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## ANDREW P. VANCE MEMORIAL WRITING COMPETITION WINNER: The Beef Hormone Dispute and Carousel Sanctions: A Roundabout Way of Forcing Compliance With World Trade Organization Decisions

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# ANDREW P. VANCE MEMORIAL WRITING COMPETITION WINNERS

## THE BEEF HORMONE DISPUTE AND CAROUSEL SANCTIONS: A ROUNABOUT WAY OF FORCING COMPLIANCE WITH WORLD TRADE ORGANIZATION DECISIONS

*Rosemary A. Ford\**

"[T]he historian will see that trade was the principle of Liberty; that trade planted America and destroyed Feudalism; that it makes peace and keeps peace, and it will abolish slavery."<sup>1</sup>

### I. INTRODUCTION

#### A. *Background*

In 1989, the European Union ("EU")<sup>2</sup> imposed an absolute prohibition on the use of synthetic hormones that resulted in a ban of hormone-treated beef imported from the United States.<sup>3</sup>

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1. Ralph Waldo Emerson, *The Young American*, Lecture before the Mercantile Library Association (Feb. 7, 1844), in *NATURE: ADDRESSES, AND LECTURES* 302-03 (1895).

2. The European Union was previously known as the European Community, and the World Trade Organization still uses that designation in its decisions. For the sake of clarity, the author has used EU throughout this paper except when referring to a World Trade Organization decision.

3. For a brief chronology of the EU's Hormone Ban, see U.S. Dep't of Agric. Foreign Agric. Serv., *FASonline, Chronology of the European Union's Hormone Ban*, at <http://www.fas.usda.gov/itp/policy/chronology.html> (last visited Mar. 6, 2002).

In 1996, the U.S. appealed the ban<sup>4</sup> following the dispute settlement procedure enacted along with the creation of the World Trade Organization ("WTO") in 1994.<sup>5</sup> After an adverse panel decision<sup>6</sup> had been appealed by the EU in 1997,<sup>7</sup> the WTO appellate body issued a ruling against the EU that required it to lift the hormone ban in the absence of any scientific risk assessment of harm.<sup>8</sup> A subsequent arbitral ruling authorized U.S. countermeasures against the EU for non-compliance with the decision within the fifteen-month accepted time period.<sup>9</sup> The countermeasures took the form of 100% ad valorem<sup>10</sup> U.S. tariffs on certain imports, up to an amount equivalent to the \$116.8 million of lost revenues that the arbitration panel determined the U.S. was losing annually as a result of the

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4. See European Communities – Measures Concerning Meat and Meat Products (Hormones), Request for Consultations by the United States, WT/DS26/1, Doc. No. 96-0359 (Jan. 31, 1996), at [http://www.wto.org/english/tratop\\_e/dispu\\_e/distabase\\_wto\\_members2\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members2_e.htm) [hereinafter U.S. Request for Consultations].

5. See Understanding on Rules and Procedures Concerning the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1226 (1994), available at [http://www.wto.org/english/docs\\_e/legal\\_e/28-dsu.pdf](http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf) [hereinafter DSU].

6. See EC Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States, Report of the Panel, WT/DS26/R/USA, Doc. No. 97-3368 (Aug. 18, 1997), at [http://www.wto.org/english/tratop\\_e/dispu\\_e/distabase\\_wto\\_members2\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members2_e.htm) [hereinafter WTO Panel Report].

7. See EC Measures Concerning Meat and Meat Products (Hormones), Notification of an Appeal by the European Communities under Paragraph 4 of Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), WT/DS26/9, Doc. No. 97-4084 (Sept. 25, 1997), at [http://www.wto.org/english/tratop\\_e/dispu\\_e/distabase\\_wto\\_members2\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members2_e.htm).

8. See EC Measures Concerning Meat and Meat Products (Hormones), AB-1997-4, Report of the Appellate Body, WT/DS26/AB/R, Doc. No. 98-0099 (Jan. 16, 1998), at [http://www.wto.org/English/tratop\\_e/dispu\\_e/distabase\\_wto\\_members2\\_e.htm](http://www.wto.org/English/tratop_e/dispu_e/distabase_wto_members2_e.htm) [hereinafter WTO Appellate Body Report].

9. EC Measures Concerning Meat and Meat Products (Hormones) – Arbitration Under Art. 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Award of the Arbitrator, WT/DS26/15, Doc. No. 98-2227, ¶ 48 (May 29, 1998), at [http://www.wto.org/english/tratop\\_e/dispu\\_e/distabase\\_wto\\_members2\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members2_e.htm) [hereinafter WTO Arbitrator Award].

