WORLD TRADE
ORGANIZATION

WT/DS26/15
WT/DS48/13
29 May 1998

(98-2227)

EC MEASURES CONCERNING MEAT AND MEAT PRODUCTS (HORMONES)

Arbitration
under Article 21.3(c) of the
Understanding on Rules and Procedures
Governing the Settlement of Disputes

Award of the Arbitrator
Julio Lacarte-Muró

I. Introduction

1. On 13 February 1998, the Dispute Settlement Body (the "DSB") adopted the Appellate Body Report[1] and the Panel Reports[2], as modified by the Appellate Body Report, in *EC Measures Concerning Meat and Meat Products (Hormones)*.[3] On 13 March 1998, the European Communities informed the DSB, pursuant to Article 21.3 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), that it intended to fulfil its obligations under the *Marrakesh Agreement Establishing the World Trade Organization*[4] (the "*WTO Agreement*") in respect of this matter, and that it had initiated the process to examine the options for compliance with a view to implementation in as short a period of time as possible, and that it would require a reasonable period of time for this process.[5]

2. On 26 March 1998, consultations were held between the European Communities and the United States and Canada in order to reach agreement on a "reasonable period of time" for the implementation of the recommendations and rulings of the DSB adopted on 13 February 1998. These consultations, and further written communications between the parties, did not lead to an agreement. Therefore, the European Communities requested, on 8 April 1998, that the "reasonable period of time" be determined by binding arbitration pursuant to Article 21.3(c) of the DSU.[6]

3. In the absence of an agreement between the parties on the appointment of an arbitrator within 10 days after referring the matter to arbitration, the European Communities requested, in a letter dated 18 April 1998 and received on 20 April 1998, and the United States and Canada requested, on 20 April 1998, the Director-General of the World Trade Organization ("WTO") to appoint the arbitrator, as provided for in footnote 12 to Article 21.3(c) of the DSU. After consultations with the parties, the Director-General decided, on 30 April 1998, to appoint H.E. Mr. Celso Lafer and myself as the

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[1]WT/DS26/AB/R, WT/DS48/AB/R.

[2]Complaint by the United States, WT/DS26/R ("US Panel Report"); Complaint by Canada, WT/DS48/R ("Canada Panel Report").

[3]As noted at paragraphs 2-5 of the Appellate Body Report, the "measures" at issue in this dispute were Council Directive 81/602/EEC of 31 July 1981, Council Directive 88/146/EEC of 7 March 1988 and Council Directive 88/299/EEC of 17 May 1988, which were codified and replaced by Council Directive 96/22/EC of 29 April 1996 ("Directive 96/22"), which came into effect on 1 July 1997, Official Journal, No. L 125, 23 May 1996, p. 3.

[4]Done at Marrakesh, Morocco, 15 April 1994.

[5]WT/DSB/M/43, 8 April 1998, p. 8.

[6]WT/DS26/14, WT/DS48/12, G/L/235, 16 April 1998.

arbitrators in this matter. Subsequently, Ambassador Lafer informed the Director-General that he was unable to accept the nomination. The Director-General informed the parties on 7 May 1998 that, given the very strict timeframe within which this arbitration must be conducted, he believed that the best course of action was to continue this arbitration with me acting as the sole arbitrator.

4. Written submissions were received from the European Communities, the United States and Canada on 6 May 1998, and an oral hearing was held on 12 May 1998.

II. Arguments of the Parties

A. *European Communities*

5. The European Communities concluded in its written submission that the "reasonable period of time" for implementation of the recommendations and rulings of the DSB in this case should be approximately four years, comprising two years for a risk assessment and approximately two years for any legislative action which may be necessary in the light of the results of the risk assessment. Later, in the oral hearing, the European Communities stated that the "reasonable period of time" could be reduced to, in total, 39 months: two years for a risk assessment and 15 months for any necessary legislative action thereafter.

6. In the view of the European Communities, the period of time that is necessary to implement the DSB recommendations and rulings in this case cannot be shorter than what is reasonably required by sound science to respond to the findings in the Appellate Body Report that the EC measures banning imports of meat and meat products derived from cattle administered with certain hormones for growth promotion purposes are inconsistent with Articles 5.1 and 3.3 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the *"SPS Agreement*"). The intention of the European Communities is to take action composed of two elements: first, to conduct hormone-specific and residue-specific risk assessments for all the hormones, as clarified by the Appellate Body, including an evaluation of the risks posed to human health from failure to observe good veterinary practice; and second, to

review the measure at issue in the light of the results of that risk assessment and propose to abolish, amend or maintain it, as appropriate.[7]

7. The European Communities asserts that the period of time to complete the first "preparatory" phase, consisting of the various scientific studies, cannot be shorter than two years. With respect to the second or "conclusive" phase, the European Communities argues that a sufficient period of time should be made available to it in order to allow for the necessary legislative measures to be taken. While the European Communities stated in its written submission that this second phase would require approximately two years, the European Communities stated in the oral hearing that it would need 15 months to conclude this phase.

