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## The EC Hormone Ban Dispute and the Application of the Dispute Settlement Provisions of the Standards Code

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## Note, The EC Hormone Ban Dispute and the Application of the Dispute Settlement Provisions of the Standards Code

*Allen Dick\**

### INTRODUCTION

As the concept of a unified European market becomes more of a reality as we approach 1992, talk of a "Fortress Europe" has heightened sensitivity on trade issues among officials of the United States and the European Community ("EC").<sup>1</sup> The EC's plan to ban the sale of meat treated with growth hormones within the Member-States has presented a trade issue disconcerting to both sides. This brewing tempest has raised many interesting legal issues involving the dispute settlement provisions set out in the Agreement on Technical Barriers to Trade ("Standards Code").<sup>2</sup> This note examines why the process failed to resolve, and thus contain, the dispute between the United States and the EC, and offers some tentative proposals for reform.

### BACKGROUND

As with many other trade disputes, one is not sure whether the politics are driven by the legal issues, or vice versa. The diplomatic activity surrounding the hormone ban dispute has been fairly intense over the past two years and continues to be so to this very day.

A directive adopted by the EC in late December, 1985, entitled "Council Directive Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action," marked the beginning of the trade dispute.<sup>3</sup> The directive prohibited the importation from third countries of meat from animals which had been administered a substance with a "thyrostatic, oestrogenic, androgenic or gestagenic action."<sup>4</sup> In laymen's terms, the EC banned the use of hormones for growth or fattening purposes. This import ban was pronounced to take effect on January 1, 1988.<sup>5</sup> The impetus for the hormone ban was an effort to harmonize the divergent Member-States' legislation on this

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1. As one might suspect, the EC has tried to placate these fears. See 5 Int'l Trade Rep. (BNA) 1416 (Oct. 26, 1988).

2. CONTRACTING PARTIES TO GATT, Basic Instruments & Selected Documents, 26th Supp. at 8 (1980) (hereinafter "Standards Code"). Both the EC and the United States are signatories to this agreement.

3. 28 O.J. EUR. COMM. (No. L 382) 228 (1985).

4. *Id.* art. 6(1).

5. *Id.* art. 6(2).

topic.<sup>6</sup> Some Member-States felt that a ban on the use of hormones in meat represented an appropriate policy due to the uncertainties surrounding the scientific research pertaining to its effect on humans.<sup>7</sup> Since other Member-States had differing assessments of the hormones' effect and therefore permitted their use, a market distortion resulted which created a "serious barrier to intra-Community trade."<sup>8</sup> The Commission chose to harmonize the Member-State legislation essentially by adopting a "no-risk" policy. It completely banned the sale of meat within the EC which had been treated with growth hormones.<sup>9</sup>

The United States responded with outrage. The ban's implementation had the potential of eliminating \$120 million worth of American meat exports to the EC.<sup>10</sup> More importantly, the United States felt that the ban was not based on any valid scientific evidence, and thus constituted a non-tariff barrier to trade.<sup>11</sup>

After bilateral negotiations failed to resolve the dispute, the United States began to operate within the framework of the Standards Code. In January 1987, the United States requested consultations with the EC under Article 14.1 of the Code.<sup>12</sup> After several months of fruitless consultations, the United States requested that the GATT Committee on Technical Barriers to Trade ("Committee") investigate the matter.<sup>13</sup> This mechanism also failed to yield a satisfactory solution to the problem. Finally, on July 15, 1987, the United States asked for the formation of a Technical Expert Group to examine the technical issues of the dispute.<sup>14</sup> The EC, however, succeeded in blocking the formation of the Technical Expert Group by vehemently objecting to it in the Committee meeting.<sup>15</sup> The EC, to this day, refuses to consider the implementation of this procedure.<sup>16</sup>

Exasperated with the failure of the dispute resolution mechanism under the Standards Code, the United States resorted to unilateral measures. It threatened to retaliate under section 301 to break the

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6. The Preamble to the directive states in paragraph 5:

[W]hereas while their immediate effect on animals from the farmer's point of view is clear, assessments of their effect on human health vary and this is reflected in the regulations governing their use; whereas this divergence distorts the conditions of competition in products that are the subject of common market organizations and is a serious barrier to intra-Community trade.

