Codex standards is not the most difficult hurdle in SPS. The most difficult hurdles are Articles 5.1 and 5.5, which apply regardless of whether there is a Codex standard.

Other Issues. One of the most interesting things about the panel report is what it does not say. During the negotiation of the SPS Agreement, much of the concern expressed by public interest groups involved two provisions—Articles 2.2 and 5.6. Article 2.2 forbids maintaining an SPS measure "without sufficient scientific evidence." Article 5.6 directs governments to ensure that SPS measures "are not more trade-restrictive than required." The Clinton administration argued that the EU's hormone ban violated both of these provisions. Yet curiously, the panel did not address these points.

The panel ended its report with a coda similar to those in previous GATT/WTO reports holding environmental measures to be GATT-illegal. The panel declared: "we would like to stress that it was not our task to examine generally the desirability or necessity of the EC Council directives in dispute." The panel is implying that the EU's import ban can be separated from its domestic regulations. Yet the panel presents no analysis to show how the EU's regulatory program could maintain coherence in the absence of parallel border measures.

Implications for Trade Policy. Unjustified barriers to food trade are one of the oldest problems in trade policy. An early attempt to address this occurred in 1929 in the International Convention for the Protection of Plants. The Convention improved environmental cooperation and directed parties to take into account "the necessity of not hampering international trade." During the 1930s, several commercial treaties propounded rules regarding sanitary restrictions.

The SPS is a major achievement in international supervision and one of the toughest agreements negotiated during the Uruguay Round. Its potential for controlling health standards was somewhat disguised by the language in SPS concerning the "rights" of governments to use sanitary and phytosanitary measures. Many commentators have been distracted by this language about "rights" and missed the fact that the purpose of SPS was to impose obligations. For example, one analyst enthused that "The new science-based standards disciplines represent a pendulum-swing back toward greater national discretion and a move away from the monolithic prescriptions of the world trading system."[5]

From my perspective as an American meat-eater, the use of hormones in meat production does not render meat less healthy to eat than it naturally is. The Commission has probably overreacted to consumer squeamishness. Yet even if the hormone ban is irrational, that does not necessarily mean that the WTO should overrule it. Indeed, there are three reasons why the WTO should avoid taking action in circumstances like this.

First, greater economic efficiency can be achieved if governments are allowed to tailor health and environmental regulations to national conditions. Since countries are not clones of each other, one would expect

[5] Jeffery Atik, "Science and International Regulatory Convergence," *Northwestern Journal of International Law and Business*, Vol. 17, pp. 736, 740 (1996-97).

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each country's regulations to reflect different values and resource endowments. In the absence of transborder spillovers (e.g., air pollution), there is little benefit to international harmonization. Indeed, regulatory diversity should be cherished because it permits decisions to be made closer to the people. Regulatory diversity also promotes a healthy competition among governments to achieve the wisest domestic standards.

Second, our planet has far more irrational government policies than the WTO could ever possibly correct. One would think the WTO would have enough irrational *trade* policies to attend to without having to meddle in irrational health policies. For example, the United States maintains discriminatory sugar quotas with no economic justification. Australia imposes high tariffs on textiles and footwear. Canada keeps out dairy products with import quotas and prohibitive tariffs. New Zealand levies a high tariff on motor vehicles. These are instances of blatant protectionism; yet the WTO is doing little to correct them.

The third reason why the WTO should not be secondguessing the European Commission on hormones is that international institutions depend upon popular support. The WTO jeopardizes that support when it dictates lower food standards. By allowing itself to be captured by export interests seeking to bulldoze foreign product standards, the WTO reinforces the myth that free trade inevitably erodes environmental and health protection.

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In a global economy, health and environmental disputes between countries are likely to have trade ramifications. This gives the WTO jurisdiction over such disputes. Because other regimes, such as the World Health Organization or the U.N. Environment Programme, do not have robust dispute mechanisms, the WTO has become an inviting forum for governments to lodge complaints about clashing health or environment policies.