8. The European Communities asserts that while Article 21.3 of the DSU imposes an obligation on the Member concerned to inform the DSB of its intentions regarding implementation, what is specifically required by the obligation to "implement" is not spelled out either in this provision or elsewhere in the DSU. Under the DSU, the required act of implementation is the removal of the inconsistency found by the DSB to exist between a measure and a covered agreement. An implementing Member has options concerning the precise means of implementation. In the present case, "[t]here is *no* recommendation or ruling of the Appellate Body about *how* the EC must bring its measures into conformity."[8] Therefore, the inconsistency can be eliminated "either by abolishing the measure *or* by providing the hormone-specific and residue-specific risk assessments that the Appellate Body held to be required under Article 5.1 of the SPS Agreement."[9] The European Communities asserts that:

> … the Appellate Body did not find that the EC's import prohibition *per se* was inconsistent with the SPS Agreement, but only that the EC had violated its obligations under the SPS Agreement by not conducting a proper risk assessment within the meaning of Article 5.1 as the basis for the import prohibition. The EC is entitled, therefore, to bring its measure into conformity with the SPS Agreement by basing it on a properly specific risk assessment, as this concept has now been clarified for the first time by the Appellate Body.[10]

[7]Written submission of the European Communities, para. 74.

[8]Written submission of the European Communities, para. 24.

[9]*Ibid.*

[10]Written submission of the European Communities, para. 64.

Referring to the finding of the Appellate Body at paragraph 129 of the Appellate Body Report that the phrase "as appropriate to the circumstances" in Article 5.1 "makes clear that the Members have a certain degree of flexibility in meeting the requirements of Article 5.1", the European Communities asserts that "the flexibility to which Members are entitled" under Article 5.1 "would be wrongfully abrogated if this arbitration does not allow the EC a reasonable period of time in which to perform the hormone-specific and residue-specific risk assessment which the Appellate Body for the first time in this case held is required."[11]

9. According to the European Communities, the recommendation in paragraph 255 of the Appellate Body Report must be read in the context of the reasoning in the Appellate Body Report, and "[a] careful examination of the Appellate Body's findings in paragraphs 198-201 and 206-208 leads to the conclusion that the essence of the Appellate Body's endorsement of the Panel's finding of inconsistency with Article 5.1 was the absence of a suitably specific risk assessment. In other words, the Appellate Body's findings and conclusions in respect of this matter rest on the proposition that no risk assessment sufficient for the purpose had been undertaken or presented to the Panel."[12]

10. The European Communities contends that the statement in Article 21.3 of the DSU that the reasonable period of time "may be shorter or longer [than 15 months], depending upon the particular circumstances" mandates a case-by-case approach in the determination of the reasonable period. The "type and technical complexity of the measure which the respondent Member is required to draft, adopt and implement within the minimum period of time can constitute 'particular circumstances'."[13] In the present case, "these 'particular circumstances' comprise the methods of implementation available to the EC under the SPS Agreement and the period of time required to accomplish them."[14] The European Communities maintains that "[s]ince there is a need … to conduct a hormone-specific and residue-specific risk assessment in order to implement the DSB recommendations and rulings, the question of what constitutes a 'reasonable period' depends upon the time it normally takes scientists in the EC (and around the world) to conduct this type of risk assessment and to review the inconsistent measure in the light of the results of that risk assessment."[15]

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[11]Written submission of the European Communities, para. 52.

[12]Written submission of the European Communities, para. 56.

[13]Written submission of the European Communities, para. 71.

[14]*Ibid*.

[15]*Ibid*.

11. With respect to the first phase of its proposed implementation of the DSB recommendations and rulings, the European Communities states that it intends to carry out a series of research projects that, it considers, constitute "the risk assessment specified by the Appellate Body report."[16] In view of the type and nature of the experiments involved, some of these projects, such as those testing the carcinogenicity and genotoxicity of residues in meat of the parent compounds and their metabolites, cannot be completed in less than two years from the time they are commenced. This time period of two years is incompressible. The European Communities states that in order to identify missing scientific information, avoid duplication of scientific work and reduce as far as possible the time necessary to complete the risk assessment, the EC Commission requested in writing, on 8 April 1998, relevant information from the United States, Canada, Australia and New Zealand. It also intends to send a similar request for information to the Codex Alimentarius Commission.