*Id.*

7. *Id.*

8. *Id.*

9. *Id.* arts. 4-6.

10. 4 Int'l Trade Rep. (BNA) 1184 (Sept. 30, 1987).

11. *Id.*

12. 52 Fed. Reg. 45,304 (1987).

13. *Id.*

14. *Id.*

15. *Id.*

16. Int'l Trade Daily (BNA) 5 (Nov. 29, 1988).

deadlock which had developed. On September 14, 1987, the United States offered to refrain from retaliation if the EC either agreed to submit the dispute to the Technical Expert Group under the Standards Code or acceded to a one-year postponement of the ban.<sup>17</sup>

The EC initially characterized this proposal as "totally unacceptable."<sup>18</sup> Nevertheless, on November 18, 1987, the EC agricultural ministers agreed to delay implementation of the proposed ban until January 1, 1989, despite objections from Belgium, Greece, Ireland, and Spain.<sup>19</sup> The EC claimed that this delay was for purely internal reasons concerning the ban's implementation.<sup>20</sup> One problem which the ministers foresaw was the large quantities (up to 600,000 tons) of beef in public storage which had been treated with growth hormones. This meat would have become unmarketable after the ban went into effect, resulting in large losses to Member-State governments. French producers who could still lawfully use growth hormones up to the January 1 deadline, but who would be denied a market for the hormone-treated meat after the deadline, presented a similar problem. Regardless of the reason why the EC delayed the implementation of the ban, this action at least provided some breathing space for negotiators, who now had an extra year to find a solution to the conflict.

This sense of relief was short-lived. On November 23, 1987, President Reagan triggered the section 301 mechanism by instructing the United States Trade Representative to hold a public hearing regarding a list of goods to target for possible economic retaliation against the hormone ban.<sup>21</sup> The Office issued the final list on December 24, 1987. It included various agricultural goods whose estimated total value was \$100 million, an amount equal to the expected loss to American producers from the hormone ban.<sup>22</sup>

An interesting development occurred in late February 1988. The European Court of Justice ("ECJ") upheld a challenge to the hormone ban brought by the United Kingdom and Denmark.<sup>23</sup> The ECJ voided the directive due to an improper voting procedure used in its adoption. Unfortunately for the United States, the ECJ did not address the substantive issues of whether the import ban violated the Treaty of Rome or whether it was based on scientific evidence.<sup>24</sup> The ECJ decision did, however, provide a ray of hope to United States

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17. 4 Int'l Trade Rep. (BNA) 1184 (Sept. 30, 1987).

18. *Id.*

19. 4 Int'l Trade Rep. (BNA) 1453 (Nov. 25, 1987).

20. *See Id.*

21. 4 Int'l Trade Rep. (BNA) 1488 (Dec. 2, 1987).

22. 5 Int'l Trade Rep. (BNA) 16 (Jan. 6, 1988).

23. Cour de Justice des Communautés Europeennes, Arrêt de la Cour, Affaire 68/86 du 23 Fevrier 1988 (LEXISINTNAT-CJCE), reported in 5 Int'l Trade Rep. (BNA) 237 (Feb. 24, 1988).

24. There was pending a substantive challenge to the directive brought by a French manufac-

negotiators, who felt that the voiding of the directive offered the EC a politically painless end to the dispute. Their hopes were dashed, though, when the EC reenacted an identical directive after only a fifteen minute discussion, with only the United Kingdom dissenting.<sup>25</sup>

In November 1988, the United States again raised the stakes by threatening to ban all EC meat imports in addition to the section 301 action. The United States negotiators claimed that this action was justified under either of two theories. First, the Reciprocal Meat Inspection provision (RMI) in section 4604 of the 1988 Omnibus Trade and Competitiveness Act provided a statutory basis for trade sanctions against the EC.<sup>26</sup> The RMI permits the United States to ban temporarily the meat imports from any country which imposes standards on United States exports "that are not related to public health concerns . . . that can be substantiated by reliable analytical methods."<sup>27</sup> Second, the administrative burden necessitated by the hormone ban was alleged by the United States to be so great that the EC would not be able to prevent the export of meat to the United States which would meet the American inspection standards.<sup>28</sup> Refusing to back down to United States pressure, the EC proclaimed that it planned to retaliate against an estimated \$361 million worth of American goods if the United States attempted to block the importation of meat from the EC.<sup>29</sup>

