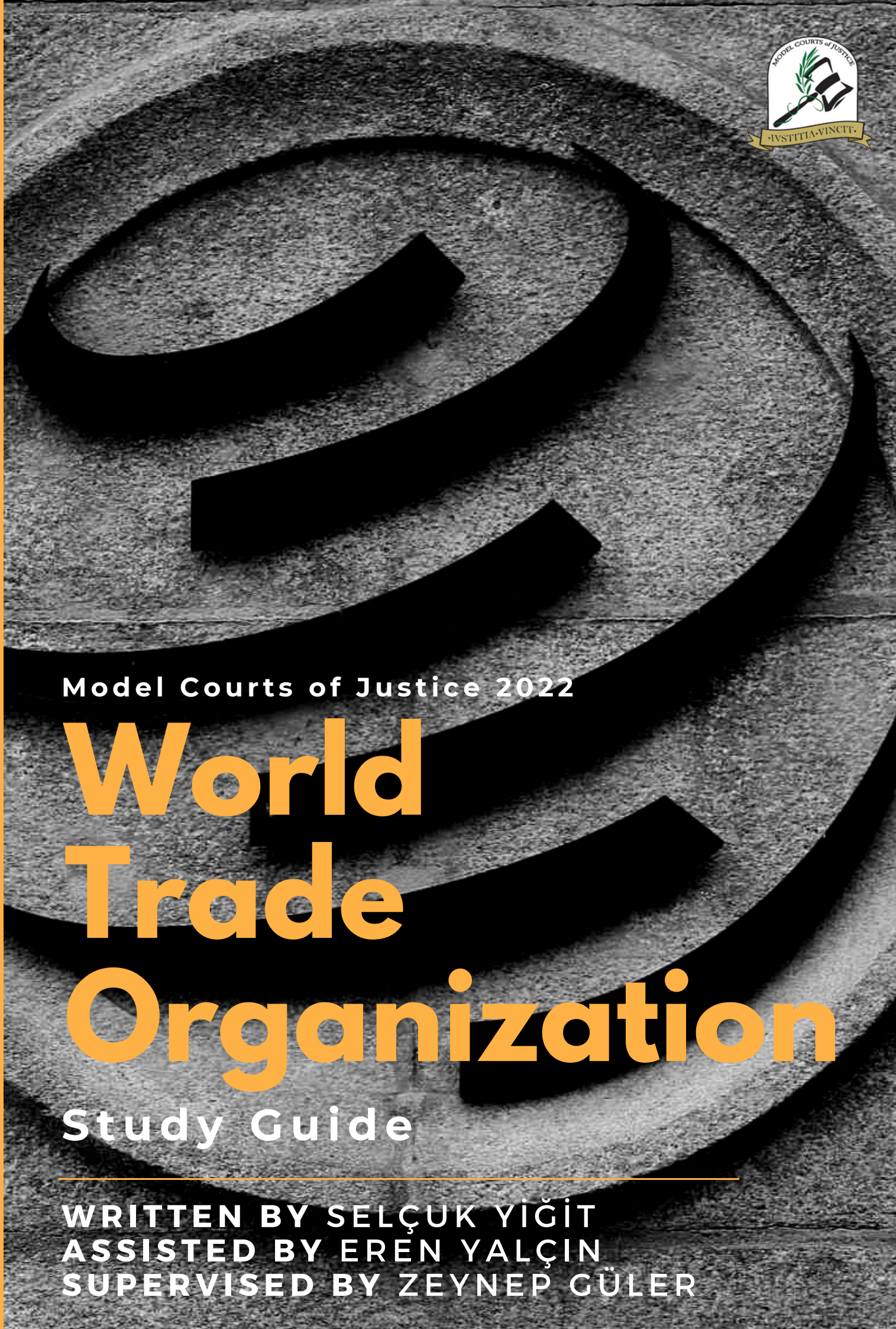

Model Courts of Justice 2022

World Trade Organization

Study Guide

WRITTEN BY SELÇUK YİĞİT
ASSISTED BY EREN YALÇIN
SUPERVISED BY ZEYNEP GÜLER

LETTER OF THE SECRETARY-GENERAL

Most Esteemed Participants,

On behalf of our academic and organization teams, once again I would like to welcome you to the Model Courts of Justice Family as The Secretary-General of the Model Courts of Justice Conference 2022! My name is Zeynep Güler, and I am a junior at Ankara University, Faculty of Law.

This time, the Panel will settle one of the most well-known and difficult business issues involving international trade law. The Beef Hormones Dispute between the United States and the European Communities is one of the most notable World Trade Organization Case for a variety of reasons. Nevertheless, the fact that it was the first test case for concerns such as non-discrimination, risk assessment, non-tariff barriers, and the precautionary principle adds to its relevance.

Mr Selçuk Yiğit, who is in charge of WTO, is a hardworking individual who joined our team this year. Before working with him, I had some reservations, but he proved to be a hard worker, a successful student, and a one-of-a-kind researcher. Working on this extraordinary case together, we put our blood, sweat, and tears. Mr Eren Yalçın, our Academic Assistant, made our task easier, and the end results are almost too fantastic to be true. I would like to show my gratitude to those amazing men.

Before attending our court sessions, I strongly advise all participants to read the Study Guide, the Handbook, the Rules of Procedure, and any other documents available on our website. If you have any queries about the conference or the committee, please do not hesitate to contact me at secretarygeneral@modelcj.org.

Sincerely,

Zeynep GÜLER

Secretary-General of Model Courts of Justice 2022

LETTER OF THE UNDER-SECRETARY-GENERAL

Distinguished Participants,

I wholeheartedly welcome you all to the 11th session of the Model Courts of Justice. My name is Selçuk Yiğit and I am a senior at Ankara University, Faculty of Law. It is my utmost pleasure to serve you as the Under-Secretary-General responsible for the World Trade Organization Dispute Settlement.

This year, the Panel will resolve one of the most famous yet challenging commercial disputes over international trade law. *The Beef Hormones Dispute* between the United States and European Communities is one of the most remarkable cases of the WTO due to numerous reasons. Yet, being the very first test case of issues such as non-discrimination, risk assessment, non-tariff barriers, or precautionary principle; particularly contributes to its significance. Hopefully, the study guide in your hands will provide you an overview of the events and navigate you through some of the landmark concepts and theories of international trade law.

Before concluding my words, I have to express my admiration for each member of the Academic Team for their meticulous work. Hats off to these people for meeting and even exceeding the academic standards of the Model CJ & cherishing its legacy. Mr Eren YALÇIN, our Academic Assistant has made a significant contribution to our work. I cannot emphasize enough how grateful I am to Secretary-General Ms Zeynep GÜLER for her dedication and cooperation throughout the process. Thanks to her, I became a part of the team and enjoyed every second of it. I also would like to thank our Director-General Ms Başak GÖKSU and her industrious Organization Team for their great effort.

I wish you all an invaluable court experience along with unforgettable memories.

Kind regards,

Selçuk YİĞİT,

Under-Secretary-General for the World Trade Organization Dispute Settlement

LETTER OF THE ACADEMIC-ASSISTANT

Esteemed Participants,

I am Eren Yalçın, a sophomore student studying in the Business Administration Department at TED University. I welcome you all to the Model Courts of Justice 2022. This year I am serving as an Academic Assistant to the Secretary-General.

My journey with the Model Courts of Justice began last year as an Academic Trainee in the World Trade Organization Committee. Although at the beginning it was a challenge for me to read legal documents as a business administration student, with the help of my fellow teammates, I had fruitful three days and I met with many great people in the conference. After witnessing the work required by this conference and how it enhances one's perspective, as well as academic skills, I decided to continue being a part of the Academic Team.

As an Academic Assistant, I was responsible for writing the introduction parts of the study guides of World Trade Organization, International Criminal Tribunal for the Former Yugoslavia. Lastly, we wrote the introduction part of United States District Court for the District of Columbia with dear Academic-Assistant, Yağmur Çiçek.

As an academic team, we have come a long way, and worked hard to provide you with an amazing three-day experience. I am sure you will enjoy reading the carefully written study guides.

Finally, I would like to express my gratitude. First, I would like to convey my respects and thanks to my sister Eylül Yalçın, who insisted that I attend the Model Courts of Justice Conference and encouraged me to be in an environment where I could improve myself. Secondly, I would like to thank to our Secretary-General Zeynep Güler for giving me the opportunity to become an Academic-Assistant. I would also like to thank all my friends in the Academic and Organization team who made this journey joyful. Finally, I would like to express my gratitude to all the valuable participants who were here and attended this magnificent conference. I wish you all a wonderful and enjoyable three days that you will never forget.

Best wishes,

Eren Yalçın,

Academic-Assistant for the Secretary-General

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I. INTRODUCTION TO THE WORLD TRADE ORGANIZATION

From the early days of the Silk Road to the formation of the modern economy, trade relations offered a sphere of conflicting interests. The way of settling such disagreements is through a neutral procedure based on a legal foundation that is accepted by all parties. To meet the aforementioned requirement, The World Trade Organization (**"WTO"**) was founded in 1995 in Geneva. Since then, it is the only global organization that deals with the rules of trade between countries. The WTO is a platform that provides the member states with the opportunity to negotiate trade issues while promoting open trade, interpreting WTO agreements, supervising national trade policies, and last but not least; settling trade disputes that may arise between states.

1. History And Development of the International Trade

Throughout the years, trade was basically known as what could be bought, what could be sold and where people can work to earn money and spend it for their own benefit. The give and take principle, exchanging, defines the nature of the trade. It comprises a variety of elements and branches such as fair trade, trade roads, trade languages, modern trade and e-commerce. In this context, the history and development of international trade will be explained in detail below.