12. With respect to what it terms the "second" or "conclusive" phase of its proposed implementation process, the European Communities asserts that it cannot take definitive legislative measures before the results of the risk assessment become available, as it cannot prejudge the outcome of the risk assessment.[17] Nevertheless, the European Communities states that the EC Commission has already initiated the process of exploring the various legislative options that would be available and the relevant decision-making procedures, and that this process will continue as the risk assessment progresses. According to the European Communities, the aim is to prepare the ground as well as possible so that, when the definitive results of the risk assessment become available, the proposal of the EC Commission to the other EC institutions can be presented within the shortest period of time possible.

13. The European Communities maintained in its written submission that if the results of the risk assessment indicate the need to take legislative action, the legislative process for the implementation of the DSB recommendations and rulings in this case could be completed within approximately two years. In the oral hearing, the European Communities stated that it would need 15 months for the legislative process. The European Communities disagrees with the United States and Canada concerning the appropriate legislative basis -- and, consequently, concerning the legislative process that must be followed within the European Communities -- for any measure abolishing or amending the current measure banning imports of meat and meat products derived from cattle administered with certain

[16]Written submission of the European Communities, para. 79.

[17]Written submission of the European Communities, para. 101.

hormones for growth promotion purposes. According to the European Communities, even if Directive 96/22 was based on Article 43 of the *Treaty Establishing the European Community*[18] (the "*EC Treaty*") and was adopted pursuant to the consultation procedure, this is no longer the correct legal situation in the European Communities.[19] As the principal objective of the measure in question is to protect human health, an act to abolish or amend Directive 96/22 will require a Directive of the Council and the European Parliament based on Article 100a of the *EC Treaty*. Any act based on Article 100a must be adopted in accordance with the co-decision procedure provided for in Article 189b of the *EC Treaty*.[20]

14. In any case, the European Communities claims that the debate on the appropriate legal basis for an act to abolish or amend Directive 96/22 will become irrelevant after the entry into force of the *Treaty of Amsterdam* on 1 January 1999. That treaty modifies Article 129 of the existing *EC Treaty* by explicitly requiring in Article 152(4)(b) that "measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health" must be adopted on the basis of the co-decision procedure. The European Communities stated that upon the adoption of the *Treaty of Amsterdam*, any pending legislation would have to be withdrawn and a new legislative process would have to be commenced.

B. *United States*

15. The United States argues that the "reasonable period of time" for implementation of the DSB recommendations and rulings in this case is 10 months, i.e., by 1 January 1999. The most relevant factors affecting the decision on the length of the reasonable period of time for implementation are: (i) the legal form of implementation necessary (e.g., legislation, regulations, decree, etc.); (ii) the nature of the legislative or regulatory changes to be made; and (iii) the period of time in which the implementing

[18]Done at Rome, 25 March 1957, as amended. Before the entry into force of the *Treaty on European Union* on 1 November 1993, this Treaty was referred to as the *Treaty Establishing the European Economic Community* (the "*EEC Treaty*").

[19]The European Communities refers for this proposition to a case pending before the European Court of Justice, Case C-269/97, *Commission v. Council*, the pleadings of which are summarized in Official Journal No. C 295, 27 September 1997, p. 17.

[20]Written submission of the European Communities, para. 106. The *Single European Act*, effective 1 July 1987, amended the *EEC Treaty* by adding Article 100a, which required the use of the cooperation procedure. The *Treaty on European Union*, which entered into force on 1 November 1993 (thereafter, the *EEC Treaty* was known as the *EC Treaty*), amended Article 100a and added Article 189b. Together, these provisions require the use of the co-decision procedure for legislation aimed at the protection of human health.

Member can achieve the proposed legal form of implementation, assuming that the Member applies itself in good faith. Based on these criteria, an implementation period of 10 months is "reasonable" in this instance in light of the action that is required of the European Communities to comply with the DSB recommendations and rulings, i.e., removal of the import ban, and the nature of the regulatory/legislative process applicable to issues involving agriculture, such as the import ban in question, under the current law of the European Communities.

16. In the view of the United States, the burden rests on the implementing Member to justify the period of time necessary for implementation of DSB recommendations and rulings. The burden of demonstrating that a certain period of time is "reasonable" becomes heavier when that period exceeds the 15-month guideline set out in Article 21.3(c) of the DSU. If the European Communities believes that immediate implementation is impracticable, it must demonstrate why this is so and must also substantiate its request for a particular period of time within which to implement.

17. According to the United States, the period of time proposed by the European Communities for implementation is unreasonable and is based on two false premises. First, while the European Communities is free to conduct a risk assessment, such a risk assessment is irrelevant to implementation of the DSB's recommendations and rulings and cannot be used to delay the "reasonable period of time" for compliance. The DSB recommendations and rulings do not require another risk assessment. The DSB has ruled that the European Communities has no human health basis for its ban. As a result, the ban is not justified under the *SPS Agreement*. Withdrawal of the measures that were found to be inconsistent with the obligations of the European Communities under Articles 3.3 and 5.1 of the *SPS Agreement* is the only action consistent with the findings of the Panel and Appellate Body and the DSB recommendations and rulings in this case. The import ban in question has already been in place for nine years, and the dispute settlement proceedings in this case have already taken two years. During this time, benefits accruing to the United States under the *WTO Agreement* have been denied. The United States should not have to wait for a further period of two years before the European Communities even begins the necessary legislative process to bring its measure into conformity with the *SPS Agreement*.[21]

[21]Statements of the United States at the oral hearing.

