EC – HORMONES[1]

(DS26, DS48)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainants	*United States* *Canada*	*SPS Arts. 3 and 5*	Establishment of Panel	*20 May 1996 (United States)* *16 October 1996 (Canada)*
			Circulation of Panel Report	*18 August 1997*
Respondent	*European Communities*		Circulation of AB Report	*16 January 1998*
			Adoption	*13 February 1998*

1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: EC prohibition on the placing on the market and the importation of meat and meat products treated with certain hormones.

- Products at issue: Meat and meat products treated with hormones for growth purposes.

2. SUMMARY OF KEY PANEL/AB FINDINGS

Harmonization

- SPS Art. 3.1 (international standards): The Appellate Body rejected the Panel's interpretation and said that the requirement that SPS measures be "based on" international standards, guidelines or recommendations under Art. 3.1 does not mean that SPS measures must "conform to" such standards.

- Relationship between SPS Art. 3.1, 3.2 and 3.3 (harmonization): The Appellate Body rejected the Panel's interpretation that Art. 3.3 is the exception to Art. 3.1 and 3.2 assimilated together and found that Art. 3.1, 3.2 and 3.3 apply together, each addressing a *separate* situation. Accordingly, it reversed the Panel's finding that the burden of proof for the violation under Art. 3.3, as a provision providing the exception, shifts to the responding party.

Risk assessment

- SPS Art. 5.1: While upholding the Panel's ultimate conclusion that the EC measure violated Art. 5.1 (and thus Art. 3.3) because it was not based on a risk assessment, the Appellate Body reversed the Panel's interpretation, considering that Art. 5.1 requires that there be a "rational relationship" between the measure at issue and the risk assessment.

- SPS Art. 5.5: The Appellate Body reversed the Panel's finding that the EC measure, through arbitrary or unjustifiable distinctions, resulted in "discrimination or a disguised restriction of international trade" in violation of Art. 5.5, noting that: (i) the evidence showed that there were genuine anxieties concerning the safety of the hormones; (ii) the necessity for harmonizing measures was part of the effort to establish a common internal market for beef; and (iii) the Panel's finding was not supported by the "architecture and structure" of the measures.

3. OTHER ISSUES[2]

- Burden of proof (SPS Agreement): The Appellate Body reversed the Panel's finding that the SPS Agreement allocates the "evidentiary burden" to the Member imposing an SPS measure.

- Objective assessments of facts (DSU Art. 11): Having noted that the issue of whether a panel has made an objective assessment of the facts under DSU Art. 11 is a "legal question" that falls within the scope of appellate review under DSU Art. 17.6, the Appellate Body said that the duty to make an objective assessment of facts is an "obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence." The Appellate Body found that the Panel did comply with the DSU Art. 11 obligation because although the Panel sometimes misinterpreted some of the evidence before it, these mistakes did not rise to the level of "deliberate disregard" or "wilful distortion" of the evidence.

- Claims *vs.* arguments: The Appellate Body held that while a panel is prohibited from addressing legal claims not within its terms of reference, a panel is permitted to examine any legal argument submitted by a party or "to develop its own legal reasoning".

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1 *European Communities – Measures Concerning Meat and Meat Products*

2 Other issues addressed: standard of review (DSU, Art. 11); precautionary principle; retroactivity of treaties (VCLT, Art. 28); objective assessment (DSU, Art. 11); expert consultation; additional third party rights to US and Canada (DSU, Art. 9.3); judicial economy.