

Michigan Journal of International Law

Volume 11 | Issue 3

1990

The Hormone Conflict Between the EEC and the United States Within the Context of GATT

Werner P. Meng

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



Part of the [European Law Commons](#), [Food and Drug Law Commons](#), and the [International Trade Law Commons](#)

Recommended Citation

Werner P. Meng, *The Hormone Conflict Between the EEC and the United States Within the Context of GATT*, 11 MICH. J. INT'L L. 819 (1990).

Available at: <https://repository.law.umich.edu/mjil/vol11/iss3/4>

This Article is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mLaw.repository@umich.edu.

THE HORMONE CONFLICT BETWEEN THE EEC AND THE UNITED STATES WITHIN THE CONTEXT OF GATT

Werner P. Meng

For many years, consumer organizations within the European Community have demanded the prohibition of natural and synthetic hormones from use in animal fodder. Since the level of hormone use by breeders varies among Member States, demands for a hormone prohibition have also differed in intensity from State to State. After lengthy negotiations beset with legal difficulties, a general, community-wide prohibition became reality at the beginning of 1989. The price of this policy has been trade difficulties with the United States which, up to the present time,¹ have resulted in trade sanctions and economic losses on both sides. Since both parties have agreed to resolve future economic differences in a more rational manner, General Agreement of Tariffs and Trade ("GATT") related questions of international law that surfaced and were championed by both sides must be examined to clarify the role of the law in such cases. The following discussion will deal with these relevant issues.

I. THE HISTORICAL DEVELOPMENT OF THE HORMONE BAN

A. *Legal Position within the EEC Council of Ministers*

In 1980, European consumer organizations called for a boycott on purchases of hormone-treated veal. This was the direct result of several "hormone scandals" which had caused a sensation within the EEC. The Council of Ministers responded by declaring its support for banning all hormone substances, natural and synthetic alike, from animal fodder. EEC veterinary law exists in the form of general directives harmonizing the laws of Member States. These directives bind States to goals specified in article 189 of the EEC Treaty ("EECT" or "Treaty of Rome"), yet leave them a certain freedom to choose their own form and methods. Thus, the hormone ban was also subject to the "harmonization by directive" procedure.

In October 1980, the Commission submitted to the Council of Ministers a draft of general guidelines for a ban. This proposal was

1. This article was finalized October 31, 1989.

expanded in January 1981, to include limits on the exceptional use of hormonal substances for therapeutic purposes. In February 1981, discussion in the European Parliament showed that a clear majority supported a ban on all hormones, but it also became apparent that Ireland and the United Kingdom favored the use of hormones as a growth stimulant for slaughter animals. They enjoyed support from other third parties, including the United States and the European pharmaceutical industry.

In July 1981, the Council adopted a directive prohibiting the use of thyrostatics and stilbenes, hormonal substances generally presumed to have harmful effects.² However, no agreement could be reached regarding a complete prohibition on using two synthetic³ and three natural⁴ hormones for feeding purposes. The directive served only to demonstrate that further research was required regarding the benign or harmful nature of those five substances. Article 5 of the directive specified that the Council should "reach a unanimous decision as soon as possible" regarding further provisions, but that, in the meantime, regulations previously promulgated by individual States concerning those hormones would continue to apply.

Between 1981 and 1984, further scientific studies were undertaken to determine the harmfulness of additional hormonal substances. In this process, natural hormones were seen as the least likely to be harmful when administered in proper dosages, while synthetic hormones required further investigation. The Commission proposed a new directive in June 1984, banning only the use of the two synthetic hormones, barring a later, contrary decision by the Council. The use of natural hormones would be left to the discretion of individual Member States.⁵ These actions were met with great concern by consumer organizations.⁶ Further, the Member States themselves were divided. While one group of States was prepared to ban the use of hormones completely in the fattening of slaughter animals, a more generous pol-

2. Council Directive 81/602/EEC concerning the prohibition of certain substances having a hormonal action and any substances having a thyrostatic action, 24 O.J. EUR. COMM. (No. L 222) 32 (1981).

3. Trenbolone and Zeranol. *Id.*

4. Progesterone, Testosterone, and Oestradiol 17/β. *Id.*

5. Proposal for a Council Directive amending Directive 81/602/EEC concerning the prohibition of certain substances, 27 O.J. EUR. COMM. (No. C 170) 4 (1984).

6. For the entire history from 1980-85, see EUROPE: DAILY BULLETIN, No. 4197, Nov. 4-5, 1985, at 15. For information on the strong protests in Europe, see EUROPE: DAILY BULLETIN, No. 4013, Jan. 24, 1985, at 12; EUROPE: DAILY BULLETIN, No. 4014, Jan. 25, 1985, at 13; EUROPE: DAILY BULLETIN, No. 4024, Feb. 8, 1985, at 13; EUROPE: DAILY BULLETIN, No. 4040, Mar. 2, 1985, at 16; EUROPE: DAILY BULLETIN, No. 4066, Apr. 9-10, 1985, at 12; EUROPE: DAILY BULLETIN, No. 4067, Apr. 11, 1985, at 14; EUROPE: DAILY BULLETIN, No. 4078, Apr. 15-16, 1985, at 10.

icy was favored by Ireland, the United Kingdom and France.⁷

This disagreement led to the issuing of a directive by the Council on July 16, 1985 that only supplemented the 1981 directive in creating formal rules of control.⁸ It contained no substantive rules concerning the use of the five controversial hormonal substances, showing that there was still no sign of agreement on this issue. The Council, however, did set a timetable for itself. Article 14 specifically stated that a decision regarding these hormones was to be made before the end of 1985. The deadline for state implementation of the 1985 directive was also to be determined within this period.