18. Second, the United States submits that the legislative procedures necessary to repeal the import ban in question can be accomplished within less than 10 months. The regulation of hormones used in the production of animals is an agricultural matter subject to Article 43 of the *EC Treaty*[22], which provides that legislation pertaining to the common market in agriculture shall be taken pursuant to the consultation procedure. Directive 96/22 was based on Article 43 of the *EC Treaty* and the European Communities is not now legally required to base a legislative measure on Article 100a of the *EC Treaty* and to use the co-decision procedure provided for in Article 189b of the *EC Treaty* in order to remove the import ban. The *Treaty of Amsterdam*, containing the modified Article 129 "that would allow the European Union to adopt legislation in the areas of health and consumer protection with the full participation of the Parliament, *i.e.*, pursuant to co-decision"[23], has not yet entered into effect. The consultation procedure is, therefore, applicable to any legislative measure implementing the recommendations and rulings of the DSB in this case. This procedure may be completed within five or six months. Even if the co-decision procedure were necessary in order to lift the hormone ban, it can be completed in less than 15 months.

C. *Canada*

19. Canada submits that the "reasonable period of time" for implementation of the recommendations and rulings in this case should be no more than 10 months. Given that the European Communities is under an obligation to implement the recommendations and rulings of the DSB in this case, Canada argues that the onus lies with the European Communities to demonstrate that the period it requests constitutes a "reasonable period of time". Canada submits that the proposed period is manifestly unreasonable, and that there are no "particular circumstances" that would justify such a time period under Article 21.3(c) of the DSU.

20. In Canada's view, the "reasonable period of time" does not include time for the European Communities to conduct a risk assessment. Rather, the "reasonable period of time" is provided to allow the European Communities to take the necessary legislative steps to remove its inconsistent

[22]The United States refers to Case 68/86, *United Kingdom v. Council*, [1988] E.C.R 855. The United States also refers to Opinion 1/94 of the European Court of Justice for the proposition that the implementation by the European Communities of the commitments in the *SPS Agreement*" will require measures to be adopted on the basis of Article 43 of the [EC] Treaty." Opinion 1/94, [1994] E.C.R. I-5271.

[23]Written submission of the United States, para. 45.

measures. In the present case, the impugned measures of the European Communities have been found inconsistent with the obligations of the European Communities under the *SPS Agreement*. Withdrawal of the measures is the only way to bring them into conformity with the *SPS Agreement*. While the European Communities is free to undertake risk assessments for any of the hormones concerned at any time, conducting such a risk assessment does not constitute compliance with the DSB recommendations and rulings. Accordingly, the European Communities should have already started taking the necessary legislative steps to withdraw the inconsistent measures.

21. Canada submits that condoning the EC request for two years to conduct a risk assessment would "reward" the European Communities for failing to base its impugned measures on a risk assessment, as required by Article 5.1 of the *SPS Agreement*. This would permit the European Communities to continue to block imports of beef from Canada for a further two years before the European Communities even initiates the necessary legislative process to bring its measures into compliance with the *SPS Agreement*, and would invite abuse of Article 5.1 of the *SPS Agreement*. The European Communities has not argued that its measures were provisionally adopted pursuant to Article 5.7 of the *SPS Agreement* because relevant scientific information was insufficient. However, on the basis of the Appellate Body Report, the European Communities purports to require time to undertake a risk assessment. The European Communities is, in effect, claiming the benefits of Article 5.7 of the *SPS Agreement* in the guise of implementing the DSB recommendations and rulings. It has been two years since the United States and Canada requested separate consultations with the European Communities in this dispute. Thus, the European Communities has had ample reason and opportunity to conduct the risk assessment it argues that it now must conduct.

22. Finally, Canada submits that the European Communities could complete the required legislative process in significantly less than 15 months. As the measures that must be brought into conformity with the *SPS Agreement* are based on Article 43 of the *EC Treaty*, amendment or repeal of these measures could be done pursuant to the consultation procedure and, under the existing law of the European Communities[24], would not legally require the co-decision procedure under Articles 100a and 189b of

[24]Canada states that regardless of any case that may currently be pending before the European Court of Justice, existing case law holds that Article 43 of the *EC Treaty* is the appropriate legal basis for modifying an agricultural measure such as the one at issue in this case.

the *EC Treaty*. The consultation procedure required by Article 43 of the *EC Treaty* can be completed in a period much shorter than 15 months, i.e., in a period of approximately eight months. Canada submits that a policy choice by the European Communities in favour of the co-decision procedure under Article 189b of the *EC Treaty*, which goes beyond the strictly legal requirements of European Community law, should not be taken into account as "particular circumstances" that would impact on the determination of what constitutes a "reasonable period of time". Even if the co-decision procedure were necessary, there is evidence that this procedure would take 18 months on average, and can take less than 15 months.