10. Meaning "according to the value" of the article, as opposed to by weight. BLACK'S LAW DICTIONARY 53 (7th ed. 1999).

ban.<sup>11</sup> Despite these legal rulings, the imposition of the tariffs and numerous trade negotiations, by the beginning of 2001 and the dawn of a new American administration, the European ban stood bloodied but unbowed, barring imports from the U.S. of high-grade, grain-finished beef.<sup>12</sup>

### *B. Causes of the U.S.-EU Standoff*

The causes of this stalemate are varied. They include cultural and regulatory differences between the two entities,<sup>13</sup> as well as a possible agenda of protectionism.<sup>14</sup> In addition, the dispute has highlighted the difficulty of enforcing compliance with WTO rulings. In the now famous words of a former

11. European Communities-Measures Concerning Meat and Meat Products (Hormones), Original Complaint by the United States, Recourse to Arbitrations by the European Communities under Articles 22.6 of the DSU, Decision by the Arbitrators, WT/DS26/ARB, Doc. No. 99-2855, 83-84 (July 12, 1999), at [http://www.wto.org/english/tratop\\_e/dispu\\_e/distbase\\_wto\\_members2\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distbase_wto_members2_e.htm) [hereinafter WTO Arbitrators Decision]. The U.S. claimed that actual losses ranged as high as \$500 million annually. George H. Rountree, *Raging Hormones: A Discussion of the World Trade Organization's Decision in the European Union-United States Beef Dispute*, 27 GA. J. INT'L & COMP. L. 607, 610 (1999).

12. The EU imported 21.3% of its 1998 merchandize from the U.S. NATO PARLIAMENTARY ASSEMBLY, COMMITTEE REPORTS, ECONOMIC AND SECURITY, GENERAL REPORT: THE WTO AND THE US-EUROPEAN ECONOMIC RELATIONSHIP (Nov. 2000), at <http://www.nato-pa.int/publications/comrep/2000/at-253-e.html> [hereinafter NATO REPORT].

13. Generally, EU food regulation is more supportive of traditional food processes that consumers and regulators believe is *natural* even in the face of scientific disapproval, and against food perceived as *unnatural* even in the face of scientific approval. See Marsha A. Echols, *Food Safety Regulation in the European Union and the United States: Different Cultures, Different Laws*, 4 COLUM. J. EUR. L. 525, 525-29 (1998). For instance, European laws allow the production and consumption of raw milk cheeses and traditionally cured meats, which are considered unsafe for human consumption by the U.S. and many in the scientific community. See *id.* And, in contrast to the relative acceptance of genetically engineered products in the U.S., Europeans have called these organisms "novel foods," and demanded they be segregated and labeled. *Id.* See also John Stephen Fredland, *Unlabel Their Frankenstein Foods!: Evaluating a U.S. Challenge to the European Commission's Labeling Requirements for Food Products Containing Genetically-Modified Organisms*, 33 VAND. J. TRANSNAT'L L. 183, 184-85 (2000) (Genetically-modified agriculture and agricultural products are considered as "Frankenstein Foods" in Europe.).

14. See discussion *infra* Part II.B.

General Counsel to the Office of the United States Trade Representative ("USTR"), "the WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheons or tear gas."<sup>15</sup>

The dispute over hormone-treated beef ("Beef Hormone")<sup>16</sup> began in 1987, prior to the creation of the WTO, when the U.S. threatened to levy a 10% increase of duties on EU agricultural products<sup>17</sup> pursuant to section 301 of the Trade Act of 1974.<sup>18</sup> For a short period, the U.S. and EU were able to negotiate an "interim measure" that allowed for some import of U.S. beef in return for the lessening of section 301 tariffs.<sup>19</sup> In 1989, the General Agreement of Trade and Tariffs ("GATT") council convened on the dispute, but discussions stalled.<sup>20</sup> Eventually, in 1996, two years after the establishment of the WTO, the U.S. requested a WTO consultation regarding the hormone ban.<sup>21</sup> Under the WTO Dispute Settlement Understanding ("DSU"), the jewel in the crown of the Uruguay Round,<sup>22</sup> "consultation" was the first part of a possible four-tier settlement process that the Beef Hormone dispute would test to its limits.<sup>23</sup>

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15. Judith Hippler Bello, *The WTO Settlement Understanding: Less is More*, 90 AM. J. INT'L L. 416, 417 (1996).

16. The WTO refers to the case as "EC Measures Concerning Meat and Meat Products (Hormones)." See, e.g., *supra* notes 4, 6-9 & 11. The author shall use the term "Beef Hormone" when referring to the dispute.