These were the parties' positions on the dispute when they met in Brussels on November 18-19, 1988. There, the EC proposed a solution by which the EC would exclude from the directive meat used for pet foods, and raise the so-called "Hilton quota" on high quality beef.<sup>30</sup> The United States rejected the proposal, and stated that the United States' response to these measures would only be a reduction in the dollar amount of goods against which the United States would retaliate.<sup>31</sup>

This was the last attempt at resolving this escalating trade dispute. The EC and the United States were expected to discuss the topic again in Montreal a week prior to the review of progress on the Uruguay Round of talks.<sup>32</sup>

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turer of hormones called *Distrivet S.A.* 5 Int'l Trade Rep. (BNA) 237-38 (Feb. 24, 1988). However, the fate of this challenge was not known at the time of this Note.

25. 31 O.J. EUR. COMM. (No. L 70) 16 (1988).

26. 5 Int'l Trade Rep. (BNA) 1447 (Nov. 2, 1988).

27. Act of Aug. 23, 1988, Pub. L. No. 100-418, § 4604.

28. Int'l Trade Daily (BNA) 9-10 (Nov. 23, 1988).

29. *Id.* at 10.

30. Int'l Trade Daily (BNA) 2 (Nov. 29, 1988).

31. *Id.*

32. N.Y. Times, Dec. 1, 1988, at 34, col. 6.

## LEGAL ISSUES

As can be seen by its history, the EC hormone ban trade dispute is another example of the frequent scenario where a relatively minor trade dispute builds and builds into a major trade war once a state takes or threatens unilateral sanctions. In this instance, had the United States successfully invoked the dispute resolution mechanism of the Standards Code, it is highly unlikely that the EC would presently be considering economic retaliation against \$360 million worth of American goods, or almost three times the initial value of the dispute. One needs to ask what flaws, if any, exist within the procedural structure of the Standards Code which resulted in its failure to resolve this particular dispute. A step by step procedural analysis will facilitate the discussion.

The Standards Code establishes five phases of dispute resolution. The first phase calls for "prompt" bilateral consultations pursuant to section 14.2.<sup>33</sup> The United States and the EC held bilateral consultations in the months of February and April of 1987, but met with no success.<sup>34</sup>

The second phase calls for the convening of the GATT Committee on Technical Barriers to Trade to investigate the matter.<sup>35</sup> The Committee met from May, 1987 to September, 1987, but failed to yield a satisfactory solution. The United States blamed "EC insistence, against the weight of scientific evidence, that consumption of meat from animals treated with growth hormones is dangerous to human health."<sup>36</sup>

Where the dispute concerns questions of a technical nature, as here, the Standards Code requires a third phase. This entails the formation of a Technical Expert Group in accordance with article 14.9.<sup>37</sup>

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33. Article 14.2 provides:

Each Party shall afford sympathetic consideration to and adequate opportunity for prompt consultation regarding representations made by other Parties with respect to any matter affecting the operation of this Agreement.

Standards Code, *supra* note 2, at 22.

34. 52 Fed. Reg. 45,304 (1987).

35. Article 14.4 states:

If no solution has been reached after consultations under Article 14, paragraphs 1 and 2, the Committee shall meet at the request of any Party to the dispute within thirty days of receipt of such a request, to investigate the matter with a view to facilitating a mutually satisfactory solution.

Standards Code, *supra* note 2, at 23.

36. 52 Fed. Reg. 45,304 (1987).

37. Article 14.9 provides:

If no mutually satisfactory solution has been reached under the procedures of Article 14, paragraph 4 within three months of the request for the Committee investigation, upon the request of any Party to the dispute who considers the issues to relate to questions of a technical nature the Committee shall establish a technical expert group . . .

Standards Code, *supra* note 2, at 23.