III. Article 21.3 of the DSU

23. Article 21.3 of the DSU provides, in part, as follows:

> … the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:
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> …
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> (c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings. In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

24. My mandate in this arbitration is to determine the reasonable period of time within which the European Communities is required to implement the recommendations and rulings of the DSB. As a "guideline", Article 21.3(c) provides that the reasonable period of time "should not exceed 15 months from the date of adoption of a panel or Appellate Body report." However, "that time may be shorter or longer, depending upon the particular circumstances."

25. The ordinary meaning of the terms of Article 21.3(c) indicates that 15 months is a "guideline for the arbitrator", and not a rule. This guideline is stated expressly to be that "the reasonable period of time … *should not exceed* 15 months from the date of adoption of a panel or Appellate Body report" (emphasis added). In other words, the 15-month guideline is an outer limit or a maximum in the usual case. For example, when implementation can be effected by administrative means, the reasonable period of time should be considerably shorter than 15 months. However, the reasonable period of time could be shorter or longer, depending upon the particular circumstances, as specified in Article 21.3(c).

26. Article 21.3(c) also should be interpreted in its context and in light of the object and purpose of the DSU. Relevant considerations in this respect include other provisions of the DSU, including, in particular, Articles 21.1 and 3.3. Article 21.1 stipulates that: "*Prompt compliance* with recommendations and rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members" (emphasis added). Article 3.3 states: "The *prompt* settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members" (emphasis added). *The Concise Oxford Dictionary* defines the word, "prompt", as meaning "a. acting with alacrity; ready. b. made, done, etc. readily or at once".[25] Read in context, it is clear that the reasonable period of time, as determined under Article 21.3(c), should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB. In the usual case, this should not be greater than 15 months, but could also be less.

27. In my view, the party seeking to prove that there are "particular circumstances" justifying a shorter or a longer time has the burden of proof under Article 21.3(c). In this arbitration, therefore, the onus is on the European Communities to demonstrate that there are particular circumstances which call for a reasonable period of time of 39 months, and it is likewise up to the United States and Canada to demonstrate that there are particular circumstances which lead to the conclusion that 10 months is reasonable.

[25]D. Thomson (ed.), *The Concise Oxford Dictionary of Current English*, ninth ed. (Clarendon Press, 1995), p. 1096.

IV. Longer Period than 15 Months

28. The European Communities maintains that, in this case, there are "particular circumstances" justifying a reasonable period of time of 39 months[26] in total. It argues that the reasonable period of time needed to implement the recommendations and rulings of the DSB can be separated into two distinct phases: (a) a minimum of two years to complete the hormone-specific and residue-specific risk assessments for all the hormones concerned, including an evaluation of the risks posed to human health from failure to observe good veterinary practice[27]; and (b) a period of 15 months to take any legislative action required, in light of the results of the risk assessments.[28]

29. I will first address whether "the particular circumstances" in this case allow the European Communities an initial phase of two years to conduct the risk assessments which it maintains are "mandated"[29] by the findings and conclusions of the Appellate Body Report.

30. Article 19.1 of the DSU reads as follows:

> Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

[26]In its written submission, para. 115, the European Communities stated that it would require a period of approximately four years, consisting of two years to conduct a risk assessment and approximately two years for any legislative process that may be necessary in light of the results of the risk assessment. However, in its concluding statement at the oral hearing, the European Communities reduced the time needed for any legislative process to 15 months. Therefore, the final position of the European Communities was that a reasonable period of time for implementation of the DSB recommendations and rulings would be approximately two years and 15 months, that is, 39 months.

[27]Written submission of the European Communities, para. 74.

[28]Statements of the European Communities at the oral hearing.

[29]Written submission of the European Communities, heading 3), page 23; statements of the European Communities at the oral hearing.