In the intervening period prior to the deadline, the European Parliament demanded the creation of a directly applicable EEC regulation establishing uniform standards for the use of hormonal substances in all Member States.⁹ In November 1985, the Commission withdrew the suggested resolution of 1984, which was compromise-oriented, and renewed its former proposal of 1980, which generally prohibited the use of all hormonal substances (with the exception of uses for therapeutic purposes).¹⁰ This, in turn, drew further categorical opposition from the United Kingdom and Denmark, while France and Ireland independently registered specified reservations. The U.K. took the view that no proof existed regarding harmful effects of natural hormones on human health.¹¹ This dissent had been anticipated by the Commission, which had accordingly based the proposal only on article 43 of the EECT — the source of regulating powers for a common agricultural policy. This legal basis required only a qualified majority within the Council for adoption. Earlier veterinary directives, including those issued concerning the use of hormonal substances, were all based “especially” on article 43 and article 100 — the general provision concerning legal standardization. However, article 100 requires a unanimous vote by the Council. Since such unanimity was not expected at that time, article 100 was no longer cited as a legal basis.

Following these procedural maneuvers, the general ban on hormones was finally passed in December 1985. The pertinent directive,

7. See EUROPE: DAILY BULLETIN, No. 4107, June 12, 1985, at 13.

8. Council Directive 85/358/EEC supplementing directive 81/602/EEC concerning the prohibition of certain substances, 28 O.J. EUR. COMM. (No. L 191) 46 (1985).

9. Directive on the prohibition of substances having hormonal or thyrostatic action, 27 O.J. EUR. COMM. (No. C 288) 153 (1985); EUROPE: DAILY BULLETIN, No. 4182, Oct. 12, 1985, at 13.

10. Amendment of the proposal for a Council Directive amending Directive 81/602/EEC concerning the prohibition of certain substances, 28 O.J. EUR. COMM. (No. C 313) 4 (1985); EUROPE: DAILY BULLETIN, No. 4195, Oct. 31, 1985, at 13.

11. EUROPE: DAILY BULLETIN, No. 4209, Nov. 22, 1985, at 13.

based on Art. 43 of the EECT, was adopted by written procedure¹² by a qualified majority.¹³ The United Kingdom and Denmark voted against the directive; Ireland abstained. The two dissenting States also opposed the use of the written protocol.

The directive was a comprehensive ban on the use of the five controversial hormonal substances for feeding purposes. Only three natural hormones were permitted to be used for therapeutic purposes. Article 5 bound Member States to ensure that no animals treated with the forbidden hormones would be transported into other Member States. Article 6 required a prohibition on the importation of such animals from third-party States.

Compliance with the prohibition concerning third-party States was ensured via the regulatory scheme common to Community veterinary law. Meat could only be imported from countries appearing on a special list sanctioned by the EEC.¹⁴ In addition, fresh meat from these States could only originate from processing plants that also appeared on an approved list.¹⁵ Plants appeared on the list only when their home States could guarantee that EEC veterinary standards were being met.¹⁶

Similar guarantees regarding the banned hormones were also required from third-party States. Community law expressly provided that these guarantees must be equivalent to those demanded by Member States of their own domestic industries,¹⁷ ensuring equal treatment of Community and third-party State producers. Article 6 of directive 85/649/EEC of December 31, 1985, provided for lists to be compiled of countries and slaughtering plants that could guarantee they met hormone standards. Article 6, section 5 of this directive gave third-party States until January 1, 1988, to meet these conditions.

By the end of 1985, the Member States still had not reached a common consensus regarding the harmful effects of hormones on

12. Art. 6, § 1 of the Procedural Rules of the Council provide for a written vote if all members agree. Rules of Procedure adopted by the Council, 22 O.J. EUR. COMM. (No. L 268) 1, 2 (1979).

13. Council Directive 85/649/EEC prohibiting the use in livestock farming of certain substances having a hormonal action, 28 O.J. EUR. COMM. (No. L 382) 228 (1985).

14. Directive du Conseil 72/462/CEE concernant l'importation d'animaux des espèces bovine et porcine et des viandes fraîches en provenance des pays tiers, 15 J.O. EUR. COMM. (No. L 302) art. 3, at 28, 30-31 (1972).

15. *Id.* art. 4, para. 1.

16. For the FRG see paragraph 13, section 2 in comparison with paragraph 14 of the meat hygiene regulation from October 30, 1986. 1986 Bundesgesetzblatt [BGBl] I 1678 (W. Ger.). The conditions for recognition will be set according to paragraph 14, section 2 and paragraph 11 section 1 of this regulation with reference to EEC directives existing at the time.

17. Council Directive 85/358/EEC supplementing directive 81/602/EEC concerning the prohibition of certain substances, 28 O.J. EUR. COMM. (No. L 191) 46 (1985) (art. 3).

human health. The preamble of the directive of December 31, 1985, mentioned that the health effects of hormonal substances had received differing evaluations. This was followed by a statement that competition had at least been distorted by differing standards — a problem that would eventually have to be resolved. One would have to make sure that consumers found conditions of purchase that were “apparently identical, and, at the same time, met most of their needs and expectations.”

B. *Legal Dispute before the European Court of Justice*

The United Kingdom filed a complaint with the European Court of Justice (“ECJ”) in Luxembourg regarding directive 85/649/EEC. The U.K. alleged that an improper legal basis had been chosen for the directive, that its legal reasoning was flawed, that the legal principles promulgated violated good faith standards, that the European Parliament and the Economic and Social Council had not been properly included in the process and that the voting procedure in the Council of Ministers had not been conducted according to proper procedure.

The court nullified the directive on the basis of the last charge, due to the United Kingdom’s explicit rejection of the use of the written voting procedure.¹⁸ It did, however, find article 43 of the EECT to be a permissible basis for the exercise of legislative power, thus affirming that a qualified majority would be sufficient for adoption. Neither earlier precedent nor the unanimity foreseen in article 5 of EEC directive 81/602 could alter the requirements of the EECT.

With this ruling, directive 85/649/EEC from December 31, 1985, was declared null and void. However, the opportunity was left open for its renewal via a qualified majority and proper procedures. This in fact occurred on March 7, 1988,¹⁹ when the unaltered text of the nullified directive was again adopted.²⁰ The specified time for implementation and the transitional measures planned for 1987 were not changed in this process.²¹

18. United Kingdom v. Council, 1988 E.C.R. 891.

19. Council Directive 88/146/EEC prohibiting the use in livestock farming of certain substances having a hormonal action, 31 O.J. EUR. COMM. (No. L 70) 16 (1988).