One of the duties of the Technical Expert Group specified in the Standards Code is to:

make such findings as will assist the Committee in making recommendations or giving rulings on the matter, including inter alia, and if appropriate, findings concerning the detailed scientific judgments involved, whether the measure was necessary for the protection of human, animal, or plant life or health, and whether a legitimate scientific judgment is involved.<sup>38</sup>

On July 15, 1987, the United States requested the formation of a Technical Expert Group to examine the scientific judgment involved in the EC's decision to ban the importation of meat treated with growth hormones.<sup>39</sup> In the United States' view, the formation of the expert group should have been automatic due to language in the Code such as "upon the request of any party" and "the Committee shall establish."<sup>40</sup> The EC, however, disagreed. It argued that since the formation of a Technical Expert Group was an act of the Committee and since the Committee only acted in consensus, its objection to the formation of the expert group was fatal.<sup>41</sup>

The EC's argument eventually prevailed. The EC's ability to block the formation of the Technical Expert Group reveals the first flaw in the dispute resolution process of the Standards Code. By requiring the Committee to act only in consensus when faced with dispute resolution issues, article 14 of the Standards Code is doomed to failure. By definition, conflicting views on the merits of any dispute will exist. Thus, it is inconceivable that a consensus could be reached if the disputants themselves are allowed to vote in the Committee. Only in the relatively rare cases where self-interest causes both disputants to resort to article 14, due to convenience or speed for example, will there *not* be an attempt to block the dispute settlement mechanism. This criticism parallels that of a GATT commentator, Bourgeois, who posits that the casting of panels in the dual roles of conciliator and adjudicator often compromises the adjudicatory function, because parties will seek to avoid a legal ruling which is politically damaging.<sup>42</sup> It also reflects one of the basic principles of jurisprudence that one cannot be the judge of one's own cause. To remedy this situation, directly af-

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38. *Id.*

39. 52 Fed. Reg. 45,304 (1987).

40. Telephone interview with Donald S. Abelson, former Director of Technical Trade Barriers, Office of the United States Trade Representative (Dec. 1, 1988) (hereinafter "Abelson Interview"); telephone interview with Suzanne M. Troje, Director of Technical Barriers to Trade, Office of the United States Trade Representative (Nov. 30, 1988) (hereinafter "Troje Interview"). Donald Abelson handled the Standards Code issues at the beginning of the EC hormone ban dispute. He has since moved on and now Suzanne Troje is responsible for Standards Code issues at the USTR.

41. Abelson Interview, *supra* note 40; Troje Interview, *supra* note 40.

42. Bourgeois, *The Tokyo Round Agreements on Technical Barriers and on Government Procurement in International and EEC Perspective*, 19 COMMON MKT. L. REV. 5, 18 (1982).

affected parties should be required to abstain from voting when faced with dispute resolution issues.

The nature of the EC's objection to the formation of the expert group exposes a second shortcoming of the Standards Code. The EC's objection was essentially a jurisdictional one. It claimed that the ban on the importation of meat treated with growth hormones was a requirement in terms of a "process and production method" ("PPM"). Thus the Standards Code did not govern, since its scope only included "standards", i.e. requirements in terms of the characteristics of the product, and expressly excluded PPMs.<sup>43</sup> The EC further argued that the hormone ban, if subject to review at all, only required compliance with GATT, notably article III.<sup>44</sup>

The EC's claim that the Standards Code excludes PPMs from its scope is generally a valid one. The Code's drafters expressly excluded PPMs mainly because they were intensively used in the agricultural sector, and the signatories did not want this highly sensitive area to be subject to the Standards Code.<sup>45</sup> The United States countered this argument at the negotiating table by citing article 14.25: "the dispute settlement procedures set out above can be invoked in cases where a Party considers that obligations under this Agreement are being circumvented by the drafting of requirements in terms of processes and production methods rather than in terms of characteristic of products."<sup>46</sup> The United States asserted that, according to article 14.25, PPMs can be brought under the dispute settlement provisions without question due to the language "can be invoked in cases where a Party considers," since it implies that the challenging party must only have a subjective belief that a Party is evading the Standards Code's substantive obligations by drafting the requirement in terms of a PPM.<sup>47</sup> This was certainly the case with the United States, which believed that the EC was trying to circumvent the jurisdiction of the Standards Code by drafting the directive in terms of "meat treated with hormones," a PPM, rather than meat with a specified maximum level of chemical residues, a standard. Either would have been equally effective in

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43. Abelson Interview, *supra* note 40. An example to help clarify the distinction between a standard and a PPM is as follows. Suppose a country wished to regulate candy canes. It could draft its regulation in terms of "candy made from syrup and heated to 250 degrees." This would be a PPM since it is defining the product in reference to the process and production method used in making candy canes. On the other hand, the regulation could be phrased to cover "candy which is hard and which has red stripes." This would be a standard since the regulation is defined in terms of the characteristics of the good.