31. The recommendations and rulings of the DSB in this case consist of the findings and conclusions of the Appellate Body Report and the Panel Reports, as modified by the Appellate Body Report, which were adopted by the DSB pursuant to Articles 16.4 and 17.14 of the DSU on 13 February 1998. The Appellate Body Report contained the following recommendation:

> The Appellate Body *recommends* that the Dispute Settlement Body request the European Communities to bring the SPS measures found in this Report and in the Panel Reports, as modified by this Report, to be inconsistent with the *SPS Agreement* into conformity with the obligations of the European Communities under that Agreement.[30]

The Panel Reports contained the following recommendation:

> We *recommend* that the Dispute Settlement Body requests the European Communities to bring its measures in dispute into conformity with its obligations under the Agreement on the Application of Sanitary and Phytosanitary Measures.[31]

32. There is an issue in this arbitration as to what constitutes "implementation of the recommendations and rulings of the DSB" under Article 21.3 of the DSU. The European Communities maintains that the Appellate Body Report "mandates" that a number of scientific studies constituting a risk assessment be conducted as "a necessary first step" to bringing the EC measures into conformity with the *SPS Agreement*.[32] The United States and Canada, on the other hand, argue that as the EC measures were found to be inconsistent with the obligations of the European Communities under the *SPS Agreement*, the *only* means of bringing them into conformity with the DSB's recommendations and rulings is by withdrawing them.

33. The Appellate Body Report and the Panel Reports, as modified by the Appellate Body Report, found the EC import prohibition to be inconsistent with the obligations of the European Communities

[30]Appellate Body Report, para. 255.

[31]US Panel Report, para. 9.2; Canada Panel Report, para. 9.2.

[32]Written submission of the European Communities, para. 72 and p. 23.

under the *SPS Agreement*, and recommended that the European Communities bring its "measures" found to be inconsistent with the *SPS Agreement* into conformity with its obligations under that Agreement. Neither the Appellate Body nor the Panel suggested ways, under Article 19.1 of the DSU, in which the European Communities should implement the recommendations and rulings of the DSB.

34. The Appellate Body concluded that the EC import prohibition of meat and meat products derived from cattle to which certain hormones had been administered for growth promotion purposes was inconsistent with the requirements of Articles 5.1 and 3.3 of the *SPS Agreement*.[33] The Appellate Body agreed with the Panel that "Article 5.1 may be viewed as a specific application of the basic obligations contained in Article 2.2 of the *SPS Agreement*", and stressed that "Articles 2.2 and 5.1 should constantly be read together."[34] The Appellate Body stated:

> We believe that Article 5.1, when contextually read as it should be, in conjunction with and as informed by Article 2.2 of the *SPS Agreement*, requires that the results of the risk assessment must sufficiently warrant -- that is to say, reasonably support -- the SPS measure at stake. The requirement that an SPS measure be "based on" a risk assessment is a substantive requirement that there be a rational relationship between the measure and the risk assessment.[35]

35. The Appellate Body confirmed the legal conclusions of the Panel Reports that the EC import prohibition was inconsistent with Articles 5.1 and 3.3 of the *SPS Agreement*. As indicated above, the Appellate Body stated that Article 5.1 must be read together with Article 2.2 of the *SPS Agreement*, and requires that "the results of the risk assessment must sufficiently warrant -- that is to say, reasonably support -- the SPS measure at stake." For an SPS measure to be *based on* a risk assessment, as required under Article 5.1, there must "be a *rational relationship* between the measure and the risk assessment" (emphasis added). The Appellate Body examined the scientific studies presented to the Panel by the European Communities in support of its measures, and affirmed "the *ultimate conclusion* of the Panel that the EC import prohibition is not based on a risk assessment within the meaning of Articles 5.1 and 5.2 of the *SPS Agreement* and is, therefore, *inconsistent* with the requirements of Article 5.1"

[33]Appellate Body Report, paras. 208, 209, 253(l).

[34]Appellate Body Report, para. 180.

[35]Appellate Body Report, para. 193.

(emphasis added).[36] It is important to note that, despite differences in the interpretation of Articles 3.1 and 5.2 of the *SPS Agreement* by the Panel and the Appellate Body, the Appellate Body agreed with the Panel's conclusions on every major point relating to whether the EC Directives at issue were "based on an assessment, as appropriate to the circumstances, of the risks to human … health" in accordance with Article 5.1 of the *SPS Agreement*.

36. In the Appellate Body Report, as in the Panel Reports, the "measures" found to be inconsistent with the obligations of the European Communities under the *SPS Agreement* were the Directives[37] maintaining the import prohibition of meat and meat products derived from cattle to which certain hormones had been administered for growth promotion purposes. These Directives were codified and replaced by Directive 96/22, effective 1 July 1997, and it is Directive 96/22, therefore, which must be brought into conformity with the obligations of the European Communities under the *SPS Agreement*.