International law; including diplomacy, protocols, treaties and norms, had to be drafted and respected since the needs and necessities arose for it. The first steps towards the establishment of the modern legal system date back to the 17th and 18th centuries. However, a genuine international legal regime did not materialize until states developed a comprehensive set of positive law based on the agreements.[1]

International trade has existed since the earliest times of civilizations yet it was not as affluent as it is today. As a result of the industrial revolution in the 19th century, a new era has begun in modern international trade.[2] Industrialization formed the basis of the new economic system and commerce. The United Kingdom and other leading European economies have gradually lowered tariff barriers on imports and led other countries to sign several bilateral

[1] *The Foundations Of The WTO* (World Trade Organization) <https://www.wto.org/english/res_e/booksp_e/historywto_01_e.pdf> accessed 19 December 2021.
[2] Huang, Y. and Tian, S., Radical Trade Reform: From Industrial to Ecological Civilization. (2020), Am J Econ Sociol, 79. <https://doi.org/10.1111/ajes.12315> accessed 16 November 2021. pp.49-72

agreements to liberalize trade. On the other hand; conflicts between the countries, uncertainties about the future such as issues related to fossil fuels, and many other signs of system failures have exposed the flaws of industrial civilization and international trade. The liberalization movement in trade continued until the outbreak of the First World War.[3]

The world got into a flap by the consequences of the First World War. Governments were in need of an improvement in the economy, but no international policy or program was capable of providing an effective global solution. For this reason, each nation had to produce its own solutions in the most appropriate way. This situation had resulted in governments setting high tariffs, instability in trade relations and discriminatory treatment. The new economic system that emerged after the Second World War led governments to regulate and develop international trade.[4]

After the Second World War, more than fifty governments decided to establish the International Trade Organization (**"ITO"**) as the agency of the United Nations to regulate the post-war international trade system. However, the ITO was never put into operation due to its unrealizable goals. Although this attempt was not successful, an important step was taken toward the liberalization of trade. As a result, this initiative caused governments to consider new solutions that are achievable to regulate trade in the international arena.[5]

a) The GATT Years

The General Agreement on Tariffs and Trade (**"GATT"**) is a legal agreement between numerous countries. The reason for the establishment of GATT was the failure of the ITO. At the Geneva Conference in 1947, negotiations resulted in GATT. It has been found to play a greater role in the development of international trade compared to the ITO.[6] GATT took the place of ITO, but the GATT Secretariat was the Interim Commission of the ITO.[7]

[3] Mitsuo Matsushita and others, *The World Trade Organization Law, Practice, And Policy* (3rd edn, Oxford University Press 2015) <https://opil.ouplaw.com/view/10.1093/law/9780199571857.001.0001/law-9780199571857> accessed 16 December 2021. p. 8.
[4] Ibid. p. 9.
[5] Ibid p. 1-3.
[6] Autar Krishen Koul, *Guide To The WTO And GATT* (2018) 6th edn, Springer Singapore, Imprint: Springer..
[7] Mitsuo Matsushita and others, *The World Trade Organization Law, Practice, And Policy* (3rd edn, Oxford University Press 2015) <https://opil.ouplaw.com/view/10.1093/law/9780199571857.001.0001/law-9780199571857> accessed 16 December 2021.

GATT was built on two major ideas. The first one is the desirability of multilateralism, and the second one is constitutionalism.[8] It was a multilateral treaty which was mainly functioning as regulating tariffs. It operated as a mechanism to lower trade barriers until the establishment of the WTO. From 1948 to 1994, GATT was perceived as a permanent establishment, but WTO took its place after 47 years.[9]

Europe and Asia are the continents where GATT first had an impact on global trade. With the addition of new members to the mandate of the GATT, the influence of the GATT expanded; as well as the help of the eight trade rounds.[10] In the first round, the parties aimed to prevent uncontrolled increases in customs duties in order to establish national trade levels. In particular, key issues such as non-discrimination and most favored nation treatment were identified in the Geneva Round.[11]

Although the establishment of the GATT was historically accidental, eight rounds of multilateral trade negotiations served as the basis of GATT. Although these rounds were made to remove tariffs and barriers to international trade, they actually made it even more complex and assertive. Despite the difficulties, all the rounds ended successfully. From the Round of Geneva 1947 to Tokyo Round 1973-79, and Uruguay Round 1986-94; each of the eight rounds had its individual developments. The most significant tours out of eight tours were the Geneva Round, Tokyo Round and Uruguay Round. [12] Below, the rounds are explained briefly.

b) From Geneva to Tokyo

In 1947, after the Second World War, 23 original contracting parties attended the original GATT Geneva Round. Approximately 45,000 tariff concessions worth 10 billion United States dollars were covered in the negotiations.[13] After that, respectively the Rounds of Annecy, Torquay, 1955-56 Geneva, Dillon, and Kennedy were completed. From the first Geneva Round to the Kennedy Round, the number of parties and countries increased from 23

[8] Ibid.
[9] 'WTO | Understanding The WTO - The GATT Years: From Havana To Marrakesh' (*Wto.org*) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm> accessed 19 December 2021.
[10] Amrita Narlikar, Martin Daunton and Robert M. Stern, 'The Oxford Handbook On The World Trade Organization' (2012).
[11] Mitsuo Matsushita and others, *The World Trade Organization Law, Practice, And Policy* (3rd edn, Oxford University Press 2015) <https://opil.ouplaw.com/view/10.1093/law/9780199571857.001.0001/law-9780199571857> accessed 16 December 2021.
[12] Ibid.
[13] Autar Krishen Koul, *Guide To The WTO And GATT* (2018) 6th edn, Springer Singapore, Imprint: Springer.

to 48. Moreover, nearly, 63100 tariff concessions worth 57.4 billion United States dollars were covered in the negotiations. The negotiations were encountered in Annecy France, Torquay England, and Geneva.[14]

After the Kennedy Round, two important Rounds were held. Firstly, the Tokyo Round 1973-79, involved 102 countries and 300 billion US dollars of trade. The most assertive round was commenced in Tokyo, and it was accomplished in Geneva.[15] Lastly, between 1986 and 1994; the Uruguay Round was initiated in Punta-del-Este with the embodies of 124 countries and 3.7 trillion US dollars of trade. The most significant round was the Round of Uruguay since most of the negotiations were made in Geneva. The most important outcomes of the Uruguay Round were the establishment of the WTO, regulation of GATT 1994 and several multilateral and plurilateral agreements.[16]

On 3 December 1999, the Millennium Round which is the ninth Round has tried to launch in Seattle during the third Ministerial Meeting of WTO. It almost failed due to various groups and NGOs. The opposition by the groups were shown during the negotiations in Seattle, and they represented a large range of concerns about the environment, human rights, labor, and protection issues of consumers. The groups and NGOs even took place in violent protests and demonstrations.[17]

In November 2001, in Doha, Qatar a new round of trade negotiations was approved within the Ministerial Conference, and it was followed by the Summit of Cancun on 13 September 2003, and Hong Kong, China in 2005. The Doha Ministerial Conference got transformed into the Doha Development Agenda (**"DDA"**) and it was scheduled to last up to 1 January 2005. After a long run, in late 2008, the agenda branched over disparate items over twenty, but many advancements were made in agriculture and non-agriculture market access negotiations.[18]

In 1973-79, during the Tokyo Round period, a comprehensive package emerged and it was adopted by ninety-nine countries. Plus, in the Round of Tokyo, the following major agreements were reached at the negotiations to combat non-tariff measures.[19]

[14] Autar Krishen Koul, *Guide To The WTO And GATT* (2018) 6th edn, Springer Singapore, Imprint: Springer.
[15] Ibid.
[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] Ibid.

1. Agreement on technical barriers to trade;
2. Agreement on government procurements;
3. Agreement on interpretation and application of *Articles VI, XVI and XXIII*; (Countervailing duties and subsidies)
4. Agreement regarding Bovine Meat;
5. International Dairy Agreement;
6. Agreement on implementation of *Article VII* (customs valuation);
7. Agreement on import licensing procedures;
8. Agreement on trade in civil aircraft;
9. Agreement on implementation of *Article VI* (anti-dumping); and
10. Framework agreements relating to
    i. Differential and more favorable treatment, reciprocity, and fuller participation

    of developing countries;
    ii. Declaration on trade measures taken for balance-of-payments purposes;
    iii. Safeguard action for development purposes; and
    iv. Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance.

The negotiations of Agreements brought GATT to the fulcrum of history for two reasons. The GATT acknowledged these Agreements as sideways Agreements and secondly, the Agreements and codes could not implement automatically, solely obligated to members who signed and ratified them.[20]

c) The Uruguay Round Negotiations

Between 1986 and 1994 the Uruguay Round of Tariff Negotiations were held because of the partial failures that have made on earlier trade rounds, including Tokyo Round since the non-tariff protectionist measures were not addressed completely.[21] In 1982, at the ministerial meeting of the GATT members in Geneva, the formation of the Uruguay Round came to the fore. At first, it seemed to fail but, in the end, 123 countries took a part in it, and the Uruguay

[20] Autar Krishen Koul, *Guide To The WTO And GATT* (2018) 6th edn, Springer Singapore, Imprint: Springer.
[21] Ibid.

Round brought a huge reform to the trading system in the world.[22] Discussions covered the trading system in general, and a wide range of areas, particularly privatization and trading intellectual property. The Round contained almost all trade branches, from banking to telecommunications, from toothbrushes to boats.[23] The difficulty of agreeing on a complete package covering nearly all of the current trade issues has led to the conclusion for some that such a negotiation will never happen again. Probably, the Uruguay Round was the largest negotiation in history.[24]

Before the Uruguay Round, the GATT functioned as a forum to enhance trade liberalization. The biggest problem faced by the GATT regime was the lack of consistency among the large number of agreements.[25] As a result, it has been believed that the GATT system was not sustainable, and the world needed a new mechanism to regulate international trade.[26]

However, the idea of establishing a new trade organization was not on the table. There were uncertainties about how the organization would approach certain issues and how they would relate to existing provisions of the GATT regime.[27] The three main concerns were: decision making, membership system, and dispute resolution procedures. These matters were addressed with the last agreement, by establishing the WTO. The establishment of the WTO at the conclusion stage of the negotiations can be shown as the most important achievement of the tour.[28]

2. Function and Structure of the World Trade Organization

World Trade Organization is an international and legal organization that deals with the rules of trade between countries. On 1 January 1995, the WTO was founded in Geneva, Switzerland, by the negotiations of the Uruguay Round and was administered by its member governments. Liberalization of trade has begun with the GATT and still is made by the organization, WTO. Members negotiate trade agreements in forums and solve trade disputes in WTO.[29] All major

[22] 'WTO | Understanding The WTO - The Uruguay Round' (*Wto.org*) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm> accessed 28 January 2022.
[23] Ibid.
[24] Ibid.
[25] Amrita Narlikar, *The Oxford Handbook On The World Trade Organization* (Oxford University Press 2014).
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] *Understanding The WTO* (5th edn, World Trade Organization Information and External Relations Division 2015) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf> accessed 7 November 2021.

decisions are made by the membership, either by ministers or by their ambassadors or delegates.[30] Since 29 July 2016, WTO has 164 members.[31]

Figure I *- WTO Public Forum, 2021*[32]

The main objective of the WTO is to raise commercial standards, originate jobs, and improve the lives of people. Some other goals of the WTO are overseeing WTO agreements, maintaining open trade, settling trade-related disputes, supervising national trade policies and cooperating with international organizations involved in global economic policymaking. Moreover, it provides a forum for members to negotiate trade deals and resolve trade issues they face.[33] Intellectual property, goods, and services are covered by the WTO agreements. These agreements are called as '*Trade rules of the WTO'*. They deal with industrial standards,

[30] 'WTO | What Is The WTO? - What We Do' (*Wto.org*) <https://www.wto.org/english/thewto_e/whatis_e/what_we_do_e.htm> accessed 6 November 2021.
[31] 'WTO Members And Observers' (*Wto.org*) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 6 November 2021.
[32] WTO/Jay Louvion
[33] 'WTO | What Is The WTO? - Who We Are' (*Wto.org*) <https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm> accessed 6 November 2021.

banking, government purchases, food safety, and more.[34] These agreements also establish the procedures for settling disputes.