20. According to Art. 10 of the newly adopted directive, the date of implementation by Member States remained fixed at January 1, 1988, two-and-one-half months before the adoption of the directive. To address this problem, the Council resolved at its March 7 meeting that the directive should apply retroactively. EUROPE: DAILY BULLETIN, No. 4738, Mar. 7-8, 1988, at 8.

21. Apparently, Council Decision 87/561/EEC on transitional measures concerning the prohibition of certain substances, 30 O.J. Eur. Comm. (No. L 339) 70 (1987), was never amended, although it was based on the nullified directive 85/649/EEC, *supra* note 13, and referred to it frequently.

C. Conflict with the United States

A second conflict became apparent within the context of United States-EEC trade relations. The United States declared that it would neither accept nor itself consider a ban on the use of hormones in animal fodder.²² The issue of a ban was taken up in bilateral negotiations between EEC and U.S. trade representatives.²³ The matter's urgency was augmented by the fact that the major American meat producers had filed a claim with the government against the EEC regarding the ban, based on section 302 of the Trade Act of 1974.²⁴ This was an indication by the Americans that they desired to bring the dispute before GATT. They contested the scientific foundation of the hormone ban in the Community. If the discriminating nature of the EEC requirements within GATT were substantiated, countermeasures would be taken.²⁵ The EEC, however, persisted in asserting that its measures were legitimate and legal.²⁶ In October 1987, the United States formally applied to GATT for the creation of an investigative committee and panel of experts. The EEC insisted on bilateral consultations in advance.²⁷

Even before the directive of December 31, 1985, was "exchanged" for that of March 7, 1988, the idea that more time was necessary for negotiations had emerged. Within the Council of Ministers, postponing the implementation date for the directive became a controversial part of the discussion.²⁸ However, due to difficulties in implementing the directive (difficulties emerging out of the second expansion of the Community in the South), the Commission suggested that additional transitional measures should be enacted.²⁹

The Americans lent emphasis to their demands by deciding to introduce sanctions if the hormone ban were put into effect.³⁰ This surely was a substantial reason for the Council's decision of November 18, 1987,³¹ to postpone the execution of the directive from December 31, 1987, to December 31, 1988. The difficulties of standardization within the Community were cited. It was also asserted that there was

22. EUROPE: DAILY BULLETIN, No. 4555, May 22, 1987, at 15.

23. EUROPE: DAILY BULLETIN, No. 4587, July 10, 1987, at 10.

24. 19 U.S.C. § 2411 (1974); EUROPE: DAILY BULLETIN, No. 4591, July 16, 1987, at 8.

25. EUROPE: DAILY BULLETIN, No. 4596, July 24, 1987, at 9.

26. EUROPE: DAILY BULLETIN, No. 4624, Sept. 24, 1987, at 7.

27. EUROPE: DAILY BULLETIN, No. 4636, Oct. 10, 1987, at 8.

28. EUROPE: DAILY BULLETIN, No. 4643, Oct. 21, 1987, at 6.

29. *Id.* at 8.

30. EUROPE: DAILY BULLETIN, No. 4666, Nov. 25, 1987, at 7.

31. Council Decision 87/561/EEC on transitional measures concerning the prohibition of certain substances, 30 O.J. EUR. COMM. (No. L 339) 70 (1987).

no desire for an abrupt termination of the market for animals previously treated with hormones. However, the most likely primary objective was to win time for further negotiations with the United States.

Until the end of December 1988, negotiations were unsuccessful. The United States insisted that the hormone ban be investigated by a group of technical experts under the auspices of the GATT Agreement on Technical Barriers to Trade, a treaty that had been negotiated in the Tokyo Round.³² The EEC refused, maintaining its sovereign right to judge for itself the extent of the health risk posed by hormone use. As a compromise, the EEC offered to exempt animal fodder from the ban on the sale of hormone-treated meat within the EEC. Furthermore, the EEC offered to raise import quotas for high-quality beef (so-called "Hilton-beef"), quotas by which it approved a specific amount of beef at an advantageous tariff rate. The United States was not satisfied, but conceded that given the specified limitations on the ban, the United States would also reduce the retaliatory measures which had been threatened.³³

On January 1, 1989, the hormone ban became effective within the Community. In response, the United States implemented economic sanctions in the form of retaliatory tariffs affecting \$153.5 million in products from the EEC.³⁴ The EEC had threatened to apply tariffs of equal worth to imports of American honey, walnuts, dried fruit, and canned corn. However, in the background loomed a further threat by the United States that could have resulted in a total ban on imports of meat from the EEC. According to the stringent legal requirements of the Omnibus Trade and Competitiveness Act of 1988,³⁵ the U.S. could prohibit the importation of meat from States with lower inspection standards than its own.³⁶ It was the opinion of the American Congress that this Act was applicable to the EEC and that the American Government had the requisite authority to carry out the prohibition. In response, the EEC Commission had ready as a counter-measure a list of U.S. products, whose aggregate value totalled approximately \$361 million, that would be subject to restricted import levels.

At the same time, the EEC demonstrated that it did not necessarily favor an escalating spiral of retaliatory trade measures. Even before

32. Agreement on Technical Barriers to Trade, 23 O.J. EUR. COMM. (No. L 71) 29 (1980).

33. *U.S.-EC Trade War Over Hormone Ban Likely After U.S. Rejects Proposed EC Compromise*, 5 Int'l Trade Rep. (BNA) No. 47, at 1554 (Nov. 30, 1988).

34. Producers of instant coffee and fruit juices were hit especially hard by this. Ironically, the largest producer in this area is the Hag AG in Bremen, which is a subsidiary of General Foods.

35. Pub. L. No. 100-418, 102 Stat. 1107 (1988).

36. The possibility is derived from § 4604, the reciprocal meat inspection requirement.

Christmas 1988, meat for livestock fodder was withdrawn from the list of banned products, and importation was permitted. The Community also made clear that there would be no automatic retaliation or use of counter-measures. Thus, the EEC signalled to Washington its willingness to negotiate on trade issues.