At present, WTO panels have no latitude to avoid politically charged disputes like meat hormones. The WTO dispute mechanism is open to all WTO members for whatever they want to complain about. Panels are obliged to choose a winner. This situation cannot help but embroil the WTO in controversy. As WTO official Richard Eglin has warned, "the WTO has a powerful enforcement mechanism at its disposal, so powerful in fact that great care has to be taken not to over-use or abuse it."[6]

The GATT/WTO dispute process performs well when it examines commercial policies, but not so well when it examines environmental policies.[7] For a regime predicated on the principle of comparative advantage, it ought to be obvious that WTO adjudication on nontrade issues is unwise. The WTO needs an abstention doctrine to avoid taking up "bad" cases. As University of Pennsylvania law professor Philip M. Nichols has written, the WTO should exempt from scrutiny laws that "are enacted to reflect underlying societal values" and that only "incidentally impede trade."[8]

When a panel finds a health or environmental measure in violation of WTO rules, the panel should decide the case on the narrowest possible ground. A panel should seek to nudge the violator into compliance. The hormone decision provides a good example of the wrong approach. Once the panel found that the EU had not done a risk assessment, it should have stopped there. By pointing out the need for such an assessment, the panel could initiate a constructive dialogue between the Commission, scientists, and the European public. This dialogue could give the Commission the political courage it needs to reconsider the hormone ban.

Instead of nudging the Commission, the Hormone panel bludgeoned it. The panel complained about the EU's legislative process, cast doubt on whether zero risk would ever be permitted under SPS, accused the Commission of disguised protectionism, and contrasted hormone regulation with the regulation of other carcinogens. Such broad criticism increases the number of people who will find fault with the panel's analysis. Several weeks ago, the European Parliament called the panel report "unacceptable."

The panel's search for the "right" answer points to another weakness in GATT/WTO adjudication. Panels do not look for integrative solutions. The U.S. government could have headed off this dispute a decade ago by assisting producers willing to ship "no-hormones-added" meat to Europe. Instead, the U.S. resisted setting up certification procedures because doing so might have undermined the confidence of American consumers in U.S. meat safety.[9]

On the other side, the Commission could have established a mandatory labeling system to identify meat produced with hormones. The Commission was too eager to impose a ban rather than leave the decision up to each individual.

Specific Criticisms. Apart from these general observations, some specific points about the panel report are in order. The panel jumped to unwarranted conclusions in characterizing differences in health regulations as "discrimination" or a "disguised restriction" on international trade. These terms have a technical meaning in trade law and are being misused by the panel.

The panel accorded no deference to the Commission's factual findings. From the panel's perspective, there wasn't much on the record to defer to. Whether panels should accord deference remains an unresolved issue in WTO jurisprudence.

In criticizing the EU for regulating one carcinogen more stringently than another, the panel pushes the WTO toward a slippery slope. If the regulation of two unlike substances—hormones and Carbadox—can be compared, it is unclear where the panel would draw the

[6] Richard Eglin, "Core Labour Standards and the WTO," *International Trade Law and Regulation*, Vol. 3, pp. 101, 103 (1997).

[7] For example, see Steve Charnovitz, "Dolphins and Tuna: An Analysis of the Second GATT Panel Report," *Environmental Law Reporter*, Vol. 24, p. 10567 (1994).

[8] Philip M. Nichols, "Trade Without Values," Northwestern University Law Review, Vol. 90, pp. 658, 719 (1996).

[9] David Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Cambridge: Harvard University Press, 1995), p. 169.

line. Should the tough regulation of hormones be compared to the lax regulation of cigarettes? The EU permits the sale of cigarettes despite their carcinogenicity.

The panel suggests that the WTO cannot tolerate "arbitrary or unjustifiable" differences in the way that the EU regulates hormones and Carbadox. That is astonishing. The WTO is much more tolerant of arbitrary trade policies. After all, the WTO would not object if the EU imposed different *tariff* rates on hormones and Carbadox.

According to the panel, the government defending its health measure should have the burden of proof. That burden can be onerous. Yet shifting it back to the plaintiff might make it too hard to prosecute trade barriers disguised as health measures. One middle-ground option would be to require unanimity among the panelists for a food safety measure to be adjudged an SPS violation.

The Hormone panel was not sufficiently open to scientific input. Although the panel acted commendably in seeking the advice of several scientists, it did not solicit the advice of food safety groups. A coalition of U.S. non-governmental organizations sent an analysis to the panel that included factual information about possible risks from hormones. But the WTO Legal Affairs Division rejected this submission, stating that "non-governmental organizations may not submit materials to a dispute panel (except at the panel's invitation)."[10]

Lastly, the composition of the panel deserves attention. Although this was a distinguished trio of panelists, the panel itself was imbalanced. At least two of the three members are WTO insiders. No one in the group, reportedly, had any expertise in health or food safety regulation. It is also interesting to note that all three panelists are male. Neither the GATT nor the WTO has ever invited a female to serve on a panel considering a health or environmental dispute.