WTO collaborates with the International Momentary Fund, the World Bank to advance the coherency of the policymaking of the global economy. Also, the WTO cooperates with United Nations (**"UN"**), Food and Agricultural Organization (**"FAO"**), and the World Health Organization (**"WHO"**).[35]

a) General Council

One of the most important decision-making bodies is the General Council which maintains and to carries out the functions of WTO. Generally, ambassadors and their equivalents are the representatives of the member governments, and they have the right to act on behalf of the ministerial conference.[36] The members of the General Council are responsible to make decisions in the ministerial conferences for the WTO. The General Council meets within three different capacities. All the three consist of all WTO Members.[37]

i. Dispute Settlement Body
ii. Trade Policy Review Body
iii. General Council (all matters not related to disputes or trade policy)

Bodies that report to the General Council:

i. The Council for Trade in Goods (Goods Council)
ii. The Council for Trade in Services (Services Council)
iii. The Council for Trade-Related Aspects of IP Rights (TRIPS Council)

[34] 'WTO | Understanding The WTO - Principles Of The Trading System' (*Wto.org*) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm> accessed 6 November 2021.
[35] 'WTO | The WTO And The United Nations' (*Wto.org*) <https://www.wto.org/english/thewto_e/coher_e/wto_un_e.htm> accessed 6 November 2021.
[36] 'WTO | General Council' (*Wto.org*) <https://www.wto.org/english/thewto_e/gcounc_e/gcounc_e.htm> accessed 7 November 2021.
[37] 'Guides: International Trade Law Research Guide: WTO Organization & Decision Making' (*Guides.ll.georgetown.edu*, 2021) <https://guides.ll.georgetown.edu/c.php?g=363556&p=4154931> accessed 7 November 2021.

Figure II *- Inside General Council of the WTO*[38]

b) Ministerial Conference

Ministerial Conference and General Council are the two main administrative bodies of the WTO, but the Ministerial Conference comes forward as the prime authority. Ministerial Conference is the ultimate decision-making body in the WTO. Since the WTO established and published Article IV of the Agreement Establishing, the Ministerial Conference is responsible for meeting every two years. It includes all the WTO members, and members are represented by trade ministers. They may make decisions within the respect of WTO multilateral agreements.[39]

[38] WTO/Jay Louvion
[39] 'WTO | Ministerial Conferences' (*Wto.org*) <https://www.wto.org/english/thewto_e/minist_e/minist_e.htm> accessed 7 November 2021.

c) Dispute Settlement Body:

The Dispute Settlement Body (**"DSB"**) meets to resolve disputes between the WTO members.[40] During the Uruguay Round, the current dispute settlement system was founded as a part of the WTO agreement. The aim of the dispute settlement system is to provide an efficient, reliable, and fast rule-oriented system to address disputes related to the applications of provisions of the WTO. [41]

Consultations are the first step of the WTO dispute resolution system. The aim of this is to reach an agreement and solution between both sides. Before the panel stage, the Members negotiate with each other to solve the dispute within 60 days. If they fail to resolve the dispute, the complainant party has the right to submit a request to DSB, which constitutes a panel to adjudicate the dispute.[42]

The term "complainant" or "complaining party" refer to the Member who brings the dispute to the DSB. The "respondent" or "defendant" terms are used for the opposing party. [43]

[40] 'WTO | Dispute Settlement Gateway' (*Wto.org*) <https://www.wto.org/english/tratop_e/dispu_e/dispu_body_e.htm> accessed 14 November 2021.
[41] 'Title IV - Trade and Trade Related Matters / ARTICLE X.24 Choice Of Forum' (*Trade.ec.europa.eu*, 2019) <https://trade.ec.europa.eu/doclib/docs/2019/november/tradoc_158465.pdf> accessed 28 November 2021.
[42] *Legal Aspects of International Trade* (The International Bank for Reconstruction and Development / The World Bank 2001).
[43] 'A Handbook on The WTO Dispute Settlement System: World Trade Organization: Free Download, Borrow, And Streaming: Internet Archive' (*Internet Archive*, 2004) <https://archive.org/details/handbookonwtodis0000worl/page/9/mode/1up?view=theater> accessed 14 November 2021.

There are several stages a dispute can go through in the WTO Dispute Resolution. At all the stages, countries are encouraged to consult each other in order to settle the dispute *'out of court'*. The panel process is illustrated below; some specified times are maximums, some are minimums, some binding, some not. [44]

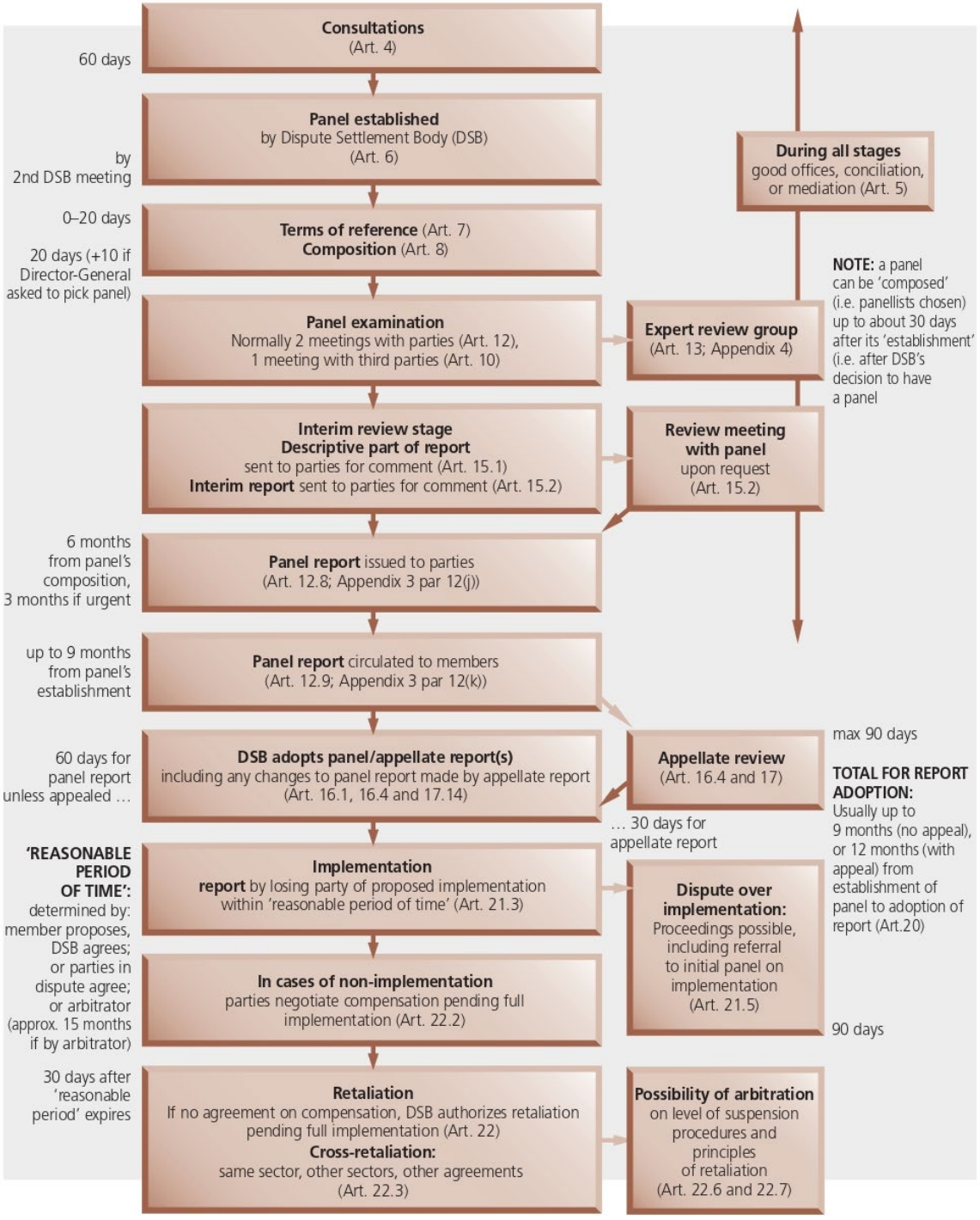

Figure III *- The Panel Process in the WTO*[45]

[44] (Wto.org, 2022) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap3_e.pdf> accessed 29 March 2022.
[45] Ibid.

i. Consultation Stage

The consultation stage is the first step of the formal dispute settlement in accordance with Article 4 of the Dispute Settlement Understanding (**"DSU"**). Before proceeding to the panel stage, the two parties, the defendant, and the complainant try to resolve it among themselves in a manner that is consistent with Article 3.7 of the DSU. Parties have the opportunity to discuss the issue and come up with a solution without litigation for 60 days, pursuant to Article 4.5 of the DSU. If they fail to find a middle ground, the complainant has the right to request to establish a panel.[46] Possible misunderstandings or disagreements could happen between members, so the parties are given a chance in the consultation phase to clarify the claims and matter of the dispute.

ii. Panel Procedure

After the consultation process, if the matter is still not resolved, the request for the establishment of a panel could be made. Panels are responsible for adjudicating disputes between members. The panel is generally composed of three panelists and exceptionally five experts. In the WTO, there is no everlasting panel. For each dispute, WTO establishes a new and different panel. Secretariat makes the appointments of the panelists.[47] Panelists cannot participate as representatives of any organization or government. They are obliged to serve independently.

For a satisfactory solution, a panel should deliberate with the parties of the dispute and hear them fairly. Panels have the right to receive technical information and advice from individuals, bodies or organizations. Before asking for information or advice from individuals, bodies, or organizations within the jurisdiction of a member, the authorities of the Members should be informed. Furthermore, if the panel asks anything to get information, the Member should respond to the question urgently.[48]

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[46] 'WTO | Disputes - Dispute Settlement CBT - The Process - Stages in A Typical WTO Dispute Settlement Case - Consultations - Page 1' (*Wto.org*) <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s2p1_e.htm> accessed 15 November 2021.

[47] 'A Handbook on The WTO Dispute Settlement System: World Trade Organization: Free Download, Borrow, And Streaming: Internet Archive' (*Internet Archive*, 2004) <https://archive.org/details/handbookonwtodis0000worl/page/9/mode/1up?view=theater> accessed 15 November 2021.

[48] 'Understanding On Rules and Procedures Governing the Settlement of Disputes / Composition of Panels' (*Wto.org*) <https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf> accessed 17 November 2021.

The subject of the review of the panel covers only the matters specified in the request made by the complaining party. The panel is only responsible for investigating the dispute in scope of the claims in the submission of the complainant. [49] Parties need to base their legal arguments on factual grounds and evidence. Evaluation of the evidence presented by the parties is at the discretion of the panel. The panel is free to accept or reject the evidence presented by the parties.[50]

Other interested members who did not participate in the consultations are also entitled to participate in the panel procedure. Third parties who consider participating in the panel procedure must inform the DSB of their substantial interest in the dispute.[51]

In the panel, the parties have no control over the duration of the procedure. This is the difference between panel procedure and arbitration procedure. All the procedure is done in accordance with the provisions of the DSU.[52]

The panel proceeds with oral hearings. The parties, who have given their opinions on the case before, make oral presentations based on their written statements.[53] After the panel listens to the oral statements made by the parties, it prepares an interim report containing the findings related to the issue.[54] The interim report is a confidential document and is not shared with the public. There is an interim review phase to inform the parties about the possible resolution process of the dispute.[55]

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[49] 'WTO | Disputes - Dispute Settlement CBT - The Process - Stages in A Typical WTO Dispute Settlement Case - The Panel Stage - Page 1' (*Wto.org*) <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p1_e.htm> accessed 28 January 2022.