17. Dale E. McNiel, *The First Case Under the WTO's Sanitary and Phytosanitary Agreement: The European Union's Hormone Ban*, 39 VA. J. INT'L L. 89, 110 (1999).

18. Trade Act of 1974 § 301, 19 U.S.C. § 2411 (2000).

19. McNiel, *supra* note 17, at 110-11.

20. See *id.* at 109-110.

21. U.S. Request for Consultations, *supra* note 4. See also Rountree, *supra* note 11, at 612.

22. The Congress had made an effective DSU a principal goal of the U.S. negotiations during the Uruguay Round talks. Important changes from the previous GATT dispute system included: (1) time limits for each stage of the settlement process; (2) creation of an appellate body; (3) no requirement for consensus in the adoption of decisions; and (4) automatic authorization for countermeasures. OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXECUTIVE OFFICE OF THE PRESIDENT, THE URUGUAY ROUND AGREEMENT ACT, STATEMENT OF ADMINISTRATIVE ACTION, UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (Sep. 27, 1994), at 1994 WL 761797 [hereinafter SAA].

23. The four stages are: (1) consultations; (2) panel; (3) appellate body; and (4) arbitration. See generally DSU, *supra* note 5; WTO, Trading into the

In May 2000, wearied by the ineffectiveness of the WTO-sanctioned tariffs and concerned about its domestic cattle industry, the U.S. came up with a new twist on an old solution. Section 301 of the Trade Act of 1974, the old solution, gave the President discretionary authority to impose retaliatory measures against any foreign government, act, policy or practice that "burdens or restricts United States commerce," and violates international obligations.<sup>24</sup> Section 407 of the Trade and Development Act of 2000, signed into law by President Clinton on May 18, 2000, added new bite to the so-called section 301 sanctions by allowing the U.S. to rotate the list of products targeted for tariffs every six months.<sup>25</sup>

The EU protested these "carousel" sanctions, arguing they are illegal under WTO rules, and immediately filed a complaint with the WTO.<sup>26</sup> The EU and U.S. participated in the initial consultation stage of WTO dispute settlement in July 2000.<sup>27</sup> According to a USTR official, these talks were "formalistic," and not significant.<sup>28</sup> To date, the U.S. has failed to implement the rotation. British Prime Minister Blair was apparently able to halt implementation in September 2000 when he expressed concern over the possible demise of the Scottish cashmere industry as a result of the proposed new tariffs.<sup>29</sup> The U.S. had also been negotiating with the EU concerning its preferential

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Future: Introduction to the WTO Settling Disputes, The Panel Process, at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/dispu2\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/dispu2_e.htm) (last visited Feb. 22, 2002).

24. Trade Act of 1974 § 301, 19 U.S.C. § 2411(a)-(b) (2000).

25. Trade and Development Act of 2000, Pub. L. No. 106-200, § 407, 114 Stat. 251, 293-94.

26. See United States – Section 306 of the Trade Act of 1974 and Amendments Thereto, Request for Consultations by the European Communities, WT/DS200/1, Doc. No. 00-2304 (June 13, 2000), at [http://www.wto.org/english/tratop\\_e/dispu\\_e/distabase\\_wto\\_members4\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members4_e.htm) [hereinafter EU Request for Consultations].

27. Ian Elliott, *European Trade Commissioner Pascal Lamy; United States Trade Standards, Compliance*, FEEDSTUFFS, July 17, 2000, at 2.

28. Off-the-Record Telephone Interview with Unnamed Official at the Office of the United States Trade Representative (Jan. 30, 2001) [hereinafter Telephone Interview].

29. See Larry Elliott et al., *Blair Warns U.S. of Trade War*, GUARDIAN UNLIMITED (Sept. 7, 2000), at <http://www.guardian.co.uk/Archive>.

tax treatment for foreign sales corporations,<sup>30</sup> and may have wanted to strengthen its negotiating position by withholding sanctions the EU perceives as controversial.<sup>31</sup>

A new administration, lacking a negotiating history, may, however, be less interested in preserving imports of luxury woolen goods at the expense of the American cattle industry, which has been the largest single U.S. agricultural sector for the past forty years.<sup>32</sup> For the last five years, despite its extraordinary competitiveness, domestic cattle industry has been in a state of crisis due to plunging cattle prices.<sup>33</sup> One way to help the downturn is to increase the volume of beef exports, but figures show that the U.S. beef and cattle market is already disproportionately liberalized compared to other countries.<sup>34</sup> Furthermore, although the \$116.8 million estimated by the WTO arbitration panel<sup>35</sup> may not seem significant in comparison with overall trading figures in the billions of dollars, this 1996 number in no way reflects the potential exports in a free-trade market to the largest import bloc in today's global economy. Carousel sanctions may open this market, and USTR Robert B. Zoellick has indicated that he

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30. See Patrick Tracey, *Agriculture: Subsidies to EU Farmers to be Phased Out Over Next Decade*, *Trade Commissioner Says*, INT'L TRADE DAILY, Jan. 5, 2001, at WL 1/5/2001 BTd d5. In February 2002, the WTO found for the EU in this dispute with the U.S. See Daniel Pruzin, *Steel: WTO Members to Meet Informally to Sift Legal Responses to U.S. Steel Safeguards*, INT'L TRADE DAILY (BNA) (Mar. 13, 2002), at WL 3/13/2002 BTd d3.