Implications for Food Safety. The power of the WTO to direct governments to change their sanitary regulations has important implications for food safety. Perfect government regulations would satisfy the tests in the SPS. But many useful government regulations are imperfect and so may run afoul of the thicket of SPS rules. Moreover, a skeptical panel can always say that a defendant government failed to justify its food safety requirement.

Because there are a lot of food safety regulations that differ between countries, many food safety disputes could be brought to the WTO. Complaints loom about genetically modified corn, E-coli bacteria in meat, fungus in wheat, salmonella contamination of poultry, and mad cow disease. On Oct. 2, President Clinton asked Congress to require federal regulators to ban imports of fruit and vegetables from countries that do not meet U.S. food safety standards. But SPS does not allow a WTO member to impose a ban merely because the exporting country has different food safety standards.

During this first application of SPS, several problems with the new disciplines became apparent. To start with, the WTO's use of Codex standards as benchmarks is problematic. The Codex standard for the hormones was adopted by a vote of 33–29 with seven absentions. This is hardly a ringing endorsement of the safety of eating hormone-processed meat. Yet SPS rules do not take into account the strength of the Codex vote.

Another problem is that review by WTO panels will tend to ratchet down food safety standards (or leave them unchanged). Panels are unlikely to ask governments to improve food safety. It is easy to see why advocates of safer food are unenthusiastic about this dynamic.

That said, one should not ignore the possibility that the SPS process can help raise food safety standards. The panel's attention to Carbadox is a case in point. But spotlighting the EU's permissive regulation of Carbadox, the WTO may add to the pressure on the Commission to tighten this regulation.

The panel made several statements that, although undeveloped in this report, could spell trouble if followed by future SPS panels. For example, the panel suggested that the risk of drug abuse might not be sufficient to justify restraints on normal usage. The panel also suggested that certain risk prevention goals might not be achievable whenever illegal use occurs.

Whatever the merits of foregoing trade negotiations based on linkage, the Hormone decision makes clear that it is too late to keep sanitary and food safety issues out of the WTO. Eventually, the logic that brought food safety and intellectual property into the WTO will impel greater coordination between the international regimes for trade, environment, and labor.

Fast-Track Debate. The U.S. Congress is now considering whether to reinstate the fast-track approval process for new trade agreements, an issue that has split both political parties. The Hormone decision has implications for this ongoing debate.

The Clinton administration has proposed a U.S. negotiating objective of addressing foreign government "policies and practices regarding labor, the environment, and other matters that are directly related to trade and decrease market opportunities for U.S. exports or distort U.S. trade." The SPS Agreement seems to fit this objective since it can help the U.S. meat industry overcome trade barriers in Europe. Future trade negotiations may craft other harmonization agreements modeled on SPS.

Some environment and health advocates are troubled by the administration's proposal, because negotiations go only in one direction. Trade negotiators may look for ways to *discipline* environmental and health standards, but not for ways to *upgrade* them. From the way the administration has described its proposal, it would seem that the fast track would be available, hypothetically, to implement a new WTO agreement to repeal food safety regulations burdensome to exporters. But fast track would not be available to implement a new international agreement to reduce

[10] Sierra Club Legal Defense Fund, Submission to the WTO Oct. 4, 1996; Letter from Jeffrey L. Gertler, WTO, to J. Martin Wagner, Sierra Club Legal Defense Fund, Oct. 17, 1996.

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risks from parasites, viruses, bacteria, and pesticides in imported food.

Many congressional Republicans have articulated a goal of keeping so-called "non-trade" issues, like labor and the environment, out of future trade negotiation. Whatever the merits of foregoing trade negotiations based on linkage, the Hormone decision makes clear that it is too late to keep sanitary and food safety issues out of the WTO. Eventually, the logic that brought food safety and intellectual property into the WTO will impel greater coordination between the international regimes for trade, environment, and labor.