44. *Id.*

45. *Id.*

46. Standards Code, *supra* note 2, at 26.

47. Abelson Interview, *supra* note 40; Report to the U.S. Congress on the Agreement on Technical Barriers to Trade — "Standards Code" 12 (Jan. 1980 to Dec. 1982) (on file at the MICH. J. INT'L L.) (hereinafter "First Triennial Report").

achieving the directive's goal.<sup>48</sup> In the United States' opinion, the jurisdictional objection to the formation of the Technical Expert Group lacked merit, since article 14.25 subjected the EC directive to review even though drafted in terms of a PPM.

As one might suspect, the EC read article 14.25 differently. The EC pointed to a French version of the Standards Code where the English word "circumvent" carries with it a volitional element.<sup>49</sup> In the EC's view, article 14.25 can only be invoked upon the showing of an intent on the part of a signatory to evade its obligations under the Standards Code.<sup>50</sup> Moreover, the EC regarded the United States' position as a "shoot first, ask questions later" policy, because the United States continually pushed for the formation of the Technical Experts Group before resolving the interpretation of article 14.25.<sup>51</sup>

The United States responded to both of these claims by first stating that it would be impossible for a challenging country to prove an element of intent, and thus, the dispute settlement procedures could never be invoked to challenge a PPM.<sup>52</sup> Furthermore, in response to the equity argument, the United States expressed a similar negative view of the opposing side's behavior, charging the EC with trying to change the rules of the game in the heat of battle to suit its needs.<sup>53</sup>

The subsequent history of the EC hormone ban dispute, with the United States threatening unilateral retaliation and the EC preparing to counter-retaliate, demonstrates that the clash over the proper interpretation of article 14.25 and the resulting scope of application of the Standards Code must be resolved. The lack of a concrete interpretation of article 14.25 creates a loophole in the Standards Code whereby parties to the agreement can evade its jurisdiction by drafting internal requirements in terms of a PPM, and then insisting on an interpretation of 14.25 which calls for an almost impossible proof of intent. The size of this loophole can be appreciated when one considers that nearly every internal regulation drafted in the form of a standard can easily be drafted as a PPM. The hormone ban directive bears this out, since a regulation framed in terms of the residue level would have been equally effective in achieving its goal.

The dispute over the correct interpretation of article 14.25 resulted in trade tensions once before. Several years ago, the United States initiated the dispute settlement process in a case involving the immersion

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48. Abelson Interview, *supra* note 40; Troje Interview, *supra* note 40.

49. Abelson Interview, *supra* note 40.

50. *Id.*; First Triennial Report, *supra* note 47, at 12.

51. Abelson Interview, *supra* note 40.

52. *Id.*

53. *Id.*

chilling of poultry, the so-called "Spin Chill" case.<sup>54</sup> Bilateral talks set the contours of the PPM issue detailed above, but the case did not proceed to review by Committee.<sup>55</sup> However, in a subsequent meeting of the Committee on October 4-5, 1983, certain ambiguous "conclusions" were reached with respect to the interpretation of article 14.25.<sup>56</sup> One view of what was actually resolved at this meeting is that the Committee "agreed to cooperate" in cases involving PPMs.<sup>57</sup> Another is a statement in an official United States document that the Committee decided that PPMs may be brought under the dispute settlement provisions of article 14.<sup>58</sup> The EC hormone ban dispute was the first test of this understanding<sup>59</sup>, and the Committee, in all likelihood, must be discouraged by the result.

One, however, suspects that any attempt to close the loophole created by the lack of a definitive interpretation of article 14.25 would be met with the same fierce opposition formed in the past. Two explanations can be offered to clarify the problem. First, one can return to the origin of the PPM exclusion and claim that parties to the Standards Code still do not want to see its application in the hypersensitive area of agriculture. However, the parties could append a savings clause to the Standards Code to close the loophole, thereby creating grandfather rights in the agricultural sector and simultaneously preventing countries from skirting their treaty obligations through artful legislative drafting.