[50] Mitsuo Matsushita and others, *The World Trade Organization Law, Practice, And Policy* (3rd edn, Oxford University Press 2015) <https://opil.ouplaw.com/view/10.1093/law/9780199571857.001.0001/law-9780199571857> accessed 28 January 2022.

[51] 'WTO | Disputes - Dispute Settlement CBT - The Process - Stages in A Typical WTO Dispute Settlement Case - Flow Chart of The Dispute Settlement Process - Page 1' (*Wto.org*) <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm#:~:text=There%20are%20three%20main%20stages,by%20the%20losing%20party%20to> accessed 28 January 2022.

[52] Kim Van der Borght, *The Review of The WTO Understanding on Dispute Settlement: Some Reflections on The Current Debate* (American University International Law 1999) <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1332&context=auilr> accessed 28 January 2022.

[53] Palmeter D, Mavroidis PC and Meagher N, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (3rd ednCambridge University Press 2022)

[54] 'WTO | Disputes - Dispute Settlement CBT - The Process - Stages In A Typical WTO Dispute Settlement Case - Flow Chart Of The Dispute Settlement Process - Page 1' (*Wto.org*) <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm#:~:text=There%20are%20three%20main%20stages,by%20the%20losing%20party%20to> accessed 28 January 2022.

[55] Ibid.

After the oral hearings, the panel examines the claims and comments made by the third parties and as a result, it concludes the process with an elaborate final report. The interim report serves as a guide for the main report. Finally, the panel presents the final report to DSB.[56]

d) Appellate Body

The Appellate Body was founded by the WTO. It was one of the greatest innovations that have been made from the GATT years to the establishment of the WTO. Panels and Appellate Body meets in Geneva, where the Appellate Body Secretariat and WTO Secretariat headquarters are situated together.[57]

The appeals from panel cases are examined by the Appellate Body. The Appellate Body either upholds, modifies or reverses the legal findings and conclusions of a panel report. According to Article 17 of the DSU, seven panelists are elected for the Appellate Body who have proven their competence in international trade, legal proficiency, and other areas that are required. They cannot be affiliated with any government.[58] The members of the Appellate Body shall serve in rotation. The rotation shall be determined in the working procedures of the Appellate Body. According to criteria adopted by the General Council based on the recommendations of the Budget, Finance and Management Committee, the WTO budget covers the expenses, including travel and subsistence allowance, of members serving in the Appellate Body.[59]

All members serving in the Appellate Body shall be present at all times and short notice for the conflict resolution proceedings & other relevant activities of the WTO. As a rule, proceedings cannot exceed 60 days; from the date on which one of the parties to the dispute formally submit its request on appeal until the date on which the Appellate Body circulates its report. If the Appellate Body is unable to provide its report within 60 days, a letter stating the

[56] Ibid.
[57] 'A Handbook on The WTO Dispute Settlement System: World Trade Organization: Free Download, Borrow, And Streaming: Internet Archive' (*Internet Archive*, 2004) <https://archive.org/details/handbookonwtodis0000worl/page/9/mode/1up?view=theater> accessed 17 November 2021.
[58] 'WTO | Dispute Settlement - Appellate Body Members, Biography' (*Wto.org*) <https://www.wto.org/english/tratop_e/dispu_e/ab_members_bio_e.htm> accessed 17 November 2021.
[59] 'Understanding On Rules and Procedures Governing the Settlement of Disputes / Appellate Review' (*Wto.org*) <https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf> accessed 17 November 2021.

reason for the delay and the approximate time will be submitted to inform DSB. No case can exceed 90 days from the date when the notice of appeal was filed.[60]

e) The Trade Policy Review Mechanism

The Trade Policy Review Mechanism (**"TPRM"**) was introduced to the GATT in 1989, following the Mid-Term Review of the Uruguay Round. Trade policy reviews were limited to trade in goods before 1995. Since 1 January 1995, in accordance with the WTO rules, the reviews have started to cover new areas such as trade in services and intellectual property rights.[61] The aim of the TPRM is;

> *'Contribute to improved adherence by all Members to rules, disciplines, and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members'.*[62]

f) Committees

The General Council of the WTO is directed by the Council for Goods, the Council for Services, and the Council for Trade-related Intellectual Property Rights. The three main councils are backed up by several committees whose job is to offer frequent reports on how each WTO Agreement is working. Other committees and working groups, such as the Committee on Trade and Environment, the Committee on Trade and Development, the Working Groups on Trade, Debt and Finance, and the Working Group on Trade and Technology Transfer, report to the General Council in addition to the three major councils.[63]

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[60] 'WTO | Disputes - Dispute Settlement CBT - The Process - Stages in A Typical WTO Dispute Settlement Case - Appellate Review - Page 4' (Wto.org, 2022) <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s5p4_e.htm#:~:text=Appellate%20review%20proceedings%20must%20generally,notice%20of%20appeal%20was%20filed.> accessed 29 March 2022.
[61] 'WTO - Trade Policy Reviews -The Trade Policy Review Mechanism (TPRM)' (*Wto.org*) <https://www.wto.org/english/tratop_e/tpr_e/tprm_e.htm> accessed 16 December 2021.
[62] Ibid.
[63] 'WTO | Understanding the WTO - Committees' (*Wto.org*) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev2_e.htm> accessed 16 December 2021.

II. The Case: United States v. European Communities

Decision of the European Communities (**"EC"**) to ban hormone-treated meat entailed a long-standing trade dispute between the United Stated (**"US"**) and the EC. Despite hard efforts to reconcile parties, a series of dispute settlement proceedings and decisions by the World Trade Organization, disagreement remains unresolved.[64] Since the consensus was not reached between parties over the safety of hormone-treated beef, EC continues to ban imports concerning hormone-treated beef, at cost of withstanding US retaliation.

1. Introduction to the Beef Hormones Disputes

'Ut quod ali cibus est aliisfuat acre venenum.'

(What is food to one, is to others bitter poison.) [65]

-Lucretius

In the second half of the twentieth century, cattle farmers in US, Europe and other places started to treat animals with hormones in order to get bigger and more saleable animals for slaughter. After revealing this new practice, it resulted in a public protest in Europe in the 1970s and 1980s. The main cause of that public objection was due to European press suggestions which associate serious health risks with hormone-treated beef. As a response, the European Commission (Commission) banned the use of hormones which concerns growth purposes in livestock — along with imports beginning in 1989.[66]

Cattle ranchers in the US claimed that the Commission lacked enough evidence to justify its ban on hormone-treated beef. Numerous tests were conducted by the US Food and Drug Administration (**"FDA"**), EC scientists and others yet certain evidence which indicates that regulated dosages of hormones were damaging to humans could not be found. However, US Government could not achieve to convince EC to change its aspect towards the issue at hand, despite ongoing efforts to remove the ban through bilateral negotiations, the WTO dispute settlement procedures and even trade sanctions as retaliation. By placing higher import duties

[64] Johnson, R., 'The U.S.-EU Beef Hormone Dispute. (2015) Congressional Research Service' 7-5700, p. 2.
[65] Lisa K Seilheimer, 'The SPS Agreements Applied: The WTO Hormone Beef Case' (1998) 4 Environmental Law,p. 537.
[66] Moss, David A. and Nick Bartlett., 'Note on WTO Disputes: Five Major Cases' (2002) Harvard Business School Background Note 703-016, p.5.

on EC products, the US has suspended trade concessions with the EC. In 1989, US came in with its first retaliatory step which imposed tariffs of 100% *ad valorem*[67] duty on selected food products and lasted until 1996.[68]

The US formally submitted its case to the WTO, alleging that the EC ban on hormone-treated beef violated the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (**"SPS Agreement"**), in 1996. The recently implemented SPS Agreement (entered into force in 1995) was designed to function as a prevention mechanism to members who misuse health regulations for protectionist purposes related to the domestic market.[69] For instance, an arbitrary regulation on health that restricts imports and is not scientifically justifiable would be deemed a violation of the SPS Agreement. Import regulations; also known as "non-tariff barriers", because they imitate the trade-restrictive function of tariffs, are frequently intended to safeguard public health while at other times, being simply disguised barriers to trade.[70]

The U.S. argued that after years of scientific research by multiple organizations, no evidence had linked to any harmful effects to hormone-treated beef. EC provided a counter-argument as a rebuttal by arguing '*there was not enough scientific evidence to conclude that these hormones, particularly when used by farmers without any official control, did not pose a risk to human health.'*.[71] EC attempted to justify its cautious position towards hormone-treated beef by arguing that since hormones were known to be carcinogenic in certain doses, the uncertainty lies in how and under what conditions this harmful effect happens. EC also emphasized that social and political settings should be taken into account when evaluating health risks.[72]

The US and EC have tried to settle the dispute through a series of WTO dispute resolution consultations, settlement panels, arbitration proceedings, and formal appeals throughout the years. The EC commissioned research and reviews to examine the scientific

[67] Ad valorem is a Latin phrase which means "according to value." Hence; all ad valorem taxes are calculated based on the assessed value of the taxed item, including import duty taxes on goods from abroad.
[68] Ibid.
[69] Moss, David A. and Nick Bartlett., 'Note on WTO Disputes: Five Major Cases' (2002). Harvard Business School Background Note 703-016, p. 6.
[70] Kastner, J. and Pawsey, R., 'Harmonising sanitary measures and resolving trade disputes through the WTO–SPS framework. Part I: a case study of the US–EU hormone-treated beef dispute.' (2002). Food Control, 13(1), pp.49-55.
[71] Taylor C, Walsh M, and Lee C., The U.S./EU Beef Controversy and A Proposed Framework for Resolving Standards Disputes in International Trade. (2003) 37 Journal of Consumer Affairs, p.63
[72] Moss, David A. and Nick Bartlett., 'Note on WTO Disputes: Five Major Cases' (2002). Harvard Business School Background Note 703-016, p. 6.

foundation for its hormone-treated beef ban. Following each of these assessments, the EC reaffirmed its position that, based on available scientific evidence, hormone-treated meat poses possible dangers to human health. The EC maintained that it has met its WTO commitments and accused the US for maintaining excessive import duties on EC goods. The US disputed whether the EC has performed an appropriate risk assessment to support its position, claiming that there is a clear worldwide scientific consensus that consuming hormone-treated meat is safe for consumers.[73]

a) Background

Between 1945 and 1995, the volume of agricultural products that traded internationally rose significantly by 800%. The global trade of food provides consumers with a wide range of food products. On the other hand, it might affect public health by transporting diseases. [74]

While food production and distribution practices develop to meet rapidly diversifying consumer demand and global competition, new pathogens and microbes are emerging. Resilient bacteria such as Salmonella, Escherichia coli, Listeria monocytogenes and Cyclospora cayetanensis infiltrate themselves into fruit, vegetables, poultry, beef and dairy products as they circulate around the world, causing "trade-related infections".[75]

Salmonella, for example, is one of the well-known and most common foodborne infections. Outbreaks of salmonellosis have been linked to growing worldwide trade. An outbreak of Salmonella spanned 17 US states and Finland, in 1995. After investigations, consequently, the virus was traced to a distributor in the Netherlands who had obtained alfalfa seeds from Italy, Hungary and Pakistan. Investigators were unable to ascertain which source was involved in these outbreaks.[76]

A common strain of Salmonella enterica sickened at least 78 people in 13 states in the US in 1999. Investigators traced the mangoes which caused the outbreak back to a farm in Brazil. Surprisingly, they discovered that no Europeans who had eaten mangoes from the same farm had become ill. According to investigators, the microbe was likely absorbed during a hot

[73] Johnson, R., 'The U.S.-EU Beef Hormone Dispute. (2015) Congressional Research Service' 7-5700, p. 2.
[74] Kastner, J. and Pawsey, R., 'Harmonising sanitary measures and resolving trade disputes through the WTO–SPS framework. Part I: a case study of the US–EU hormone-treated beef dispute.' (2002). Food Control, 13(1), pp.49-55.
[75] Jill R Hodges and Ann Marie Kimball, 'The Global Diet: Trade and Novel Infections' (2005) 1 Globalization and Health, pp. 1-2.
[76] Ibid.

water treatment to repel fruit flies in mangoes destined for the US. The treatment was required to meet US standards prohibiting the importation of products infected with the Mediterranean fruit fly – which the Europeans did not apply.[77]

International efforts to manage trans-border disease transmission have become increasingly vital as the global exchange of agricultural goods and the associated health concerns have increased.[78] As a result of this situation, national governments and the international community urged to institute protective health regulations.