The Council of Ministers agreed that no sanctions would be imposed by the Community, at least until the meeting of the GATT Council in February, 1989. The EEC had also indicated that it would consent to the convocation of a GATT panel for dispute settlement, as provided in article XXIII. This awakened hopes which went unfulfilled in the GATT Council meeting of February 9, 1989. It became apparent that GATT involvement in the dispute was not based on the consensual agreement of both parties. The U.S. wanted only a technical experts group, while the EEC refused this option. The EEC desired a dispute settlement panel to investigate whether the Americans were justified in taking unilateral economic sanctions, without utilizing the settlement procedures of GATT article XXIII.³⁷ Despite this failure to find a solution, bilateral negotiations resumed. In February, a seventy-five day "ceasefire period" was agreed upon during negotiations in Washington, while a combined group of experts searched for plausible solutions. At issue was the question of whether hormone-free meat could be furnished to the EEC in an economically satisfactory manner.³⁸

The dispute's further development up to Fall 1989 exemplifies the typical features of trade law disputes between States of similar economic power. On one side, pragmatism was the prevailing theme. A bilateral group of experts prepared for the gradual opening of the European market to U.S. meat exporters that met EEC health requirements. As a result, EEC imports increased, leading to a corresponding but limited reduction of U.S. punitive customs duties.³⁹ The EEC complained that the reductions were insufficient. It threatened to enact its own sanctions if the pragmatic solution failed to bring about a speedier redress.⁴⁰

Still, the Council remained unwilling to pursue unilateral sanctions. In October 1989, the Council formally decided to request a GATT dispute settlement procedure.⁴¹ Regarding the legal issues in-

37. EUROPE: DAILY BULLETIN, No. 4952, Feb. 10, 1989, at 6.

38. *Suddeutsche Zeitung*, Feb. 20, 1989, at 22.

39. EUROPE: DAILY BULLETIN, No. 5058, July 15, 1989, at 6; EUROPE: DAILY BULLETIN, No. 5059, July 17-18, 1989, at 9; EUROPE: DAILY BULLETIN, No. 5085, Sept. 8, 1989, at 5.

40. EUROPE: DAILY BULLETIN, No. 5060, July 19, 1989, at 7; EUROPE: DAILY BULLETIN, No. 5092, Sept. 18-19, 1989, at 9.

41. EUROPE: DAILY BULLETIN, No. 5104, Oct. 5, 1989, at 7.

volved in the dispute, the views of the parties now diverge as much as ever. It would be timely and appropriate for GATT to intervene at this juncture to find a legal solution.

II. ECONOMIC IMPACT

The ban on imports of hormone-treated meats affected American producers as well as meat-importing companies in the EEC which maintain close business relations with the United States. The importation of slaughter by-products was of chief concern, as hormones are rarely used in meat products of higher value, and the U.S. does not export such higher-value products to the EEC in large quantities.⁴² Also, in view of the threatened ban on imports, several European importers had bought large quantities of meat in advance. On the U.S. side, there were product surpluses. The loss of the European export market resulted in increased U.S. supplies of meat, falling prices, and loss of farm income.⁴³ For these reasons there was a feverish search for substitute markets, with particular attention paid to Mexico and Japan.

Special interests within the United States did not take a uniform position. In early 1989, cattle breeders from Texas expressed an interest in supplying the EEC with hormone-free meat products. This offer was made by John Hightower, the Secretary of Agriculture in Texas, and aroused great interest within the Community.⁴⁴ At this time, Hightower also expressed the fear that competitors of American meat producers in Argentina, Australia, Brazil and New Zealand would fill the gaps resulting from the American refusal to comply with the EEC ban on hormones. American consumer organizations were also demanding that U.S. production methods be brought into compliance with EEC standards so that American consumers could be supplied with hormone-free meat in the future.

In contrast to the United States, Argentina welcomed the EEC ban on hormones. Argentina claimed to be the world's lowest user of hormones for feeding purposes. As a result of the growing dispute between the EEC and the U.S., it expected a competitive advantage,⁴⁵ as did other Latin American exporting countries. In Australia, the government of New South Wales recommended that its beef producers conform their breeding practices to EEC requirements. Twenty per-

42. EUROPE: DAILY BULLETIN, No. 4693, Jan. 6, 1988, at 12.

43. *Neu Abstazmärkte für Hormonfleisch*, *Suddeutsche Zeitung*, Jan. 5-6, 1989, at 29, col. 1.

44. *EC to Talk Further with Texas Farm Officials about Offer to Export Hormone-Free U.S. Meat*, 6 Int'l Trade Rep. (BNA) No. 4, at 94 (Jan. 25, 1989).

45. EUROPE: DAILY BULLETIN, No. 4665, Nov. 23-24, 1987, at 8.

cent of Australian beef was raised using methods that incorporated hormones. The Australian producers themselves, however, refused to accept the European ban.⁴⁶

In the United States, the burden of the dispute was borne by importers of products (like fruit juices and instant coffee) that were covered by the American sanctions. Trade sanctions, under the circumstances, cut *both* ways. Here, a more general point emerges: foreign States and their producers are not the only ones affected by sanctions — importers of the banned goods in the State imposing the sanctions are similarly affected. Due to import barriers and prohibitions, goods become scarce in the home market. This leads to price increases that are paid for by consumers. Trade sanctions imposed on economic grounds, therefore, always have the added result of transferring income from consumers to producers in the protected economic sectors — in this case, the agricultural sector.

Finally, the ban on hormones also affected those pharmaceutical companies that produce hormonal substances used for feeding purposes. They brought claims individually. *Distrivet*, a French hormone producer, sued the Council of Ministers, claiming the invalidity of the decision of 87/561/EEC.⁴⁷ The President of the European Court refused a motion for a temporary order in this case, citing the obvious inadmissibility of the claim.⁴⁸ *Distrivet* later brought a further claim of invalidity against the Council of Ministers, specifically the directive 88/146/EEC. *Distrivet* made this claim together with the American pharmaceutical concern *Pitman-Moore* and the "European Federation for Animal Health" (*FEDESA*), which was founded by eight American companies, seven of which produce hormones. This claim met with no better success. Again, the President of the European Court refused the claim based on inadmissibility.⁴⁹

III. PUBLIC HEALTH DIMENSIONS

The EEC's position is that the public health dangers posed by hormone products have not yet been adequately determined. Until this question is clarified, the EEC has taken upon itself the right to prohibit the sale and importation of these products without discriminating between domestic and foreign breeders. There is, without question, a lack of definite scientific data existing either to confirm or

46. EUROPE: DAILY BULLETIN, No. 4696, Jan. 9, 1988, at 10.

47. *Distrivet v. Council*, 1988 E.C.R. 209.