31. See Daniel Pruzin, *European Union: EU Initiates WTO Complaint to Derail U.S. 'Carousel' Retaliation as Unilateral*, INT'L TRADE DAILY (BNA) (Jun. 7, 2000), at WL 6/7/2000 BTd d9.

32. The cattle industry has generated more than \$30 billion in revenues for the last dozen years. See Terence P. Stewart et al., *Trade and Cattle: How the System is Failing an Industry in Crisis*, 9 MINN. J. GLOBAL TRADE 449, 452 (2000). For more information see U.S. Department of Agriculture, *Economic Research Service*, at <http://www.ers.usda.gov/Briefing/FarmIncome>.

33. See Stewart, *supra* note 32, at 452.

34. For instance, in 1997, the U.S. was the leading importer of beef in the world with a forecast of 1.034 million metric tons ("MT") while the more populous EU imported only 380,000 MT, and exported 910,000 MT. See *id.* at 492-93.

35. See *id.* at 501.

thinks carousel legislation is a "powerful tool" for bringing the EU into compliance with international trading rules.<sup>36</sup>

### C. Summary

This Note will argue that carousel sanctions may offer an attractive short-term political gain when applied to a dispute, such as Beef Hormone that has run on for fifteen years without a good faith resolution. Although the sanctions are trade restrictive, the U.S. leads the world in its lack of trade barriers, and perhaps can be forgiven for sparing use of this effective tool. Because of its disproportionate trade liberalization, the two-edged nature of sanctions is especially harmful to the U.S., harming the importer as well as the exporter. Carousel rotation, however, means that importers only stay on the target list for six months, thus redistributing the harm in such a way that its impact is individually lessened, though affecting more businesses. Ultimately, however, this Note argues that sanctions are not in the U.S.'s best interest since their trade-restrictive nature undermines this country's long and ardent dedication to the principles of free trade.<sup>37</sup> In addition, even if, carousel retaliation is conceded to be permissible under international law, which is not yet clear, sanctions have alienated private businesses on both sides of the Atlantic.<sup>38</sup> Finally, the WTO is slowly moving beyond the bilateral trade concessions that inspired the signatories of GATT.<sup>39</sup> The multilateral standards represented by, for instance, the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement") indicate a new legal departure for

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36. See Gary G. Yerkey, *Trade Policy: U.S. Will Reassert Leadership on Trade, Pushing EU and Japan Aside*, Zoellick Says, INT'L TRADE DAILY (BNA) (Jan. 31, 2001), at WL 1/31/2001 BTd d2.

37. See Terry L. Anderson & J. Bishop Grewell, *It Isn't Easy Being Green: Environmental Policy Implications for Foreign Policy, International Law, and Sovereignty*, 2 CHI. J. INT'L L. 427, 438 (2001).

38. See, e.g., Gary G. Yerkey, *European Union: Corporate Leaders Say U.S.-EU Disputes Harming Business, Urge Quick Resolution*, INT'L TRADE DAILY (BNA) (Nov. 21, 2000), at WL 11/21/2000 BTd d12 ("These disputes feed protectionist sentiment that gives rise to calls for retaliation which can only have a negative impact on the business community.").

39. See WTO, UNDERSTANDING THE WTO AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES (1998), at [http://www.wto.org/english/tratop\\_e/sps\\_e/spsund\\_e.htm](http://www.wto.org/english/tratop_e/sps_e/spsund_e.htm) (last visited Mar. 5, 2002).



the WTO.<sup>40</sup> Multilateral standards could imply multilateral enforcement, replacing the bilateral sanctions employed to this point. This is the future toward which the U.S. must look even if it recognizes the need for at least the credible threat of sanctions in the interim.

In Section II, this Note will trace the history of the Beef Hormone dispute through the dispute settlement process of the WTO. This will include relevant social and political background to the dispute. Section III will discuss the legality and effectiveness of trade sanctions in general, and as a way of forcing compliance with WTO decisions. Section IV suggests alternate ways of enforcing compliance with WTO rulings that strengthen the goals of global free trade.