The WTO agreements are the primary mechanisms for addressing health issues concerning internationally traded goods. Technical Barriers to Trade (**"TBT"**) and SPS are the agreements that deal with processes and standards for traded products. By applying mutual standards to all trading partners, both agreements aim to provide predictability and prevent discrimination among trading countries.[79]

The WTO adjudicates in disputes according to the SPS Agreement and it requires members who violate the SPS Agreement to modify or withdraw their non-compliant sanitary measures. While the WTO cannot force a country to change its measures, it can allow countries that have been harmed to retaliate for the non-compliant measures. In such cases the WTO authorizes the aggrieved member to revoke previously granted trade concessions to the violating country, usually by raising tariff rates on the exports of the country.[80] Beef hormones dispute is one of the most remarkable cases of WTO due to several reasons. Yet, being the very first test case of the WTO-SPS Framework particularly contributes to its significance.

i. General Conditions and Policies in Europe

Hormones were widely used as growth promoters in husbandry in Europe until the 1980s. However, a series of press suggestions and incidents prompted the EC to prohibit their usage by January 1989. There were reports of illicit use of melengestrol acetate in veal production in the 1970s and in Italy, in 1980, hormone abnormalities in teenagers were thought

[77] Ibid.
[78] Ibid.
[79] Jill R Hodges and Ann Marie Kimball, 'The Global Diet: Trade and Novel Infections' (2005) 1 Globalization and Health, p. 5.
[80] Kastner, J. and Pawsey, R., 'Harmonising sanitary measures and resolving trade disputes through the WTO–SPS framework. Part I: a case study of the US–EU hormone-treated beef dispute.' (2002). Food Control, 13(1), pp.49-55.

to be caused by hormone-treated veal consumption. The EC banned the melengestrol, in July 1981.[81]

Table 1 *- Five hormones at issue before the EC* [82]

Growth Promoting Hormone	Natural or Synthetic
Estrogen	Natural
Testosterone	Natural
Progesterone	Natural
Trenbolone	Synthetic
Zeranol	Synthetic

The EC also considered banning five additional hormones at the time, three natural and two synthetic (see Table 1), but decided against it due to concerns from France and the United Kingdom, both of which have farmers who use them. [83]

The European Parliament (Parliament), where European consumer and environmental groups enjoy considerable influence, became the center of focus of the opposition to hormone use within the EC. When the Commission proposed allowing the use of the three natural hormones for fattening purposes under strict requirements in 1985, the Parliament vehemently objected, and the Commission backed down. The Parliament also adamantly opposed to a compromise that would have allowed member states to maintain their own regulations for at least some of the contested hormones. Instead, they insisted on unified standards.[84]

The EC was divided as it approached a decision on the five hormones in question. The Netherlands, Greece, and Italy were in favor of a total prohibition. Since they had already banned the use of all growth hormones, they wanted the EC to do likewise to ensure a unified meat market and preserve the economic interests of their inefficient beef hormones. While Germany allowed its farmers to utilize hormones, the country's powerful green movement led it to join the anti-hormone camp. Britain and Ireland, for their part, advocated for the continued

[81] Ibid.
[82] Ibid.
[83] Ibid.
[84] David Vogel, *Trading Up: Consumer and Environmental Regulation in A Global Economy* (1995), Harvard University Press. pp. 150-189.

use of all five hormones. The powerful farming lobby in the United Kingdom claimed that Trenbolone and Zeranol were required for the management of young beef bulls, while farming interests in Ireland feared that a prohibition would only lead to the creation of a black market in hormones. A complete ban on hormones was also opposed by France and Denmark.[85]

However, as anti-hormone sentiment grew in Europe, some countries that allowed hormones use began to worry that their continuing to use hormones would place their producers at a competitive disadvantage in comparison to the rest of the community, as consumers might turn away from their '*tainted'* beef and veal.[86]

In July 1981 the EC set up an expert group (the Lamming group) to determine whether or not these hormones pose harmful effects on human beings. The Lamming group stated in their report that these three natural hormones '*did not present any harmful effects to the health of the consumer then used under the appropriate conditions as growth promoters in farm animals'*.[87] Subsequently, the Lamming group concluded that two other artificial hormones were also safe. Nevertheless, the EC expanded the 1981 ban to include the five additional hormones in 1985, which officially entered into force in 1989. Before the ban, the use of hormones in meat production was regulated differently in each of the member states of the EC. Within Europe, this inconsistency itself was also causing trade barriers. As a result, the 1989 EC hormone ban served to harmonize them while also defining trade policy of the EC to the rest of the world.[88]

ii. Administration of Hormones in Meat Production

In the US and other meat-exporting countries, growth-promoting hormones are commonly practiced in cattle production. Hormones have been permitted for usage in the US since the 1950s. Hormones are used by cattle ranchers not only because they help animals to grow larger and faster on less feed and other inputs, lowering production costs, but also because they generate a leaner carcass, which is more in line with consumer demands for low-fat, low-cholesterol diets.[89] According to studies, animals treated with the disputed hormones grow eight

[85] Ibid.
[86] Ibid.
[87] EC Measures Concerning Meat and Meat Products (Hormones), [1997] WTO DSB Report, para.II.28
[88] Kastner, J. and Pawsey, R., 'Harmonising sanitary measures and resolving trade disputes through the WTO–SPS framework. Part I: a case study of the US–EU hormone-treated beef dispute.' (2002). Food Control, 13(1), pp.49-55.
[89] Johnson, R., 'The U.S.-EU Beef Hormone Dispute. (2015) Congressional Research Service' 7-5700. pp. 1-2.

to twenty-five per cent faster and require less food in the growing process, which reduce the production cost.[90] Additionally, as stated by Le Conseil National de la Jeunesse et de l'Avenir, young farmers union of France, these hormones cause a ten to twenty % increase in carcass weights.[91]

Substances that either naturally occur in the body of the a nimal or mimic naturally occurring compounds are classified as growth-promoting hormones. Three natural hormones; estradiol, progesterone, and testosterone, as well as zeranol and trenbolone acetate (two synthetic hormones), can be implanted in the ear of the animal. Melengestrol acetate, a feed additive that can help with weight increase and feed efficiency, has been approved by the US. However, not all hormone combinations are approved for usage in all cattle classes. The FDA and the US Department of Agriculture (**"USDA"**) work together to regulate animal growth promoters.[92]

The aforementioned hormones in beef from an implanted animal, according to both of these agencies, have no physiological significance for humans. Moreover, in the US, about 30 animal growth-promoting products are available and marketed.[93]

Other countries that have legalized the use of growth-promoting hormones in beef production, in addition to the US, are Canada, Australia, New Zealand, South Africa, Mexico, Chile, and Japan.

b) The EC Beef Hormone Ban

In the early 1980s, the EC Council adopted Directive 81/602 to prohibit the production and importing of meat from animals treated with growth hormones.[94] This restriction limited the use of natural hormones for therapeutic purposes, prohibited the use of synthetic hormones, and banned the importation of animals and meat from animals that have been treated with hormones. The ban did not enter into force until January 1, 1989. Meat and meat products from

[90] Lisa K Seilheimer, 'The SPS Agreements Applied: The WTO Hormone Beef Case' (1998) 4 Environmental Law,p. 542.
[91] Lisa K Seilheimer, 'The SPS Agreements Applied: The WTO Hormone Beef Case' (1998) 4 Environmental Law,p. 543.
[92] Johnson, R., 'The U.S.-EU Beef Hormone Dispute. (2015) Congressional Research Service' 7-5700, p. 2.
[93] Ibid.
[94] William A. Kerr and Jill E. Hobbs, 'The North American–European Union Dispute Over Beef Produced Using Growth Hormones: A Major Test for The New International Trade Regime' (2002) 25 The World Economy, p. 289.

animals treated with six growth promoters that allowed for use in the US, including estradiol, testosterone, progesterone, zeranol, trenbolone acetate, and melengestrol acetate, were initially prohibited in the scope of the ban.[95]

The ban reflects the approach of the EC to food safety policy, termed as the precautionary principle, which encourages implementing protective measures before complete scientific evidence of a risk of harm. The ban restricts the trade of meat and meat products from countries that use these growth promoters on a regular basis.[96]

The Commission defended the restriction by claiming that it is a necessity to preserve consumer health and safety. This viewpoint arose, in part, as a result of consumer concerns in the 1970s over the illicit use of melengestrol in veal production in France, which was related to complaints of hormonal anomalies in Italian adolescents. [97] This situation aroused concerns about the potential negative health effects of administrating hormones in animal production, contributing to a climate of suspicion in Europe.[98]

During the 1990s, outbreaks of bovine spongiform encephalopathy (BSE), a lethal brain disorder known as 'mad cow disease' in British cattle herds affected EC consumer meat demand once again. Scientific evidence of a relationship between BSE and Creutzfeldt-Jakob disease (CJD), a human form of BSE, increased consumer skepticism about meat safety. The ongoing discovery of BSE-infected cattle in some of the European countries has exacerbated an adverse political, economic, and social climate for resolving the meat hormone dispute. Despite the fact that BSE has nothing to do with hormones, many European beef farmers were fearful of doing anything that would give customers an additional reason not to buy meat, such as utilizing hormones. Consumer reactions to the introduction of transgenic plants and other forms of biotechnology into the food chain have raised many of the same kinds of concerns. [99]

Political and economic factors also have played a crucial role in the decision of the Commission to keep the hormone-treated beef ban in place. The opposition against hormone-treated meat continued unabated, both producer and consumer interest groups in the EC put

[95] Johnson, R., 'The U.S.-EU Beef Hormone Dispute. (2015) Congressional Research Service' 7-5700, p. 2.
[96] Ibid.
[97] Kastner, J. and Pawsey, R., 'Harmonising sanitary measures and resolving trade disputes through the WTO–SPS framework. Part I: a case study of the US–EU hormone-treated beef dispute.' (2002). Food Control, 13(1), pp.49-55.
[98] Johnson, R., 'The U.S.-EU Beef Hormone Dispute. (2015) Congressional Research Service' 7-5700, pp. 3-4.
[99] İbid.