48. *Id.* at 214-16.

49. *FEDESA v. Council*, Case 160/88 (ECJ decision of July 13, 1988) (not yet published).

disprove the dangers of these substances. This was admitted by Martin Bangemann, the German Economic Secretary at the time, who had expressed a definite understanding of the American position.

As previously mentioned, scientific studies in the Community have indicated a high likelihood that the three natural hormones do not have deleterious effects on health. In contrast, the dangers posed by the two synthetic hormones are still unclear. Of further importance were the results of a group study conducted by the FAO and the WHO in 1987. The study found natural hormones to be so unobjectionable in terms of health risks that all threshold limits could be abandoned. Minimum levels were only established for the two synthetic hormones.⁵⁰

The question remains to what extent adverse health effects must be proven before a State may legitimately exclude a product from its markets. The EEC has applied a standard of broad discretion, referring to similar United States policies long practiced in the fields of veterinary medicine and food quality. In these areas, the United States unilaterally adopted extensive regulations, with which EEC exporters were required to comply. The public health rationale behind these regulations is now as questionable as ever. One example is the prohibition on using unpasteurized milk to make cheese. It is a procedure used without objection in Europe and, in the opinion of the EEC, poses no public health threat. The same is true of the American ban on imports of sprayed citrus fruits, apples, and flowers. The policy posing the most difficulty for the Federal Republic of Germany is the ban on imports of beef and pork products. The American view is that German agricultural concerns have not eliminated hoof and mouth disease or trichinosis. It is a questionable rationale, since cows and pigs are inoculated against these diseases in Germany. Still, German meat products may only be imported into the United States when they originate in certified, disease-free farms. In all of these cases, the United States has unilaterally pursued its own public health interests.

IV. EVALUATION UNDER GATT

The GATT⁵¹ is one of several mechanisms regulating trade between the United States and the EEC. Although the EEC is not itself

50. Die Zeit, Jan. 6, 1989, at 15.

51. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187; *see generally* J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969); E. MCGOVERN, *INTERNATIONAL TRADE REGULATION* (1986); R. SENTI, *GATT SYSTEM DER WELTHANDELSORDNUNG* (1986); K. W. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* (1970); R.E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (1975); H.J. MÜLLER, *GATT: RECHTSSYSTEM NACH DER*

a contracting party of GATT, through its assumption of legislative powers on matters of foreign trade under the EEC Treaty,⁵² it has taken on the *de facto* position of a party, a status tacitly accepted by the other contracting parties.⁵³ Public health concerns are among the regulated exceptions articulated in article XX of GATT. According to this section, GATT never prohibits national policies that relate to the protection of public health unless they are used in an arbitrary or unjustifiably discriminatory manner, or if they present a disguised restriction on international trade. A State has only the burden of proving public health concerns as a valid exception to general GATT obligations if other rights under GATT appear to be violated by these policies.

Public health policies might arguably be governed by article III of GATT. This article forbids protecting domestic production by using discriminatory policies that burden imported goods.⁵⁴ However, because our concern here is with an import ban on goods from countries and companies not on EEC lists, the issue is actually one of trade barriers. These are dealt with in article XI of GATT, which provides that no import prohibitions or restrictions — whether made effective through quotas, import or export licenses or other measures — shall be instituted or maintained. This standard also applies to limitations on imports motivated by public health concerns.⁵⁵ Such health restrictions are not included in the exceptions to the general prohibition that are contained in article XI, section 2.⁵⁶

Thus, the EEC must rely on the general exceptions for public health policies provided in article XX of GATT. Accordingly, the regulation of the use of hormones in the meat of stock animals must be

TOKIO-RUNDE (1986); Petersmann, *Dreissig Jahre Allgemeines Zoll- und Handelsabkommen*, 19 ARCHIV DES VOLKERRECHTS 23 (1980).

52. Treaty Establishing the European Economic Community, *opened for signature* Mar. 25, 1957, art. 113, 298 U.N.T.S. 11.

53. See, e.g., Ehlerman, *Die innergemein schaftliche Anwendung der Regeln des GATT in der Praxis der EG*, 20 EUROPARECHT 91-95 (1985) (EC practice when applying GATT rules within the EC); Petersmann, *Die EWG als GATT-Mitglied-Rechtskonflikte zwischen GATT-Recht und Europaischem Gemeinschaftsrecht*, 20 EUROPARECHT 78 (1985) (The EEC as a member of the GATT; legal conflicts between GATT law and the EC). Cf. the landmark decision of the European Court of Justice, *International Fruit Co. v. Produktschap voor Groenten en Fruit*, 1972 E.C.R. 1219.

54. The article requires national treatment of foreign goods. The hormone ban, applying equally to foreign and domestic products, conforms with this duty.

55. It would be too narrow to limit article XI only to quotas on imports. See E. MCGOVERN, *supra* note 51, at 186; see also CONTRACTING PARTIES TO GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS Supp. 25, at 68 (1979) (Panel Report on minimum import prices in the EEC).

56. This is also true of the relatively generous agricultural product exceptions in section 2(c), which pertain to market regulation.

applied without discriminating by country of origin. The EEC ban applies to all meat products, regardless of origin. Exceptions are made according to the type of product, not the country of origin. The American suggestion that the ban is a veiled limitation on trade cannot be substantiated. The European regulation is not motivated by a desire to protect hormone-free meat. This misconstrues the essence of the ban, which was primarily conceived in response to protests from consumer organizations. The fact remains that, in addition to the impact of the ban on third-party States, the ban has also affected the agricultural sectors of States within the EEC that use high amounts of hormones.