## II. THE BEEF HORMONE DISPUTE

### A. *Scientific Background*

Beginning in the 1950's, the U.S. Food and Drug Administration ("FDA") and the Department of Agriculture ("USDA") approved the use of endogenous and synthetic bovine growth hormones ("BGHs")<sup>41</sup> as a safe, cost-effective way to increase the feed efficiency in grain-fed cattle.<sup>42</sup> The cattle receive the hormones in the form of implants the size of pencil erasers behind their ears.<sup>43</sup> They are then able to convert the grain, usually corn, with greater rapidity into the succulent, high grade "marbled" meat that U.S. consumers enjoy.<sup>44</sup> Most

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40. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND vol. 1, available at [http://www.wto.org/english/doc\\_e/legal\\_e/15-sps.pdf](http://www.wto.org/english/doc_e/legal_e/15-sps.pdf) (last visited Feb. 23, 2002) [hereinafter SPS Agreement].

41. The bodies of both humans and bovines produce three hormones in a *natural*, or endogenous manner as opposed to synthetic hormones that are manufactured. The latter have a slightly different molecular structure, but otherwise mimic the function of endogenous hormones. See McNiel, *supra* note 17, at 97.

42. See *id.* at 99-100.

43. *Beef Hormones*, CARGILL BULL. (Oct. 1996), at <http://www.cargill.com/today/bulletin/t101996.htm>.

44. Beef with fat deposits within the muscle tissue (marbling) is more palatable to most people than lean beef without fat deposits. Marbling is

of the beef exported from the U.S. is this choice cut variety.<sup>45</sup> BGHs were widely adopted in the U.S. because of the competitive advantage they gave to feedlots operating on razor-thin, even negative profit margins.<sup>46</sup> By contrast, in countries with minimal demand, or a lack of financial resources to support demand for fatty meat, cattle can be grazed without expensive grain feedings and the resultant economic desirability of BGHs.<sup>47</sup>

### *B. Political Reaction in Europe to Growth-Promoting Hormones*

Prior to 1981, European countries followed differing policies on growth hormones.<sup>48</sup> In 1981, reports alleging that Italian children had grown enlarged breasts after eating imported baby food containing veal treated with diethylstilbestrol ("DES")<sup>49</sup> prompted an Italian boycott of veal imports from countries where the hormones were allowed.<sup>50</sup> In response to popular concern, the Council of the European Communities ("Council") passed Directive 81/602,<sup>51</sup> forbidding the marketing of any new hormones pending further studies.<sup>52</sup> Following the Directive, the EU established a Scientific Working Group ("Scientific Working Group") composed of twenty-two

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most easily produced by feeding grain to the growing/fattening animals. See Rountree, *supra* note 11, at 607.

45. See U.S. Department of Agriculture, *Economic Research Service*, at <http://www.ers.usda.gov/Briefing/cattle/Trade.htm> (last visited Feb. 25, 2002).

46. See Rountree, *supra* note 11, at 608.

47. See *id.*

48. See McNiel, *supra* note 17, at 100-01 (stating that prior to 1981, Italy, Denmark, the Netherlands, West Germany and Belgium had either banned or severely restricted use of the growth hormones whereas France, the United Kingdom, Ireland and Luxembourg licensed some hormone products).

49. In 1954, DES was approved by the FDA for use in beef cattle but was later found to be a carcinogen and banned in the U.S. in the late 1970's. *Id.* at 99.

50. *Id.* at 101.

51. Council Directive 81/602, Concerning the Prohibition of Certain Substances Having a Hormonal Action and of Any Substances Having a Thyrostatic Action, 1981 O.J. (L 222) 32.

52. This meant that in some EU Member States all but one of the hormones allowed in the U.S. were permissible. See McNiel, *supra* note 17, at 102.

prominent European scientists to determine if the use of natural and synthetic growth hormones in animals had any scientifically observable effects on human health.<sup>53</sup> A year later, in 1982, the Scientific Working Group issued an interim report stating that it found no harm derived from the use of endogenous hormones.<sup>54</sup> With regard to synthetic hormones, the Scientific Working Group reported that it needed more data.<sup>55</sup>

Despite the interim report, in 1985, the European Parliament ("Parliament") adopted a resolution stating that information regarding endogenous and synthetic hormones was "far from complete."<sup>56</sup> It also noted that an "over production of meat and meat products . . . adds considerably to the cost of CAP [the EU's Common Agricultural Policy]."<sup>57</sup> The European resolution occurred in the context of the introduction of milk quotas the previous year that had led to an increase of dairy cattle slaughtered for meat, more than doubling EU intervention stocks of beef.<sup>58</sup> Following the adoption of this