pressure on the EC trade policy-makers to stick to their position banning hormone-treated beef.[100]

Many European cattle producers supported the import ban of the EU in part since they were worried about competition caused by the cheaper imported beef from the United States and other beef exporting countries. In addition to responding to consumer concerns, EU agricultural policymakers have been resistant to initiatives that could accelerate the downturn of the agriculture sector and contribute to greater unemployment.[101]

From the US side, the ban hit exports dramatically. The US exported hundreds of millions of dollars of beef and veal to EC countries each year from 1986 to 1988, the years prior the ban. These exports expanded at a rate of almost 30% per year. After the ban, these figures decreased almost to zero. The US cattle sector estimated that the ban of EC would cost them $250 million in sales each year. As a result of these losses, the US retaliated by imposing 100% *ad valorem* duties on selected EC-imported items. However, after the Panel was established, the US completely terminated its retaliatory measures.[102]

c) Nature of Hormones

Hormones govern physiological processes and are produced by every animal and plant species. A hormone is any chemical substance produced by an organ that, after being transported in the blood of the mammal, has a specific regulatory impact on cells remote from the origin of the hormone. There are three categories of natural hormones produced endogenously by both humans and cattle: estrogen, progesterone, and testosterone. These substances are often called as the ‘natural’ or ‘endogenous’ hormones. Trenbolone acetate, zeranol, and melengestrol acetate are ‘synthetic’ hormones that are not generated naturally in humans or cattle. In terms of biological effect, these hormones are very similar to ‘normal’ ones, although their molecular structures are slightly different. The daily production of endogenous hormones varies greatly between species and even within the same species,

[100] Ibid
[101] Ibid.
[102] Lisa K Seilheimer, 'The SPS Agreements Applied: The WTO Hormone Beef Case' (1998) 4 Environmental Law,p. 553.

depending on factors such as age, sex, and pregnancy. A pregnant cow, for example, can produce 50 to 100 times more progesterone than a steer.[103]

i. Natural Hormones

Three out of six hormones in question are produced naturally by humans and animals: estrogen, progesterone, and testosterone. Estrogen is a sex steroidal hormone with the oestrogenic effect which is mainly responsible for female characteristics; testosterone is a sex steroidal hormone with the androgenic effect which is mainly responsible for male characteristics; and progesterone is a sex steroidal hormone with the gestagenic effect which is mainly responsible for maintaining pregnancy. These three hormones are being created throughout the lifetime of each individual and are necessary for appropriate physiological function and maturation.[104]

ii. Synthetic Hormones

The other three hormones at issue are artificially generated hormones: trenbolone, zeranol and melengestrol acetate. Synthetic hormones mimic the biological activity of natural hormones. Trenbolone mimics the activity of testosterone; zeranol mimics the activity of estrogen, and melengestrol mimics progesterone. The three natural hormones could be used for medical treatment and therapeutic purposes in the US. Estrogen is allowed for zootechnical purposes as well. All six hormones are also accepted for growth promotion purposes. Among these six hormones; trenbolone, zeranol, and melengestrol have no zootechnical or therapeutic usage. Five of these hormones (except melengestrol) are produced as pellets with approved and fixed doses of the chemical, implanted in the ear of the animal for growth promotion. The ear is discarded while slaughtering. Melengestrol is given to animals as a feed additive.[105]

[103] Dale E McNeil, 'The First Case under the WTO's Sanitary and Phytosanitary Agreement: The European Union's Hormone Ban' (1998). Virginia Journal of International Law, vol. 39. pp. 96-98
[104] Josling, Tim & Roberts, Donna & Hassan, Ayesha. (2021). The Beef-Hormone Dispute and its Implications for Trade Policy. p. 37.
[105] Ibid.

d) The Codex

The Codex Alimentarious Commission (the Codex Commission) is a joint U.N. Food and Agriculture Organization (**"FAO"**) & World Health Organization (**"WHO"**) advisory body that develops standards which ensure the safety of food.[106] When it comes to issues related to food safety, these global standards are taken into account. As a result, the Codex Alimentarius (the Codex) is a collection of uniformly adopted food standards.[107]

These standards guide the Dispute Settlement Body of the WTO in its decisions since the SPS Agreement adopted the Codex as the standard for veterinary drug and pesticide residues. Therefore, when Members implement sanitary measures, the measures must either be based on the Codex standards or meet the requirements set forth at the Article 3.3 of the SPS Agreement, which apply to measures that are not based on international standards.[108]

The SPS Agreement establishes an assumption of legitimacy for SPS measures based on internationally accepted standards. It requires Members to support stricter standards based on a scientific justification, which includes a risk assessment that results in scientific proof of the negative impacts of the regulated product.[109]

The Codex Commission has three purposes:

1) to facilitate international trade through the removal of non-tariff trade barriers caused by differing national food standards;

2) to protect the health of consumers and ensure fair practices in the food trade; and

3) to promote coordination of all food standards, work undertaken by international governmental and nongovernmental organizations.[110]

[106] Lisa K Seilheimer, 'The SPS Agreements Applied: The WTO Hormone Beef Case' (1998) 4 Environmental Law,p. 541.
[107] Josling, Tim & Roberts, Donna & Hassan, Ayesha. (2021). The Beef-Hormone Dispute and its Implications for Trade Policy. p. 37.
[108] Lisa K Seilheimer, 'The SPS Agreements Applied: The WTO Hormone Beef Case' (1998) 4 Environmental Law,p. 550.
[109] Layla Hughes, 'Limiting the Jurisdiction of Dispute Settlement Panels: The WTO Appellate Body Beef Hormone Decision' (1998) Georgetown International Environmental Law Review, vol. 10, no. 3, 1998, pp. 931-917.
[110] George H. Rountree, 'Raging Hormones: A Discussion of the World Trade Organization's Decision in the European Union-United States Beef Dispute' (1999) Georgia Journal of International and Comparative Law, vol. 27, no. 3. pp. 617-619.

Figure IV *- Cover of a Codex Report.*[111]

A Codex committee is the organization that deals with veterinary medications in foods. The committee is responsible for the following, in terms of the acceptability of hormones in food:

1) determine priorities for the consideration of residues of veterinary drugs (including hormones) in foods, establish a list of priority drugs in foods and establish a list for review;

2) recommend what are maximum residue levels for the substances on these lists;

3) develop codes of practice as may be required; and

4) determine criteria of analytical methods used for the control of veterinary drugs.[112]

When it comes to Codex standards to determine the resolution of the Beef Hormones Dispute, the question is whether Codex should consider only *'hard sciences,'* such as chemistry and biology, or should also include so-called *'soft sciences,'* sociology and political science, for instance. Accepting soft sciences is taking consumer views and perceptions into account

[111] 'FAO - News Article: Codex Alimentarius Commission: 6-11 July 2015' (Fao.org, 2022) <https://www.fao.org/news/story/en/item/296415/icode/> accessed 28 March 2022.
[112] Ibid.

while defining the standards, whereas the hard science approach focuses solely on the laboratory data.[113]

The Codex uses three criteria in its assessments for food: quality, safety, and efficacy. Consideration of consumer perception, as the EC wishes in this case, would require the addition of a fourth criterion, which the Codex Commission has not been willing to do. This criterion would entail citizens and interest groups to involve directly in defining the level of risk that a society is ready to take. It could include such considerations as; public perceptions of food safety, economic impact, social effects, animal welfare, environmental impact and ethics. These additional elements acknowledge that states and individuals accept varying amounts of risk depending on the value they place on the benefits or harms that come with the acceptance of risk. If this fourth criterion were implemented, scientific merit and research would be evaluated together with consumer concerns and demands. Thus, consumer perceptions and ethical considerations would potentially take precedence over the purpose of removing trade barriers.[114]

The fourth criterion approach may be popular among many, yet others perceive it as a disguised trade barrier. This latter viewpoint supports "social needs test" considered by the European Parliament. The plan would enable the EC to consider any impact might have on employment and local industry caused by particular technology. Such a plan brings along the risk of leaving no practical restraint on barriers to trade. From this perception, every country could come up with some social reason to justify refusing a particular food. Muslim people, for instance, are concerned that the Codex does not provide grounds for objections based on religious beliefs.[115]

The Codex rejected the soft science approach at its meeting in July 1995. It adopted a set of recommendations which based on the hard science in international trade. These recommendations were provided in order to make the Codex *'the source of scientific standards for international trade.'* [116]

The Codex also established guidelines for standards of residues in five growth hormones. Hormone treated beef, such as that produced in the US, was found to be safe for human consumption as long as the residues were within the limits of the standards. The goal of

[113] Ibid.
[114] Ibid.
[115] Ibid.
[116] Ibid.

the Joint FAO/WHO Expert Committee on Food Additives (**"JECFA"**) in the evaluation of veterinary drugs is: [117]

'to establish safe levels of intake by setting Acceptable Daily Intakes (ADI) and to develop maximum residue limits (MRL) when veterinary drugs are used in accordance with good veterinary practice'.

For three natural hormones, it was considered "unnecessary" to establish an ADI or MRL which determines the safety of the hormones.[118] It was stated that:

> *'Establishing an ADI and an MRL for a hormone that is produced endogenously at variable levels in human beings was considered unnecessary by the Committee. Residues resulting from the use of this substance as a growth promoter in accordance with good animal husbandry practice are unlikely to pose a hazard to human health.'*

The 1988 JECFA Report on which the Codex standards are based, concluded that residues occurring from the use of testosterone and estrogen as growth promoters in accordance with good animal husbandry practice are not likely to pose a danger to human health and that the amount of exogenous progesterone ingested in meat from treated animals would not be capable of exerting a hormonal effect, and thus, any toxic effect, in humans.[119]

Because the potential hazardous effect of residues of these hormones is directly tied to their hormonal effect, the report found that the additional residue levels in hormone-treated animals are not capable of having any toxic effect, according to JECFA. The Codex Commission agreed on safe limits for two synthetic hormones in December 1987, while it found that no limits were required for the three natural hormones in question. The US and the EC, as it was predicted, had opposite reactions to these Codex developments. The US Secretary of Agriculture stated: [120]

> *'The commission's actions will benefit both consumers and producers around the world by establishing standards on food products that are based on science.'*

[117] Josling, Tim & Roberts, Donna & Hassan, Ayesha. (2021). The Beef-Hormone Dispute and its Implications for Trade Policy. p. 38-42.
[118] Ibid.
[119] Ibid.
[120] George H. Rountree, 'Raging Hormones: A Discussion of the World Trade Organization's Decision in the European Union-United States Beef Dispute' (1999) Georgia Journal of International and Comparative Law, vol. 27, no. 3. pp. 617-619.

On the other hand, the EC Secretary of Agriculture expressed his displeasure by criticizing the secret ballot procedure of the Commission. The EC Secretary said that:[121]

> *'It was totally unacceptable that an international organization should make such an important and far-reaching decision in secret, and this procedure totally contradicts the need to ensure greater transparency in the world of Codex.'*

Those who oppose the use of hormones, claimed that the Codex standards were not unanimous, that they were themselves influenced by the pressure of the US public and private sector, and that therefore their decisions should not be seen as precisely "scientific".[122]

[121] Ibid.
[122] Ibid.