According to the wording of article XX of GATT, the EEC may itself decide whether the hormone ban is necessary to protect public health. The Community must evaluate whether the estimated resultant risk of using hormones (a risk that all presently known scientific research on both artificial and natural hormone substances has been unable to rule out) can be tolerated, or if a protective ban should be issued. Article XX does not require such measures to meet any specific prerequisites, aside from mentioning the permissible preventative goals, but does require non-discriminatory effects.⁵⁷ The States themselves have discretion to decide how to protect public health within their borders, but they must refrain from any discriminatory practices. Imports should not be the only products to receive equal treatment within the EEC; the same rules should apply to Community products as well.

At the same time, experience within the EEC, in particular, has shown that formally non-discriminatory measures may in fact disable imports in favor of domestic goods, and States may employ and preserve them with exactly, or partially, that intent.⁵⁸ However, the ECJ may not interpret articles XI and XX of GATT as broadly as it does article 30 of the EEC Treaty. While the court itself monitors application of the protective measures of the EEC Treaty under article 36,

57. See CONTRACTING PARTIES TO GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS Supp. 30, at 107, 125 (1984) (Panel Report titled *United States — Imports of Certain Automotive Spring Assemblies*).

58. The formal definition of discrimination, still used by the Commission in Directive 70/50/CEE, 13 J.O. EUR. COMM. (No. L 13) 29 (1969), was abandoned with respect to article 30 of the EEC Treaty, *supra* note 52, which forbids quantitative restrictions on imports following the decision of the ECJ in *Dassonville*. *Procureur du Roi v. Dassonville*, 1974 E.C.R. 837. Since then, determinations have depended on the factual restrictions on trade. Many decisions of the ECJ have demonstrated that positive determinations may be reached despite formal policies of equal treatment. See *Rewe-zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, 1979 E.C.R. 649 (alcoholic content for liquor); *Commission v. Germany*, 1987 E.C.R. 1262 (sausage imports).

international bodies do not enjoy such extensive authority within the context of GATT. GATT dispute settlement panels are not permanent organs with full judicial independence. The final decision on disputes is made by the contracting parties, the political plenary organ of GATT. Thus, the preconditions for an independent organ like the European Court of Justice to monitor and, if necessary, supersede State decisions concerning preventive health measures do not yet exist within the framework of the present GATT legal order.⁵⁹

The protective clause of article XX leaves States the freedom to decide the method, intensity and necessity for precautions, while saying little regarding the effects of protective measures. According to the standard, the EEC in this case has not exceeded the limits determined by the protective clause.

Even if the United States maintains a different opinion, it may not unilaterally retaliate without violating its responsibilities to the EEC under international law. This also holds true for punitive tariffs when they are set higher than U.S. contractual tariff obligations accepted during the tariff reduction rounds under the auspices of GATT, article II. In addition, selective tariffs also violate the Most-Favored-Nation ("MFN") principle of GATT, article I. Finally, GATT provides for an arbitration procedure to resolve legal disputes. This procedure must be used to attempt a reconciliation before resorting to any retaliatory measures.

GATT, article XXIII provides that a contracting party may apply for dispute settlement if it believes that the concessions or other advantages it has gained as a result of this treaty have been nullified or impaired.⁶⁰ A violation of GATT is not required for the initiation of this procedure, but, if such a violation can be shown, there is a rebuttable presumption of injury. As a matter of course in such a proceeding, a

59. See *supra* note 55, and accompanying references.

60. The dispute settlement procedure under article XXIII of GATT was developed in a "Framework Agreement" of the Tokyo Round. *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, in AGREEMENTS RELATING TO THE FRAMEWORK FOR THE CONDUCT OF INTERNATIONAL TRADE 13 (GATT 1979). An annex contains an agreed description of the procedures that have arisen out of customary law. See Meng, *Streitbeilegung im GATT*, 41 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 69 (1981); Petersmann, *Strengthening GATT Procedures for Settling Trade Disputes*, 11 WORLD ECON. 55 (1988); Hudec, *GATT Dispute Settlement after the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145 (1980); DeKieffer, *GATT Dispute Settlement: A New Beginning in International and U.S. Straight Law*, 2 NW. J. INT'L L. & BUS. 317 (1980); Comment, *The GATT Dispute Settlement Procedure in the 1980s: Where Do We Go from Here?* 5 DICK. J. INT'L L. 82 (1986); Note, *Current Efficacy of the GATT Dispute Settlement Process*, 22 TEX. INT'L L.J. 87 (1987); Bercero, *Trade Laws, GATT and the Management of Trade Disputes between the U.S. and the EEC*, 5 Y.B. EUR. L. 149 (1985); Bliss, *GATT Dispute Settlement Reform in the Uruguay Round: Problems and Prospects*, 23 STAN. J. INT'L L. 31 (1987); Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51 (1987).

panel will be created to report to the GATT Council. The Council then decides whether to accept the panel's report and its recommendations regarding the dispute. As a last resort, the Council may also authorize one of the parties to take retaliatory measures.

In cases of alleged GATT violations, States are not free to choose between taking part in a dispute settlement proceeding and resorting to self-help by initiating economic retaliatory measures. Article XX-III of GATT provides that a party "can" utilize such procedures. However, the carefully graduated procedural structure, allowing for the eventual authorization of retaliation only as a last resort, has no useful purpose if States that are economically powerful enough could independently assume the right to implement repressive measures as valid reprisals under international law.⁶¹ In such a system, the greater economic powers would dominate, leaving weaker States with no means of economic redress. Only through internationalizing the arbitration process and authorizing sanctions can GATT parties reach some degree of bargaining equality.