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53. The Scientific Working Group on Anabolic Agents in Animal Production, also known as the Lamming Committee, was chaired by Professor G.E. Lamming. *See id.*

54. *See* Communication from the Commission to the Council Concerning the Use of Certain Substances Having a Hormonal Action in Animal Production: Proposal for a Council Directive Amending Directive 81/602 Concerning the Prohibition of Certain Substances Having a Hormonal Action and of Any Substances Having a Thyrostatic Action, COM(84)295 final at 2. The Scientific Working Group found:

[T]hat the use of oestradiol 17- $\beta$ , testosterone and progesterone [i.e. endogenous hormones] and those derivatives which readily yield the parent compound on hydrolysis after absorption from the site of application, would not present any harmful effects to the health of the consumer when used under the appropriate conditions as growth promoters in farm animals.

*Id.*

55. *See id.*

56. Resolution Closing the Procedure for Consultation of the European Parliament on the Proposal from the Commission of the European Communities to the Council for a Directive Amending Directive 81/602 Concerning the Prohibition of Certain Substances Having a Hormonal Action and of Any Substances Having a Thyrostatic Action, 1985 O.J. (C 288) 158, 158.

57. *Id.*

58. *See* McNiel, *supra* note 17, at 104 n.98.

resolution, a scheduled meeting of the Scientific Working Group was canceled, and on December 31, 1985, the EU banned the use of endogenous hormones with an exception for therapeutic and zootechnical purposes, and placed a complete ban on all synthetic hormones.<sup>59</sup> Member States were given a transition period of three years to bring their laws into compliance.<sup>60</sup> Two years later, in August 1987, the members of the Scientific Working Group publicized what would become their final report, concluding that the synthetic hormones they studied were safe when used to promote growth.<sup>61</sup>

### *C. Other Influences on European Thinking*

In 1984, scholars introduced the "precautionary principle" into international discourse in the First International Conference on the Protection of the North Sea.<sup>62</sup> This controversial doctrine is still evolving, but, generally, it states that in the face of uncertainty and ignorance of effects, as in the case of possible marine pollution, science can inform decision-making, but ethical and political considerations are primary.<sup>63</sup> The EU has subsequently incorporated it into environmental policy,<sup>64</sup> advancing the principle as an international environmental doctrine.<sup>65</sup> The EU is currently using it to require labeling for genetically modified products.<sup>66</sup> In defending the Council Directive banning the use of

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59. *Id.* at 104.

60. See Council Decision 87/561 on Transitional Measures Concerning the Prohibition on Administration to Farm Animals of Certain Substances Having a Hormonal Action, 1987 O.J. (L 339) 70.

61. See *Ban on Growth Hormone 'Political,' Scientists Say*, MONTREAL GAZETTE, Aug. 19, 1987, at A4.

62. JOEL TICKNER ET AL., THE PRECAUTIONARY PRINCIPLE IN ACTION: A HANDBOOK 2 (1999), available at <http://www.biotech-info.net/handbook.pdf> (last visited Feb. 24, 2002).

63. See *id.*

64. See Article 174 of the Treaty Establishing the European Community has a requirement to base "Community policy on the environment . . . on the precautionary principle and on the principle that preventive action should be taken." TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, art. 174, O.J. (C 340) 3, 254-55 (1997).

65. See Rio Declaration on Environment and Development, June 14, 1992, U.N. Doc. A/CONF.151/5/Rev.1, 31 I.L.M. 874 (1992).

66. See Echols, *supra* note 13, at 538.

endogenous and synthetic growth hormones against various legal challenges, the Court of Justice of the European Communities ("ECJ") appeared to be applying precautionary principles. It found that the ban need not be based on scientific data alone, and that it was permissible to respond to political concerns expressed by the Parliament and the "anxieties and expectations" of consumers.<sup>67</sup>

In 1986, bovine spongiform encephalopathy ("BSE"), or "mad cow disease" was detected in the United Kingdom.<sup>68</sup> Protein supplements containing contaminated sheep and cattle offal thought to cause the disease were forbidden in 1988, but the regulation was not strictly enforced until 1991-92.<sup>69</sup> By then, the disease had reached epidemic proportions, bringing output of the British beef industry to its lowest level in twenty years.<sup>70</sup> Despite extraordinary, and until recently successful, EU efforts to contain the outbreak,<sup>71</sup> the public loss of confidence in food safety continues to color European attitudes.<sup>72</sup> The recent outbreak of foot and mouth disease in the United Kingdom<sup>73</sup> will not help to change these attitudes.