37. The ultimate holding of the Appellate Body Report, affirming the Panel Reports, is that the EC import prohibition is not based on a risk assessment within the meaning of Articles 5.1 and 5.2 of the *SPS Agreement*. "The essence of the Appellate Body's endorsement of the Panel's finding of inconsistency with Article 5.1" was *not*, as maintained by the European Communities, "the absence of a suitably specific risk assessment".[38] That is not what the Appellate Body found. Rather, the Appellate Body, agreeing with the Panel, concluded that the EC import prohibition was *not based on* a risk assessment in accordance with the provisions of the *SPS Agreement*. These findings constitute the recommendations and rulings of the DSB, adopted on 13 February 1998 under Articles 16.4 and 17.14 of the DSU, which must be implemented by the European Communities within the reasonable period of time as determined by this arbitration.

38. It is not within my mandate under Article 21.3(c) of the DSU, to suggest ways or means to the European Communities to implement the recommendations and rulings of the Appellate Body Report and Panel Reports. My task is to determine the reasonable period of time within which implementation

[36]Appellate Body Report, para. 208.

[37]See footnote 3.

[38]Written submission of the European Communities, para. 56.

must be completed. Article 3.7 of the DSU provides, in relevant part, that "the first objective of the dispute settlement mechanism is *usually to secure the withdrawal of the measures concerned* if these are found to be inconsistent with the provisions of any of the covered agreements" (emphasis added). Although withdrawal of an inconsistent measure is the *preferred* means of complying with the recommendations and rulings of the DSB in a violation case[39], it is not necessarily the *only* means of implementation consistent with the covered agreements. An implementing Member, therefore, has a measure of discretion in choosing the *means* of implementation, as long as the means chosen are consistent with the recommendations and rulings of the DSB and with the covered agreements.

39. Withdrawal is the *preferred* means of implementation under Article 3.7 of the DSU, and *prompt compliance* with the recommendations and rulings of the DSB is essential under Article 21.1. It would not be in keeping with the requirement of *prompt* compliance to include in the reasonable period of time, time to conduct studies or to consult experts to demonstrate the *consistency* of a measure already judged to be *inconsistent*. That cannot be considered as "particular circumstances" justifying a longer period than the guideline suggested in Article 21.3(c). This is not to say that the commissioning of scientific studies or consultations with experts *cannot* form part of a domestic implementation process in a particular case. However, such considerations are not pertinent to the determination of the reasonable period of time.

40. I would like to emphasize that the obligation of the European Communities to base its measures on an assessment of the risks to human health, in conformity with the provisions of the *SPS Agreement*, commenced on 1 January 1995 when the *WTO Agreement* came into force.[40] Article XVI:4 of the *WTO Agreement* specifically requires every Member to "ensure the conformity of its laws, regulations

[39]By contrast, in a non-violation case, brought under Article XXIII:1(b) of the GATT 1994, Article 26.1(b) of the DSU states explicitly that "there is no obligation to withdraw".

[40]The Appellate Body affirmed the Panel's finding that the *SPS Agreement* does not limit the temporal application of its provisions to SPS measures adopted *after* 1 January 1995, but also applies to measures which *continued* in effect after the entry into force of the *WTO Agreement.* The Appellate Body also noted that "the measure at issue in this appeal is, since 1 July 1997, no longer embodied in the pre-1995 Directives referred to above, but rather in Directive 96/22, which was elaborated and enacted *after* the entry into force of the *WTO Agreement.* None of the parties contests that the currently applicable measure is subject to the disciplines of Articles 5.1 and 5.5 of the *SPS Agreement.*" Appellate Body Report, paras. 128-130.

and administrative procedures with its obligations" under the covered agreements. Contrary to the European Communities' arguments that it did not know that hormone-specific and residue-specific assessments were required by Article 5.1 of the *SPS Agreement*[41], the European Communities did not need to wait for the Appellate Body Report before commissioning scientific studies to support its import ban. Indeed, the European Communities seemed to recognize this when it convened the *Scientific Conference on Growth Promotion in Meat Production* from 29 November to 1 December 1995 specifically to assess whether there were risks to human health from hormone-treated beef. However, the studies from that *Scientific Conference* were found by the Panel, and confirmed by the Appellate Body, to *not* rationally support the EC import prohibition.[42]

41. To grant the European Communities a further two years, from the date of adoption by the DSB of the Appellate Body Report and Panel Reports, to conduct the risk assessment that was required as of 1 January 1995 would not be consistent with the provisions of the DSU requiring prompt compliance with DSB recommendations and rulings, nor with the obligations of the European Communities under the *SPS Agreement*.

42. For the foregoing reasons, it would not be proper to include in the reasonable period of time granted to the European Communities under Article 21.3(c) of the DSU, an initial phase of two years for the conduct and completion of scientific studies to determine if there is a risk to human health from hormone-treated beef.

V. Shorter Period than 15 Months

43. Having determined that the time required for conducting a risk assessment cannot be considered as "particular circumstances" justifying an extension of the reasonable period of time beyond 15 months, I will turn to the arguments made by the United States and Canada that there are "particular circumstances" which would justify a reasonable period of time of 10 months.