Article XXIII begins to take on meaning only when one sees it as obligating GATT States to utilize this method of dispute settlement, rather than immediately threatening to initiate unilateral sanctions. Doubts have arisen as to whether American practice under section 301 of the Trade Act conforms to this principle. Moreover, the U.S. Congress has apparently rejected the principle of nonretaliation.⁶² On the other hand, however, State practice within GATT — where the predominant rule of interpretation is based on considerations of effectiveness — supports the principle.⁶³ Thus, American retaliatory measures in the hormone dispute were illegal under GATT — even without considering the further question of whether a State, under general international law, may eventually resort to reprisals if a contracting party blocks dispute settlement proceedings under GATT article XXIII. The latter is a subsidiary issue that may be considered in light of general principles of international law concerning repressive acts. The United States, however, never requested an article XXIII proceeding.

61. Partsch, *Reprisals*, in 9 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 330-35 (R. Bernhardt ed. 1986).

62. See House Ways and Means Committee Hearings on the Trade Reform Act of 1973, H.R. REP. NO. 571, 93d Cong., 1st Sess. 66-67 (1973).

63. See also CONTRACTING PARTIES TO THE GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS Supp. No. 23, at 98 (1977) (Panel Report on DISC Legislation). In a dispute between the U.S. and Brazil, more than thirty Contracting Parties demanded that the U.S. utilize the dispute resolution procedures of GATT before imposing sanctions, since unilateral sanctions would be destructive to the GATT system. Included among these states, in particular, were the EEC and Japan. See *U.S. Rebuffs Criticism at Council Meeting that It Acts Unilaterally on Trade Problems*, 6 Int'l Trade Rep. (BNA) No. 7, at 194 (Feb. 15, 1989).

Its request for a technical experts group was not based on the article XXIII dispute settlement procedure.

In contrast, faced with the prospect of U.S. retaliation, the EEC did ask for an article XXIII proceeding. Despite the EEC request, an important obstacle remained since such proceedings cannot be conducted in the face of a U.S. objection/refusal to participate. Legally, both parties to a dispute have the right to a voice in all decisive phases of the directive procedure, including the creation of a panel, passing on the results of its investigation, and providing recommendations and authorizations to the disputing parties. GATT, article XXV, para. 4 provides for majority rule as the norm for voting among the contracting parties (which compose the primary organ) and thus, also, for the Council. However, based on longstanding practice, these organs have voted by consensus rather than by majority.⁶⁴ As demonstrated by the GATT ministerial declaration of 1982,⁶⁵ the idea that the dissenting vote of the accused party could block the entire procedure is a possibility that is neither excluded nor made mandatory. In this context, it is important to mention that in the vast majority of arbitration procedures, consensus on determinations has been reached.

If the violating party can actually prevent the GATT dispute settlement procedure from reaching its proper result (a result that may include the authorization of sanctions), significant consequences result for our evaluation of article XXIII procedure. If proceedings under article XXIII are considered to be final and exclusive, then, arguably, one can resort to the retaliatory rules of general international law only where retaliation represents the sole adequate remedy against a party that tries to escape the reach of article XXIII. However, one cannot presume that recourse to reprisals would be forbidden where one disputing party torpedoes the designated procedure of the article XXIII dispute settlement process and where the other parties adhere to the principle of consensus despite that party's recalcitrance.⁶⁶ It would be senseless, absent an equivalent treaty procedure, for States simply to give up their coercive rights under general international law.

A State's obstruction of the progress of article XXIII dispute set-

64. Petersmann, *supra* note 60, at 74. In the context of the Uruguay Round, the principle of "consensus minus two" should be implemented. This principle would prevent the disputing parties from participating in the decision.

65. CONTRACTING PARTIES TO THE GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS Supp. No. 29, at 9 (1983) (Ministerial Declaration). The Declaration discusses continuing use of the traditional consensus method in dispute settlement procedures. The Declaration argues that this method should not lead to obstruction. It hints, in theory, that such an obstruction could lead to a retreat to the majority principle. In practice, such a retreat has not occurred.

66. See *supra* note 55, and accompanying cases.

tlement proceedings leads to new interpretive questions. However, if the United States continues to withhold its consent to the proper institution of article XXIII settlement procedures, and lack of consensus among the Parties prevents a majority decision from being made, then these circumstances should adequately fulfill the conditions for permitting reprisals. Only when such an impasse is reached should it become permissible for the EEC, confronted by the failure of contemporaneous negotiations, to initiate economic sanctions in response to those adopted by the United States.

V. COMPATIBILITY WITH THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE

Neither article III nor article XI of GATT provides satisfactory protection against the erection of technical trade barriers. Therefore, efforts have been made to develop more detailed regulations in this area. In 1979, in the context of the Tokyo Round, the Agreement on Technical Barriers to Trade (Standards Code) [hereinafter "the Agreement"] was created.⁶⁷ It concerns all goods, including industrial and agricultural products (article 1.3), and is thus applicable to meat products. Technical regulations were included in the Agreement. The regulations were defined in the treaty as binding prescriptions for technical specifications,⁶⁸ which included determinations of quality levels, limitations on use, and requirements regarding safety and measurements.⁶⁹ One can infer from the reference to the urgent problem of protection of public health in article 2.6 that health concerns were incorporated into the "quality levels" and usage limitations of the Agreement.

Article 2.1 of the Agreement prohibits technical regulations from being developed or used with an intent to limit trade, or from unintentionally resulting in "unnecessary barriers to international trade." Article 2.1 also forbids discrimination between imported and domestic goods. The Agreement contains further obligations regarding consultation and publication of technical regulations (articles 2.5 and 2.6). Third World producers are normally allowed a generous period to conform to new regulations (article 2.8).

Apparently, the EEC has not violated any formal obligation. The

67. Agreement on Technical Barriers to Trade, 23 O.J. EUR. COMM. (No. L 71) 29 (1980). Here, the EEC is a full treaty party. For information concerning the Agreement, see Nusbaumer, *The Gatt Standards Code in Operation*, 18 J. WORLD TRADE L. 542 (1984), and Middleton, *The GATT Standards Code*, 14 J. WORLD TRADE L. 201 (1980).