2. Beef Hormones Dispute in the World Trade Organization

Rather than usual commercial disputes over trade or customs regulations, this case has proven to be so difficult to resolve due to several reasons. The case involves domestic legislation and internal policy problems, as well as use of SPS measures to restrict trade and rules for dispute settlement.[123]

***Figure V** - Headquarters of the WTO in Geneva, Switzerland.*[124]

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In the WTO, the US challenged whether the ban of the EC is consistent with its WTO obligations under the SPS Agreement. Both the US and the EC claimed that after a series of WTO consultations, panel decisions, and appeals; these proceedings have validated their respective views in the dispute. [125]

Despite numerous attempts questioning the validity of the ban, the EC has regularly chosen to keep it in place, citing consumer concerns, animal welfare worries, meat quality, and hormone effects on the cattle and milk sectors of the EC. Several times, the legislation governing the ban of the EC have been reissued and/or amended.[126] The EC maintained that

[123] Johnson, R., 'The U.S.-EU Beef Hormone Dispute. Congressional Research Service' (2015) 7-5700, pp. 3-4.
[124] 'Where Is The Headquarters Of The World Trade Organization Located?' (WorldAtlas, 2022) <https://www.worldatlas.com/articles/where-is-the-headquarters-of-the-world-trade-organization-located.html> accessed 28 March 2022.
[125] Johnson, R., 'The U.S.-EU Beef Hormone Dispute. Congressional Research Service' (2015) 7-5700, pp. 3-4.
[126] In 1999, the commission decided unanimously to keep the ban in place, with only the United Kingdom's Agriculture Minister's vote to terminate the ban.

researches support its position to keep the ban in place. These researches were on the potential human health concerns linked with the use of hormone-treated beef.[127]

The US contended that the EC has not undertaken a thorough risk assessment to justify its stance, and that there is a clear worldwide scientific agreement supporting the safety of hormone-treated meat for consumers. Starting in the late 1980s, the US implemented trade sanctions on certain EC agricultural products, as authorized by the WTO, in the form of high import tariffs.[128]

a) Overview of the WTO Proceedings

As a reaction to the initial ban on hormone-treated beef of the EC in the 1980s, the US first invoked GATT dispute settlement under the TBT Agreement of the Tokyo Round in 1986-1987 and threatened to impose retaliatory duties on selected EC imports. Retaliatory duty is a tariff/tax a government charges on imports, in order to punish another country and intend to compel it to grant reciprocity privileges. [129]

The EC ban was not totally implemented until January 1, 1989, as a result of the US move. Following the implementation of the ban, the US imposed a hundred per cent *ad valorem* retaliatory duties valued at $93 million in EC imports, which remained in effect until May 1996. Both the US and the EC had requested WTO consultations in an attempt to resolve the dispute, earlier in 1996.[130] The WTO dispute settlement process started with these requests for consultations. The US, Australia, Canada and New Zealand entered into joint consultations with the EC yet a mutually satisfactory resolution was not reached.[131]

After the consultation phase, which had failed, the US requested a WTO dispute settlement panel case against the EC in April 1996; claiming that the ban violates the WTO commitments of the EC under the GATT of 1994, SPS and TBT Agreement.[132] The US was joined in the complaint by Australia, Canada, and New Zealand.

[127] Ibid
[128] Ibid.
[129] Johnson, R., 'The U.S.-EU Beef Hormone Dispute. Congressional Research Service' (2015) 7-5700, p. 5.
[130] Ibid.
[131] Dale E McNeil, 'The First Case under the WTO's Sanitary and Phytosanitary Agreement: The European Union's Hormone Ban' (1998). Virginia Journal of International Law, vol. 39. p. 111.
[132] Johnson, R., 'The U.S.-EU Beef Hormone Dispute. Congressional Research Service' (2015) 7-5700, p. 5

b) Precautionary Principle

The precautionary principle is an instrument for bodies and regulators which address the difficulty of regulatory decision-making in the face of scientific uncertainty. According to the principle, in case of threats of crucial or irreversible damage, lack of complete scientific certainty should not be a reason for delaying measures to prevent environmental corruption. This principle guarantees the right of regulatory authorities of the EC to keep the regulation in place even if there is no clear scientific evidence available that hormone-treated beef poses danger to human health.[133] Under European Law, the precautionary principle is defined as following:[134]

> *'Where there is uncertainty as to the existence or extent of risks to human health, protective measures may be taken without having to wait until the reality and seriousness of those risks become fully apparent.' [135]*

The EC claimed that the adopted measures were precautionary and as a customary rule of international law, the precautionary principle protected the right to keep the ban in place even the argument of the Directive was not based on scientific evidence put forward. This claim of the EC was based on the maxim that agreements such as the SPS Agreement should be interpreted in light of any relevant rules of international law that applicable to the parties.[136]

Science never ensures absolute certainty. The environmental impact of an activity often does not become apparent until sometime after the activity has happened. Hence, undesirable and potentially irreversible consequences may emerge if the activity is not prevented because of the unavailability of adequate scientific proof which proves the danger of the activity. These observations about science reflect our understanding of human physiology and the influence of external environmental factors on human health, as well as global environment.[137]

An understanding of science in light of these global interconnections and extreme scientific uncertainty reveals the danger of assumption that a chemical substance is safe until

[133] Layla Hughes, 'Limiting the Jurisdiction of Dispute Settlement Panels: The WTO Appellate Body Beef Hormone Decision' (1998) Georgetown International Environmental Law Review, vol. 10, no. 3, pp. 931-934.
[134] Jacqueline Peel, 'Of Apples and Oranges (And Hormones in Beef): Science and The Standard of Review in WTO Disputes Under the SPS Agreement' (2012) 61 International and Comparative Law Quarterly. p.10.
[135] Case C-236/01, Monsanto Agricoltura Italia [2003] ECR I-8105, para 111. See also Case C-180/96, United Kingdom v Commission [1998] ECR I-2265, para 99; Case C-157/96 National Farmers' Union and Others [1998] ECR I-2211, para 63; Case E-3/00 EFTA Surveillance Authority v Norway [2001] EFTA Ct Rep 73, para 31.
[136] Layla Hughes, 'Limiting the Jurisdiction of Dispute Settlement Panels: The WTO Appellate Body Beef Hormone Decision' (1998) Georgetown International Environmental Law Review, vol. 10, no. 3, pp. 931-934.
[137] Ibid.

we have evidence that it is dangerous. The precautionary principle is based on this understanding and it can be understood as a rejection of the *'wait and see'* mentality which prioritizes scientific certainty as a precondition for taking protective health measures. Therefore, the principle appreciates the inability of science to predict environmental and physiological interactions precisely. [138]

The precautionary principle was invoked by the EC as a rationale for its ban on the import of hormone-treated beef. It can be argued whether the precautionary principle is accepted in the WTO or not.[139] According to Stanton;

> *'the SPS: . . . clearly permits precautionary measures when a government considers the scientific evidence insufficient to permit a final decision on the safety of a product or process.'* [140]

It is unclear if the precautionary measures permitted by the SPS are equivalent to the precautionary principle enshrined in EC environmental regulation. Since the precautionary principle has flaws when it comes to utilizing it as a decision-making tool, it is unlikely that WTO members intended to have it incorporated in the SPS. Being susceptible to political influence and manipulation is one of the reasons for hesitation. In case of an incomplete scientific evidence, accepting the precautionary principle in the SPS would nullify decision-making based on scientific principles and, as a result, weaken the SPS. The SPS explicitly stated, however, that precautionary measures are only supposed to be temporary, and that a member who invokes them should be actively seeking to fill in the gap in scientific knowledge. Yet, the EC made no indication that the ban was only in place for a limited time.[141]

The framers of the SPS expected that scientific consensus, as defined by international scientific organizations, would provide a substitute. When a member state wanted to challenge the scientific consensus, it would have to be decided by WTO Panels, with recourse to the WTO Appellate Body on legal and procedural issues if necessary. [142]

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[138] Ibid.
[139] William A. Kerr and Jill E. Hobbs, 'The North American–European Union Dispute Over Beef Produced Using Growth Hormones: A Major Test for The New International Trade Regime' (2002) 25 The World Economy, pp. 291-292.
[140] Stanton, G.H., 'Understanding the GATT Agreement on the Application of Sanitary and Phytosanitary Measures', Food, Nutrition and Agriculture, (1995). 11, pp. 36–42.
[141] Ibid.
[142] Ibid.

c) Chronology of the Case

1981-1988—The EC imposes a series of restrictions on livestock production (Directives 81/602, 88/146, and 88/299) limiting the use of natural hormones to therapeutic purposes, prohibiting the use of synthetic hormones, and prohibiting importation of animals and meat from hormone-treated animals. The US raises the EC hormone ban in the Committee on Technical Barriers to Trade, and invokes dispute settlement under the Tokyo Round Agreement on Technical Barriers to Trade in the GATT. The EC postpones the implementation of its ban until January 1, 1989. President Reagan announces, and suspends, retaliatory duties (100% ad valorem) on around $100 million worth of EC imports, in late 1987. Various scientific reviews were also launched during this time, including researches by the European Commission, JECFA of the World Health Organization and the Committee on Veterinary Drugs of the Codex Alimentarius Commission (Codex Committee) of the United Nations Food and Agriculture Organization and the US Food and Drug Administration and similar institutions in other countries. [143]

1989—The EC totally implements its ban on meat and meat product imports from animals treated with six growth promoters, three of which are natural; estrogen, progesterone and testosterone and three of which are synthetic; zeranol, trenbolone, and melengestrol. In the US, these six hormones have been approved for use. The ban effectively prevents the US from exporting beef to the EC. The US imposes retaliatory duties (100% ad valorem) on EC imports worth $93 million, which remain in effect until May 1996, when the EC seeks a panel before WTO against the US action. [144]

1995—The Sanitary and Phytosanitary (SPS) Agreement, which is part of the GATT Uruguay Round, enters into force.[145]

1996—The US requests a WTO dispute settlement panel case against the EC, claiming the ban violates WTO obligations of the EC. Australia, Canada, and New Zealand join the US in the complaint. The EC votes to keep the ban in place. The European Commission issues a new Directive 96/22, which repeals the 1981 and 1988 directives; confirms and extends the prohibitions. The law is planned to be effective on July 1, 1997.[146]

[143] Johnson, R., 'The U.S.-EU Beef Hormone Dispute'. (2015) Congressional Research Service 7-5700, p. 30.
[144] Ibid.
[145] Ibid.
[146] Ibid.