[41]Written submission of the European Communities, para. 52; statements of the European Communities at the oral hearing.

[42]Appellate Body Report, para. 197; US Panel Report, para. 8.124; Canada Panel Report, para. 8.127.

44. The United States and Canada argue that compliance with the recommendations and rulings of the DSB in this case can only be achieved by the repeal of the existing import prohibition, and that within the European legislative system, full implementation is practicable within a period of 10 months, i.e., by 1 January 1999. In their view, the repeal of Directive 96/22 can be effected by means of the consultation procedure under Article 43 of the *EC Treaty*. The European Communities contests this point and maintains that any modification of Directive 96/22 must be based on Article 100a of the *EC Treaty*, and must be adopted, therefore, under the co-decision procedure provided for in Article 189b of the *EC Treaty*. In its written submission, the European Communities asserts that:

> … the Services of the Commission have come to the conclusion that an act to abolish or amend the Council Directive currently in force that prohibits the use of hormones (i.e. Directive 96/22/EC) will require another Directive of the Council and the European Parliament based on Article 100A of the EC Treaty. This is because the principal objective of the measure in question is to protect human health. Any act based on Article 100A must be adopted in accordance with the special co-decision procedure provided for in Article 189b of the EC Treaty. In addition, the opinion of the Economic and Social Committee is required.[43]

During the oral hearing in this arbitration, the European Communities asserted that, if determined necessary in the light of the results of the risk assessment, it would take the necessary legislative steps to amend or repeal the existing Directive 96/22 within a period of 15 months, using the co-decision procedure provided for in Article 189b of the *EC Treaty*.

45. The United States and Canada argued that the legal basis for any legislative act abolishing or amending Directive 96/22 should be Article 43, not Article 100a, of the *EC Treaty*, since this Directive was based on Article 43 in the first place. They rely on the decision of the European Court of Justice in *United Kingdom* v. *Council*[44], in which the Court found that Article 43 of the *EEC Treaty* applied where the legislation proposed was directed *both* to the objectives of agricultural policy and to other objectives which were pursued on the basis of Article 100 of the *EEC Treaty*. However, the European Communities states that this is no longer good law, and refers to an action brought on 22 July 1997 by the EC Commission challenging the legality of Council Regulation (EC) No. 820/97 of 21 April

[43]Written submission of the European Communities, para. 106.

[44]Case 68/86, [1988] E.C.R. 855.

1997, which establishes a system for the identification and registration of bovine animals and the labelling of beef and beef products. The Council adopted that Regulation under the provisions of Article 43 of the *EC Treaty* as a measure concerning the production and marketing of beef. The Commission has asked the Court to annul the Regulation for the following reasons:

> … where such an act has at [*sic*] its principal objective the protection of human health, it must be based on Article 100a of the EC Treaty, even though the act concerns a product included in Annex II of the Treaty and might make a contribution, ancillary to the principal objective, to the attainment of one or more objectives of the common agricultural policy. The Commission considers that the development of the provisions of the EC Treaty relating to public health warrant *a reconsideration* of the interpretation given by the Court in the past of the relationship between Article 43 and Article 100 of the EC Treaty.[45] (emphasis added)

46. The European Communities maintains, furthermore, that regardless of the current state of EC law on this issue, the question will be moot when the *Treaty of Amsterdam* comes into force, which could be as early as 1 January 1999. Article 152(4)(b) of the *Treaty of Amsterdam* explicitly provides that "measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health" must be adopted following the co-decision procedure provided for in Article 189b of the *EC Treaty*.

47. Strictly as a matter of *current* EC law, it would appear that a proposal to repeal or modify Directive 96/22 could be initiated under the provisions of Article 43 of the *EC Treaty*. However, I am mindful that when the *Treaty of Amsterdam* enters into force, which could be as early as 1 January 1999, veterinary and phytosanitary measures which have as their objective the protection of public health must be adopted by means of the co-decision procedure provided for in Article 189b of the *EC Treaty*. The European Communities has also stated that upon the entry into force of the *Treaty of Amsterdam*, any legislative proposal initiated under the consultation procedure provided for in Article 43 would have to be withdrawn and reinitiated under the co-decision procedure provided for in Article 189b of the *EC Treaty*.[46]

[45]Case C-269/97, Official Journal No. C 295, 27 September 1997, p. 17.

[46]Statement of the European Communities at the oral hearing.

VI. Award

48. In light of the above considerations, I determine that the reasonable period of time for the European Communities to implement the recommendations and rulings of the DSB in this case is *15 months* from the date of adoption of the Appellate Body and Panel Reports by the DSB, that is, 15 months from 13 February 1998.

Signed in the original at Geneva this 26th day of May 1998 by:

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Julio Lacarte-Muró