A second, more persuasive explanation is the different substantive treatment given an internal regulation, depending upon whether or not the scope of the Standards Code encompasses the regulation. If an internal regulation is adjudged to be outside the scope of the Standards Code, as most if not all of the PPMs are classified, then that regulation will only be subject to the provisions of GATT, notably article III. When one compares the substantive obligations of article III to those of the Standards Code, one discovers that it is much more difficult to challenge an internal regulation under article III of GATT.

This can be clearly shown in the context of the EC hormone ban dispute itself. What follows is a comparison of the substantive obligations of the Standards Code and those of article III of GATT, as applied to the facts of this dispute. This comparison will provide clear

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54. First Triennial Report, *supra* note 47, at 14; CONTRACTING PARTIES TO GATT, Basic Instruments and Selected Documents, 27th Supp. 39 (1981).

55. First Triennial Report, *supra* note 47, at 14; CONTRACTING PARTIES TO THE GATT, *supra* note 54, at 39.

56. CONTRACTING PARTIES TO GATT, Basic Instruments and Selected Documents, 30th Supp. 147 (1986).

57. Troje Interview, *supra* note 40.

58. Report to the U.S. Congress on the Agreement on Technical Barriers to Trade — "Standards Code" 13 (Jan. 1983 to Dec. 1985) (on file at the MICH. J. INT'L L.).

59. Troje Interview, *supra* note 40.

evidence that the closure of the article 14.25 loophole by the Committee is highly unlikely due to the fact that many countries want their internal regulations subject to the softer GATT treatment. Furthermore, an incidental benefit of this exercise is the examination of the substantive arguments of the parties enabling one to predict the outcome of this dispute if it should ever reach a panel, either in a GATT or a Standards Code context.

Article 2.1 contains the relevant substantive provision of the Standards Code which concerns the preparation, adoption, and application of standards by central government bodies.<sup>60</sup> Article 2.1 enumerates two specific obligations. First, a country may not prepare, adopt, or apply standards which intentionally create obstacles to trade.<sup>61</sup> This has not been an issue of contention between the EC and the United States, due to the difficulty of proving intent in this specific instance and in general. Secondly, parties to the Standards Code must ensure that neither "standards themselves nor their application have the effect of creating unnecessary obstacles to trade."<sup>62</sup> This obligation encompasses de facto discrimination due to the language of "have the effect." A critical word in this phrase is "unnecessary" since that gives a party the right to adopt standards which are necessary for the achievement of a domestic objective. The EC's position with respect to article 2.1 is that, assuming *arguendo* that the Standards Code covers PPMs, the ban on the importation of meat treated with growth hormones is necessary to protect the health of its citizens, and thus is consistent with the Standards Code even though it may create an obstacle to trade.<sup>63</sup>

The United States has three responses to this argument. The United States alleges that the hormone ban is not necessary in either one of the two senses. First, it is "unnecessary" since scientific evidence does not support the conclusion that consumers are harmed by the use of growth hormones.<sup>64</sup> The EC counters this by claiming to follow a "no risk" policy.<sup>65</sup> The validity of the EC's response rests on the absence of scientific evidence that the use of hormones is not harmful to consumers. Until a scientific body conclusively establishes the

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60. Article 2.1 provides in part:

Parties shall ensure that technical regulations and standards are not prepared, adopted or applied with a view to creating obstacles to international trade . . . They shall likewise ensure that neither technical regulations nor the standards themselves nor their application have the effect of creating unnecessary obstacles to international trade.

Standards Code, *supra* note 2, at 9-10.

61. *Id.*

62. *Id.*

63. 5 Int'l Trade Rep. (BNA) 1447 (Nov. 2, 1988).

64. 4 Int'l Trade Rep. (BNA) 1184 (Sept. 30, 1987).

65. 5 Int'l Trade Rep. (BNA) 1497 (Nov. 16, 1988).

absence of harm to consumers, the EC feels the risk is great enough to necessitate the exclusion of hormone-treated meat from its market.