Conclusion. The SPS Agreement was not designed to undermine legitimate food safety regulations. It was designed to knock down unjustified trade barriers. Of course, reasonable people may differ on whether a particular regulation is legitimate or unjustified. Within a country, such differences are worked out through legislation, administrative proceedings, and courts. Between countries, such differences may now be decided by WTO panels.

In the first SPS adjudication, the panel handled some things well. It invited the opinion of outside experts. It properly concluded that the Commission had not done an adequate risk assessment.

Nevertheless, the Hormone decision is flawed. The panel did not give serious consideration to the Commission's claims that the dangers of misusing hormones justified the ban. The panel's finding that the different regulation of hormones and Carbadox constitutes "discrimination" or a "disguised restriction" was not supported by analysis. The panel did not consider briefs from public interest groups that might have provided evidence of a risk from hormones.

The most serious problem with SPS is Article 5.5. As interpreted by the panel, this article requires regulatory consistency as a condition of WTO legality. This can undermine legitimate food safety regulation. The Appellate Body should look carefully at the Hormone panel's analysis and the implications of its decision.

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HIGHLIGHTS

High-Tech Firms Suggest Expanding ITA to Include Hundreds of New Goods
U.S. high-technology companies submit their recommendations to the Clinton administration for expanding the tariff-cutting Information Technology Agreement to include hundreds of new products—from photocopying machines to digital cameras. The companies also propose steps that could be taken by governments to eliminate non-tariff trade barriers. **Page 1746**

EU Official Says Accession Talks With China Nearing Final Stages
European Trade Commissioner Sir Leon Brittan says that China has entered the "last lap of negotiations" on entry to the WTO with its pledge to ease import quotas. Brittan, who calls the commitment a "conceptual breakthrough," says he received assurances during private talks in Beijing that Chinese authorities agreed to eliminate quotas on imported commodities. **Page 1755**

Helms Asks U.S. for Documents on Cuba Law, Says President Failed to Act
Senate Foreign Relations Committee Chairman Jesse Helms asks the State Department to supply all documents, including classified papers, relevant to a key provision of the Helms-Burton law. President Clinton, Helms says, has not addressed his earlier concerns over the administration's enforcement of the law's Title IV, which requires the president to deny U.S. visas to those found dealing in property expropriated by the Cuban authorities. **Page 1766**

Clinton Administration Still Upbeat Concerning Fast-Track's Prospects
Clinton administration officials are still upbeat publicly about prospects for moving a fast-track bill through Congress this year. Administration officials say the president has been speaking to lawmakers by phone and personally in small groups. The House Ways and Means Committee, with the support of only four Democrats, has approved a compromise proposal. However, House Minority Leader Richard Gephardt says there will likely be an alternative measure when legislation comes to the House floor. **Pages 1747, 1748, 1788**

U.S. Frustrated by Japan's Progress on Market Access for Autos
The United States and Japan end three days of review of the 1995 auto and auto parts agreement, with U.S. officials expressing great frustration and Japanese delegates complaining their efforts to open the Japanese market have been almost exhausted. Assistant USTR Wendy Cutler says Japan was unwilling to take significant steps to improve market access. **Page 1759**

Analysis

WTO AND FOOD SAFETY: A World Trade Organization dispute panel decision holding that the European Union should lift its ban on meat imports produced with growth hormones marked many firsts for the world trade regime, according to an analysis by Steve Charnovitz, director of Yale University's Global Environment & Trade Study. **Page 1781**

ALSO IN THE NEWS

MERCOSUR: President Clinton expresses support for MERCOSUR, saying it could be a building block for liberalized Western Hemisphere trade. **Page 1769**

WTO DAIRY COMPLAINTS: The United States takes disputes on European Union cheese and Canadian milk to the WTO Dispute Settlement Body. **Page 1750**

CHINA CONTROLS: Commerce Secretary William Daley says at the close of a week-long trade mission to China that negotiators have failed to agree on commercial deals and a pact that would permit the sale of U.S. nuclear power technology to Beijing. **Page 1756**

THAI DUTIES: The Thai government will raise customs duties and excise taxes on more than 20 goods and services and cut $2.78 billion from its 1998 fiscal year budget. **Page 1762**

WTO TRIPs: The United States and the European Union will continue to insist that countries seeking to join the WTO agree to comply fully with its intellectual property agreement immediately upon accession to the organization. **Page 1749**

TEXT

FAST TRACK: Text of Rep. Archer's original compromise fast-track legislation. **Page 1788**

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