3. CLAIMS

The EC claims, in particular, that the long-term effects of ingestion were unknown (despite widespread consumption in North America and other countries over long periods of time). Furthermore, the EC argues that a complete understanding of how hormones might react with other substances being consumed is unavailable.[147]

When it comes to implement a trade barrier concerning health protection, it cannot be open-ended at the discretion of one country. Otherwise, the principle of scientific evidence enshrined in the SPS would no longer be valid. If there is an abuse of SPS provisions to extend protection to domestic producers, the panel must adjudicate to prevent it.[148] According to the US, the ban on growth hormones lacked any scientific justification pursuant to SPS regulations; the EC had failed to conduct required risk assessments of the harms posed by the hormones before enacting the ban; and the ban was intended to protect the EC cattle industry rather than be based on health risks. Hence, the ban is a disguised restriction on international trade. [149]

The EC argues that the measures are in line with the requirements of the SPS Agreement. The SPS Agreement, according to view of the EC, respects a signatory's right to determine the level of protection that is suitable. The EC maintains that it has simply increased the level of protection from the Codex recommendations for the disputed hormones since their use could endanger human and animal health. [150]

The EC Directive set stricter hormone residue standards than those established by the Codex Commission.[151] The EC claims that the Codex standards are not applicable to the present dispute because: (i) The Codex standards only apply to MRLs and do not apply to the use of hormone growth promoters; (ii) the Codex standards in question are not measures that trigger Codex levels of protection; (iii) the decision of the Codex to adopt the standards only got

[147] William A. Kerr and Jill E. Hobbs, 'The North American–European Union Dispute Over Beef Produced Using Growth Hormones: A Major Test for The New International Trade Regime' (2002) 25 The World Economy, p. 290.
[148] Ibid.
[149] Josling, Tim & Roberts, Donna & Hassan, Ayesha. (2021). The Beef-Hormone Dispute and its Implications for Trade Policy. p. 13.
[150] Lisa K Seilheimer, 'The SPS Agreements Applied: The WTO Hormone Beef Case' (1998) 4 Environmental Law,p. 545.
[151] Layla Hughes, 'Limiting the Jurisdiction of Dispute Settlement Panels: The WTO Appellate Body Beef Hormone Decision' (1998) Georgetown International Environmental Law Review, vol. 10, no. 3, p. 918.

accepted by a narrow margin; and (iv) it could not have expected that the standards would be '*binding'* since under the SPS Agreement it was stated that they would be *'advisory*.' [152]

The EC acknowledges that science is an important component in regulating the use of harmful substances, yet believes that the involvement of science in the regulatory process is restricted since it lacks certainty. Significantly, the EC contends that the difference in degree of regulation between the US and the EC reflects the different levels of consumer protection adopted by the two sides. For the EC, obtaining a high level of consumer protection is more vital than considering the commercial interests of farmers and pharmaceutical corporations, whereas the US does not embrace this viewpoint. When the safety of a product is controversial, the EC prioritizes consumer protection over anything else.[153] However, according to the US, consumer concerns should not play a substantial role in allowing a country to implement a ban that restricts international trade, unless it is not scientifically justified.[154]

It remains unresolved that whether basing the ban on the lack of scientific evidence exceeded what the scientific consensus required or did not. The US says that the requirements of the EC exceed international standards and the EC had failed to present any scientific evidence that its regulations provided a higher level of health security than international standards. Additionally, the US also claims that the regime for hormone-treated beef is stricter than other products; pork, for instance, where use of hormones is permitted. The US also points out that the EC was holding importers to a higher standard than domestic producers, which indicates possible discrimination among these interest groups. [155]

[152] Lisa K Seilheimer, 'The SPS Agreements Applied: The WTO Hormone Beef Case' (1998) 4 Environmental Law, p. 551.
[153] Ibid. p. 545.
[154] Josling, Tim & Roberts, Donna & Hassan, Ayesha. (2021). The Beef-Hormone Dispute and its Implications for Trade Policy. p. 14.
[155] William A. Kerr and Jill E. Hobbs, 'The North American–European Union Dispute Over Beef Produced Using Growth Hormones: A Major Test for The New International Trade Regime' (2002) 25 The World Economy, p. 291.

Central arguments of the two sides are compactly summarized as following:[156]

For the United States the ban:

- was intended to protect the EC cattle industry rather than be based on health risks;
- was maintained without sufficient scientific evidence in contravention of Article 2.2 of SPS;
- constituted a disguised restriction on international trade, in breach of Article 2.3 of SPS;
- was not based on the relevant international standards, guidelines or recommendations; hence, it contravened Article 3.1 and 3.3 of SPS;
- was maintained without scientific substantiation that it provided a higher level of health protection than the international standard;
- was not based on a risk assessment and was inconsistent with Article 5.1 of SPS;
- provided a level of protection that arbitrarily and unjustifiably varied from levels provided by other measures which had resulted in discrimination and a disguised restriction on trade, breaching Article 5.5 of SPS.[157]

Defense of European Communities rests on the grounds that:

- burden of proof lies with the party challenging the appropriateness of measures under the SPS Agreement, in this case the US.[158]
- given the current state of scientific knowledge about the risks presented by these substances, a ban was the only scientifically, technically, and economically suitable option available to EC regulators to satisfy urgent public health goals.'[159]
- scientific data on the safety of growth hormones was insufficient, and therefore further research was needed;

[156] William A. Kerr and Jill E. Hobbs, 'The North American–European Union Dispute Over Beef Produced Using Growth Hormones: A Major Test for The New International Trade Regime' (2002) 25 The World Economy, p. 290.
[157] D Roberts, 'Preliminary Assessment of The Effects of The WTO Agreement on Sanitary and Phytosanitary Trade Regulations' (1998) 1 Journal of International Economic Law, p. 388.
[158] Lisa K Seilheimer, 'The SPS Agreements Applied: The WTO Hormone Beef Case' (1998) 4 Environmental Law,p. 548.
[159] D Roberts, 'Preliminary Assessment of The Effects of The WTO Agreement on Sanitary and Phytosanitary Trade Regulations' (1998) 1 Journal of International Economic Law, p. 388.

- the US lacked the control mechanisms needed to ensure safe hormone administration;
- the ban was justified by the historical use of the *'precautionary principle'* of the EC; and that the EC approaches risk assessment differently than the US.
- objection to the claim of the US that the ban is based on protectionism rather than health concerns.
- it desired to keep the embargo in place while conducting further risk assessment researches.
- the EC always had provided a higher level of consumer protection, and the present restriction adheres to these higher standards while not violating the SPS agreement.[160]

[160] Josling, Tim & Roberts, Donna & Hassan, Ayesha. (2021). The Beef-Hormone Dispute and its Implications for Trade Policy. p. 14.

4. ESTABLISHED AGENDA

The Panel shall decide:

1- Whether the EC hormone ban measures are based on existing international standards, guidelines or recommendations
2- Whether the EC hormone ban could be justified as achieving a higher level of protection than would be achieved by measures based on the relevant international standards
3- Whether the EC hormone ban measures were based on a risk assessment
4- Whether the hormone ban is necessary to protect human life or health, based on scientific principles and not maintained without sufficient scientific evidence
5- Whether the Precautionary Principle is applicable to the case as a justification to the ban as a customary rule of law
6- Whether the EC hormone ban is a disguised restriction on international trade

Additionally, the Panel may decide;

7- Whether burden of the proof shifts to the US, taking language of the relevant provisions of the SPS Agreement into account
8- Whether the EC hormone ban results in inconsistency in the application of appropriate levels of protection and results in discrimination
9- Whether the interpretation of the wording in the Article 3.1 of the SPS Agreement binds parties or acts as a recommendation

III. APPLICABLE LAW

1. The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)

a. Article 2: Basic Rights and Obligations

The essential rights and obligations of Members under the SPS Agreement are outlined in Article 2.

'2.1 Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement.

2.2 Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

2.3 Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

2.4 Sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).'

b. Article 3: Harmonization - International Standards

Article 3 of the SPS Agreement covers the objective of ensuring sanitary procedures are consistent on the basis of international standards, guidelines, or recommendations.

'3.1 To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.'

SPS Agreement adopted the phrase "based on" international standards in the Article 3.1, rather than the stronger mandate of "conform to" international standards. The panel must decide on how to interpret this phrase taking the wording into account.

> *3.2 Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.*
>
> *3.3 Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5.(2) Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.'*

There are two main elements of this provision. First, the challenged measure must provide a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards. Second, this higher level of protection must be scientifically justified or must result from the choice of the Member of an adequate level of protection; determined in accordance with specific requirements, including a risk assessment.

The Codex is used by SPS Agreement as the standard for veterinary drug and pesticide residues. As a result, when Members implement sanitary measures, they must either be based on the Codex standards or meet the requirements set forth at the Article 3.3, which applies to measures that are not based on international standards.

c. Article 5.1 – Risk Assessment

Article 5.1 established the risk assessment requirement and explained how Members should determine and implement appropriate sanitary measures.

> *'Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.'*

The risk assessment should identify the harmful effects on human health. If any of these adverse effects exist, it should assess the potential or probability of occurrence of these effects. The term probability invokes a quantitative dimension to the notion of risk whereas possibility does not. The possibility of risk expresses the actual potential of adverse effects which might not be observed in a science laboratory operating under strictly controlled conditions. Therefore, due to distinct meanings of two words; Panel's interpretation of risk is critical.

d) Article 5.4: Minimizing Trade Effects

> *'Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects.'*

Pursuant to Article 5.4, Members should consider to minimize trade effects when determining the appropriate levels of sanitary or phytosanitary protection.

e) Article 5.5 - Prohibition on Discrimination and Disguised Restriction on International Trade

> *'With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. Members shall cooperate in the Committee, in accordance with paragraphs 1, 2 and 3 of Article 12, to develop guidelines to further the practical implementation of this provision. In developing the guidelines, the Committee shall take*

into account all relevant factors, including the exceptional character of human health risks to which people voluntarily expose themselves.'

Articles 5.5 requires consistency in the treatment of similar risk situations. Each of the three elements below must be present for a sanitary measure to be in violation of Article 5.5: (i) the Member adopts different appropriate levels of sanitary protection in different situations; (ii) the distinction in levels of protection imposed by the member in the different situations is arbitrary or unjustifiable; and (iii) the distinction in levels of protection results in discrimination or a disguised restriction on international trade.

f) Article 5.6

'Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.'

Article 5.6 requires that SPS measures adopted by Members to achieve an appropriate level of protection are not more trade-restrictive than required.

g) Article 5.7

'In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.'

h) Article 5.8

'When a Member has reason to believe that a specific sanitary or phytosanitary measure introduced or maintained by another Member is constraining, or has the potential to constrain, its exports and the measure is not based on the relevant international standards, guidelines or recommendations, or such standards, guidelines or recommendations do not exist, an explanation of the reasons for such sanitary or phytosanitary measure may be requested and shall be provided by the Member maintaining the measure.'

2. Dispute Settlement Understanding (DSU)

a. Article 11

'The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.'

IV. CONCLUSION

The decision of the EC to ban hormone-treated beef entailed a long-standing trade dispute between the US and the EC. Despite hard efforts to reconcile parties and a series of dispute settlement proceedings; disagreement still stands.[161] The US claimed that by banning the import of hormone-treated beef, the EC breached multiple provisions of the SPS Agreement; respectively Article 2, 3 & 5 and violated its WTO commitments under GATT of 1994 and TBT Agreement.

After the consultation phase, which had failed, the US requested a WTO dispute settlement panel case against the EC in 1996. The case is now in the hands of the Panel to determine whether the EC violated the recently adopted SPS Agreement or not. The Panel will examine a variety of concepts and theories of international trade law which are going to set precedent such as precautionary principle and non-tariff barriers while reaching a decision. What is food to one might be bitter poison to others. Now, it is up to the participants to decide which.

[161] Johnson, R, 'The U.S.-EU Beef Hormone Dispute.' (2015) Congressional Research Service 7-5700, p. 2.

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