The United States secondly alleges that the import ban is "unnecessary" because less restrictive alternatives can be used to achieve the same end.<sup>66</sup> For instance, the use of testing for chemical residues would attain the same goal of consumer protection. However, the word "unnecessary" in article 2.1 may not encompass this type of challenge. When one looks to the preamble of the Standards Code, the word "necessary" connotes a causal relationship to domestic policy rather than a least restrictive context.<sup>67</sup> The EC could also argue on policy grounds that this type of challenge should not be allowed due to a party's sovereign right to decide how best to achieve the aims of domestic policy. This may be especially true when one considers the ease in which a challenger can construct a less restrictive alternative with the benefit of hindsight.

The third United States response would resort to the preamble of the agreement. The preamble states, in language mirroring article XX of GATT, that a party may take measures necessary to achieve domestic goals, but that these measures must not constitute a "disguised restriction on international trade."<sup>68</sup> Given the difficulty of proving a fraudulent intent on the part of the EC in enacting the directive, the United States has little chance of succeeding on this ground.

In sum, the dispute over whether the enactment of the hormone ban directive is or is not a substantive violation of the Standards Code turns upon the issue of whether it is a necessary measure to protect EC consumers. Both sides have presented valid arguments, and it is difficult to see how a panel might decide this question. The point to be stressed here, however, is that the Standards Code provides a party with the tools to mount a credible challenge to an internal regulation. One can better appreciate the significance of this point by contrasting the Standards Code situation to a challenge to an internal regulation under article III of GATT.

Article III, the most relevant substantive provision of GATT, contains two specific obligations. Paragraph 1 states that contracting parties shall not use internal regulations "so as to afford protection to domestic industries."<sup>69</sup> As one commentator has noted, "establishing

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66. Troje Interview, *supra* note 40.

67. The preamble to the Standards Code states in paragraph six:

Recognizing that no country should be prevented from taking measures necessary . . . for the protection of human, animal, or plant life, . . . subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.

Standards Code, *supra* note 2, at 8.

68. *Id.*

69. Article III, paragraph 1 provides:

The contracting parties recognize that . . . laws, regulations and requirements affecting the

their protective effect or intent requires a review of their reasonableness . . . [which] necessitates difficult value judgments concerning the legitimacy of the policy aims underlying the standards and the way in which the standards are related to these aims."<sup>70</sup>

Moreover, even if a challenging party successfully made this rather vague showing, a GATT panel might also require the party to show an injury to its exports. A panel considering Spanish soyabean measures first proposed the export injury test.<sup>71</sup> In that dispute, Spain adopted consumption quotas on soyabean oil. The panel concluded that this was designed to protect Spanish *olive oil* production, but because United States exports of *soyabeans* had not been restricted, American exports experienced no adverse effect. Thus, no article III violation was found.<sup>72</sup> Due to various countries' objections that article III contains no injury requirement, however, the Council only noted, rather than adopted, the panel's report.<sup>73</sup> Also, the panel hearing the *Animal Feeds* case apparently ignored the EC's argument that there was no injury when it found a violation of article III, providing further evidence that article III may not necessarily contain an injury requirement.<sup>74</sup>

Paragraph 4 contains article III's second specific obligation. It requires contracting parties to accord to foreign products treatment no less favorable than that given to domestic products.<sup>75</sup> On its face, the EC hormone ban directive is consistent with this obligation because, as the EC is apt to tell the United States, the prohibition on the use of hormones applies to domestic producers as well.<sup>76</sup>

The United States has intimated, however, that the EC in fact did not apply the directive to its domestic producers, resulting in de facto discrimination against the United States.<sup>77</sup> To support their contention before a GATT panel that de facto discrimination is equally viola-

internal sale . . . of products . . . should not be applied so as to afford protection to domestic production.

General Agreement On Tariffs and Trade, CONTRACTING PARTIES TO GATT, Basic Instruments and Selected Documents 1, at 13, 18 (1952) (hereinafter "GATT").

70. Bourgeois, *supra* note 42, at 8.

71. E. MCGOVERN, INTERNATIONAL TRADE REGULATION 247 (2d ed. 1986) (citing Report of panel on Spanish measures concerning domestic sale of soyabean oil, 24 O.J. EUR. COMM. (No. L 5142) (1981)).

72. *Id.*

73. *Id.* (citing Decision of Council, 24 O.J. EUR. COMM. (No. L 5245) 32 (1981)).

74. E. MCGOVERN, *supra* note 71, at 247.

75. Article III, paragraph 4, states:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale . . . .

GATT, *supra* note 69, at 18.