68. See Agreement on Technical Barriers to Trade, *supra* note 67, at Annex 1.

69. *Id.* at Annex 1.

question is whether the hormone ban has violated the substantive obligations of article 2.1 of the Agreement. Discriminating against imports from third states, as well as against other EEC goods, is prohibited by the rules described above. The essence of these rules and the resulting burdens within the Community also exclude the assumption that trade barriers have been erected by the EEC under the pretext of public health precautions. The fact that meat produced in other States under locally acceptable conditions may not be imported into the EEC is undoubtedly a trade barrier. However, the question remains whether the ban has the effect of creating an "unnecessary trade barrier."

Once again, the question becomes how large a margin of tolerance should be allowed for the policy position of each individual State. There is no precedent to consult. Surely, one should not demand that States, in spite of well-founded suspicions, must tolerate the presence of potentially harmful substances in domestic and imported foodstuffs, absent *conclusive* proof of deleterious health effects. On the contrary, States should have broad discretion to make such decisions. This point is emphasized in article 2.2 of the Agreement on Technical Barriers to Trade, which permits a State, for health protection reasons, to deviate from international norms that are judged unfit. The State's decision must, of course, be substantiated upon request.

In contrast, EEC practice has shown that public health measures have been used in the past as a pretext for protectionism. For this reason, there are limitations on misuse beyond which treaty obligations will be considered violated. The above-mentioned explanatory requirement indicates that States have the responsibility to substantiate their actions — a necessity for minimizing abuse of discretion. To this extent, the obligations under the Agreement go beyond GATT obligations. Whether these obligations are violated by the EEC hormone ban, at least with respect to natural hormones, depends on medical and biological assessments.

The Agreement on Technical Barriers to Trade creates a procedure for multistage negotiations so that a nonpartisan decision can be made to determine the limits beyond which abuse will exist.⁷⁰ As GATT, article XXIII similarly envisions, a determination may be made not only as to violations of law, but also as to situations in which parties have lost or suffered impairment of a benefit flowing from the treaty. Initially, there is a consultation requirement. The problem is brought before the Committee on Technical Barriers to Trade, a plenary organ

70. *Id.* art. 14.

of the Member States. The Committee first determines whether the dispute concerns trade issues or technical questions that would require more careful, technically-informed examination (article 14.5). In the latter case, a group of technical experts may be formed at the request of one of the parties. This is not an option, like that specified in GATT, article XXIII, to be chosen at the discretion of the Committee, but instead is mandatory. The requirement is counterbalanced by the fact that decisions in the Committee on Technical Barriers to Trade are made only by consensus. One party alone can thus veto the formation of a technical group, as the EEC did in the case of the hormone ban.⁷¹

Alternatively, upon the request of a disputing party the Committee can and must create a special panel to investigate the matter, facilitate arbitration, and give an advisory opinion to the Committee. The Committee then makes a final decision. It can, in the case of a sufficiently serious charge, authorize the injured State to suspend its obligations under the Agreement (article 14.21). These procedural steps also face the threat of obstruction by one of the disputing parties, due to consensus practice.

The U.S. request for the formation of an expert group was blocked by the EEC. However, the U.S. did not request a dispute settlement procedure as provided by the Agreement. Only this procedure is permitted to lead to the authorization of retaliatory measures. Such measures could only be applied within the framework of the Agreement, where article 14.21 refers to the suspension of obligations "under this Agreement." This means that injured States may not erect technical trade barriers without being limited by considerations of necessity. In the hormone incident, however, the United States did indeed implement punitive tariffs. As long as these tariffs remain a unilateral act by a state, they represent, in principle, a violation of article II of GATT. The violation arises because such retaliation goes beyond the scope of the Agreement. Thus, in the context of the dispute settlement procedure of the Agreement on Technical Barriers to Trade, the position of the United States is illegal.

It remains to be examined whether the United States may respond to an asserted violation of the Treaty on Technical Trade Barriers with unilateral retaliatory action in the form of a violation of article II of

71. Another question is whether the creation of such an investigative group can be halted. Article 13.3 of the Agreement specifies that international organizations that play dual functions (the mixed FAO/WHO Commission on the Codex Alimentarius is an example) should be avoided. *Id.* art. 13.3. As mentioned, the FAO/WHO plenum had just investigated the impact of hormones. However, such an investigation would not bind GATT in any legal respect.

GATT. Under general international law there would be no hesitation in permitting a country to respond to the violation of one treaty by violating another, if the counter-violation were directed toward the same treaty partner⁷² and if other preconditions of retaliation had been met. This practice can, however, be prohibited through special treaty provisions. Neither GATT nor the Agreement on Technical Barriers to Trade permits the enactment of counter-measures without the authorization of the responsible organ, barring a demonstration that proper procedure has been obstructed. In both cases, the rule applies only to counter-measures directed at actions which are covered under the same treaty, within the same "frame of reference." It would not, however, make much sense if counter-measures in the context of another treaty relationship could be freely taken. The intent to exert international control over retaliatory measures by requiring authorization would be defeated. For these reasons, one must treat the corresponding regulations as completely prohibiting "cross-counter-measures," such as responding to a violation of the Agreement on Technical Barriers to Trade with a violation of GATT provisions. This conclusion is also supported by article 14.23 of the Agreement, which attempts to reconcile the arbitration procedures of the Agreement and those of article XXIII: those of the Agreement take precedence, while the GATT procedure applies only to disputes arising out of GATT itself. Both procedures theoretically comprise a harmonized unity, a circumstance incompatible with the unilateral retaliation previously described.

In conclusion, many perspectives lend support to the EEC position. In any case, since no settlement procedure is underway, the U.S. sanctions are at present illegal. In spite of this, they will not fail to have an effect. An economically rational solution will likely be found in order to avoid the harms of further retaliatory measures. Such a solution, however, would be a result of economic pressures, not a victory for the rule of law. It is regrettable that in recent times threats to impose sanctions have often preceded the initiation of legal procedures. The fact that threats are normally followed by escalation of the dispute speaks for the economic rationale, but not for the pre-eminence of law in the field of international economic relations. One can only hope that the major trading nations will realize that substantive as well as procedural legal instruments are available to them within the context of GATT. These instruments will help make implementa-

72. In the case of a multilateral treaty, the counter-violation must not be precluded by the rights of other treaty partners.

tion of the law a top priority in international trade — a condition for ensuring the legal rights of all trading nations.