76. 5 Int'l Trade Rep. (BNA) 1497 (Nov. 16, 1988).

77. *Id.*

tive as de jure discrimination under article III(4), the United States could cite *Schieffelin v. United States*<sup>78</sup> where an American court hinted that de facto discrimination may form the basis of a complaint. However, the EC could, in turn, allege that the court in *Schieffelin* interpreted an FCN treaty which had a different national treatment clause than that found in GATT.<sup>79</sup> Thus, the *Schieffelin* case may be irrelevant to a complaint brought under Article III of GATT.

Even if the United States could establish a violation of article III under a theory of de facto discrimination, the EC could always resort to article XX of GATT, which allows a contracting party to escape its GATT obligations when it pursues one of the specified domestic objectives.<sup>80</sup> The EC would claim that, assuming *arguendo* it discriminated in fact against American goods, article XX provides a justification for doing so, since the hormone ban is a measure to protect the welfare of its citizens. This would force the United States to rely on arguments that the hormone ban is not "necessary" to achieve this goal, or that the ban is really "a disguised restriction on international trade."

It is much more difficult for a country to challenge the use of a standard under GATT than it is to do so under the Standards Code for two reasons. First, the Standards Code explicitly acknowledges the theory of de facto discrimination against imported goods despite the fact that this theory has not been definitively accepted in a GATT application. Second, the Standards Code provides the challenging party with a specific tool with which to attack the imposition of a standard by including the word "unnecessarily." Under article III of GATT, the phrase "afford protection" is vague and presents a difficult initial hurdle. Only once a challenging party has overcome this obstacle does one reach the issue of the meaning of "necessary" in article XX. The difference in substantive treatment between the Standards Code and GATT explains both the motivation behind the EC's insis-

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78. 424 F.2d 1396, 1398-1403 (C.C.P.A. 1970). The center of the dispute in the case was the American proof-gallon system of taxation which applied equally as a matter of law between foreign and domestic goods, but which as a matter of fact resulted in higher taxation rates for imported goods. The importers challenged the practice on the basis of a FCN treaty between Ireland and the United States. The court felt itself bound by a previous case which rejected a similar challenge under article III of GATT, the logic being that since the FCN treaty was "no more restrictive" than GATT, the result in the previous case governs. One can infer from this statement that the GATT national treatment clause in article III is more restrictive and thus may apply to a broader range of internal laws which, as a matter of fact, discriminate against imports.

79. *Id.*

80. Article XX provides in part:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . necessary to protect human, animal or plant life or health.

GATT, *supra* note 69, at 48.

tence on their interpretation of article 14.25 and why this loophole is unlikely to be closed anytime soon by the Committee.

#### CONCLUSION

The EC hormone ban dispute involves many complex procedural and substantive issues concerning the application of the Standards Code. The failure of this agreement's dispute settlement provisions led to an escalation of the trade dispute by prompting both parties to consider unilateral measures in an effort to preserve markets for their exports.

The application of the dispute resolution mechanism in the Standards Code to the EC hormone ban dispute exposed two major flaws in the process. The first flaw is the requirement that the Committee act in consensus when handling the settlement of disputes, for it inevitably allows a disgruntled party to block the process. The second shortcoming of article 14 is the lack of a concrete interpretation of article 14.25 which allows a party to easily evade the obligations of the Code by drafting its internal requirements in terms of a PPM.

Shifting to a normative sense, there are reforms which should be considered in order to ensure that standards disputes in the future are settled in a multilateral setting without resort to unilateral measures. First, interested parties should be required to abstain from voting in dispute settlement procedures. Second, an attempt should be made to formulate a concrete interpretation of article 14.25, to prevent countries from skirting their code obligations through artful legislative drafting. This last proposed reform has little chance of being adopted due to the difference in substantive treatment of internal regulations by the Standards Code and under GATT.

It shall be interesting to see how the EC and the United States resolve this dispute. Both sides set forth valid substantive arguments in both a GATT and Standards Code context. Whatever the outcome, the issues concerning the Standards Code which have been raised by the EC hormone ban dispute should be resolved in a definitive manner so as to prevent trade disputes from becoming a quid pro quo battle of unilateral measures.