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67. Case C-331/88, *The Queen v. Minister for Agriculture, Fisheries and Food and the Secretary of State for Health ex parte: Fedesa and Others*, 1990-10 E.C.R. I-4023, 4061-62, ¶¶ 7-10 (1990).

68. See Sean Henahan, *Mad Cow Disease: The BSE Epidemic in Great Britain, An Interview With Dr. Frederick A. Murphy*, ACCESS EXCELLENCE, at <http://www.accessexcellence.org/WN/NM/madcow96.html> (last visited Mar. 6, 2002).

69. See *id.*

70. Ellen Ruppel Shell, *Could Mad-Cow Disease Happen Here?*, ATLANTIC MONTHLY, Sept. 1998, at 92, 92.

71. See Michael D. Lemonick, *Can It Happen Here?*, TIME, Jan. 29, 2001, at 58 (reporting recent outbreaks of the disease in Italy, Spain and Germany, along with deaths in France and Ireland).

72. The trust that U.S. citizens place in the FDA is not shared by European citizens whose governments and scientists have exposed them to BSE, dioxin contaminated food and gene-altered maize that killed butterflies. See, e.g., Ernst-Ulrich Petersmann, *Prevention and Settlement of International Trade Disputes Between the European Union and the United States*, 8 TUL. J. INT'L & COMP. L. 233, 252 (2000).

73. See, e.g., Sarah Lyall, *Foot-and-Mouth Disease Intrudes, Putting British Farmers in Dread*, N.Y. TIMES, Mar. 3, 2001, at A1.

*D. The EU Hormone Ban Finds No Support in Science-Based Risk Assessments*

In 1987, the Joint FAO/WHO Expert Committee on Food Additives ("JECFA")<sup>74</sup> found no harm in the use of endogenous hormones, and established acceptable daily intake levels and maximum residue limits for two synthetic growth hormones.<sup>75</sup> In a July 1991 meeting, the Codex Alimentarius Commission ("Codex"), whose standards guide the WTO in its decisions, after much discussion, decided against adoption of the acceptable daily intake limits prescribed by JECFA<sup>76</sup> in a decision that was primarily seen as political.<sup>77</sup> In 1995, again after much discussion,<sup>78</sup> Codex adopted the JECFA recommendations concerning the use of endogenous hormones and the intake levels for the two synthetic hormones.<sup>79</sup>

In 1994, the SPS Agreement<sup>80</sup> was signed into law by 135 member countries as part of the Final Act of the 1984-1994 Uruguay Round re-negotiating the GATT.<sup>81</sup> The SPS

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74. JECFA is a committee of the Codex Alimentarius Commission, a joint endeavor of the Food and Agricultural Organization ("FAO") and the World Health Organization ("WHO"), that provides influential guidelines concerning food safety. The JECFA committee is an independent group of international experts that focuses on the scientific evaluation of a veterinary drug and does not consider government policies and politics. JECFA recommends an acceptable daily intake and a maximum residue limit for a veterinary drug residue in a specific food commodity. See Joint FAO/WHO Expert Committee on Food Additives, *Fact Sheet*, at <http://www.fao.org/es/esn/Jefca/what-e.pdf> (last visited Feb. 24, 2002).

75. See JOINT FAO/WHO EXPERT COMM. ON FOOD ADDITIVES, EVALUATION OF CERTAIN VETERINARY DRUG RESIDUES IN FOOD: THIRTY-SECOND REPORT (1988).

76. See CODEX ALIMENTARIUS COMM'N, REPORT OF THE TWENTY-FIRST SESSION OF THE JOINT FAO/WHO CODEX ALIMIMENTARIUS COMMISSION, Alinorm 95/37 (1995) [hereinafter CODEX REPORT]. See also McNiel, *supra* note 17, at 108.

77. See McNiel, *supra* note 17, at 108.

78. See *id.* at 109.

79. See CODEX REPORT, *supra* note 76.

80. SPS Agreement, *supra* note 40, at Annex A, ¶ 1(b) (defining a sanitary or phytosanitary measure as one applied "to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs").

81. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS-RESULTS

Agreement recognized the sovereign right of nations to take measures that affect food safety and animal and plant health, but stated that regulation shall not "arbitrarily or unjustifiably" discriminate.<sup>82</sup> It also stated that regulatory measures should be based on a scientific risk assessment.<sup>83</sup> In drafting the SPS agreement to include a science-based risk assessment, negotiators "looked at the EU ban on imports of beef produced from cattle administered growth hormones as a prototypical example."<sup>84</sup>

### *E. The WTO Beef Hormone Decisions*

#### 1. The Panel Decision: A Victory for the U.S.

In April 1996, after consultations proved unfruitful, the Beef Hormone dispute went before a WTO panel.<sup>85</sup> The panel determined that the SPS Agreement governed the dispute<sup>86</sup> and that the ban was inconsistent with Articles 3.1, 5.1 and 5.5 of the Agreement.<sup>87</sup> Oddly, the panel did not look at Article 2, arguably the heart of the SPS Agreement, which states that measures can only be maintained with sufficient scientific evidence.<sup>88</sup> Instead, it looked to Article 3.1 which imposes the obligation on states to "base their sanitary and phytosanitary measures on international standards . . . where they exist."<sup>89</sup> The panel found a violation of this provision because the EU standard was not based on existing Codex standards.<sup>90</sup> Article 5.1 mandates that SPS measures must be based on an assessment of the "risks to human . . . life or health . . . as

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OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1125 (1994) [hereinafter Final Act]. For the Final Act documents, see WTO, *Legal Texts: The WTO Agreements*, at [http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm) (last visited Mar. 5, 2002).

82. See SPS Agreement, *supra* note 40, art. 5, ¶ 5.

83. See *id.* ¶ 2.

84. See McNiel, *supra* note 17, at 90-91.

85. See WTO Panel Report, *supra* note 6.

86. For a discussion of whether hormonal substances naturally found in meat should be called "contaminants," see McNiel, *supra* note 17, at 114.

87. See WTO Panel Report, *supra* note 6, ¶ 8.271.

88. For a discussion of this issue, see McNiel, *supra* note 17, at 118-20.

89. See SPS Agreement, *supra* note 40, art. 3, ¶ 1.

90. See WTO Panel Report, *supra* note 6, ¶ 8.77.

appropriate to the circumstances.”<sup>91</sup> The panel determined that the EU did not have a scientific justification for going beyond international standards in instituting the hormone ban.<sup>92</sup> Article 5.5 states that parties should avoid “arbitrary or unjustifiable distinctions” in levels of protection if the measures then result in “discrimination or disguised restriction of international trade.”<sup>93</sup> The panel found a violation based on the difference between the extreme level of protection for added hormones when compared with the lack of protection for these hormones as they occur naturally in foods, such as meat and dairy products,<sup>94</sup> or compared with the unlimited residue levels allowed for carbadox (a genotoxic substance) when used for growth promotion.<sup>95</sup>

## 2. The Appellate Body Ruling Narrows the Scope of the Panel Findings

The EU appealed the decision to the WTO Appellate Body (“Appellate Body”) which overruled the panel’s findings with regard to Articles 3.1<sup>96</sup> and 5.5 of the SPS Agreement, but affirmed the holding that the EU had not based its regulation on a scientific risk assessment, and thus violating Article 5.1.<sup>97</sup> It was a Pyrrhic victory for the U.S. Some commentators felt that the ruling weakened the SPS Agreement, demonstrating its inability to deal with complicated global issues.<sup>98</sup> The Appellate Body’s rejection of the Codex standards certainly represented a step backward in the process of harmonizing standards.<sup>99</sup> Further, it overruled the requirement that the assessment had to be concluded at the time the measure was

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91. See SPS Agreement, *supra* note 40, art. 5, ¶ 1.

92. See WTO Panel Report, *supra* note 6, ¶ 8.137.

93. See SPS Agreement, *supra* note 40, art. 5, ¶ 5.

94. See WTO Panel Report, *supra* note 6, ¶¶ 8.216, 8.241 & 8.271.

95. See *id.* ¶¶ 8.197, 8.214 & 8.228.

96. See WTO Appellate Body Report, *supra* note 8, ¶ 165 (stating that the SPS Agreement, although envisioning harmonization of standards in the future, does not require that recommendations, such as the Codex guidelines, be transformed into “binding norms”).

97. See *id.* ¶ 197 n.120.

98. See Regine Neugebauer, *Fine-Tuning WTO Jurisprudence and the SPS Agreement: Lessons from the Beef Hormone Case*, 31 LAW & POL’Y INT’L BUS. 1255, 1256 (2000).

99. See, e.g., McNiel, *supra* note 17, at 133.



implemented.<sup>100</sup> This left open the door to a scientific finding by any scientist, orthodox or otherwise, that could provide the basis for a permissible risk assessment as the Appellate Body found that an SPS measure could derive from "a divergent opinion coming from qualified and respected sources," rather than exclusive reliance on "mainstream" scientific opinion.<sup>101</sup>

In addition, the SPS Agreement lists a number of factors to be taken into account when conducting a risk assessment.<sup>102</sup> The Appellate Body decided this was not a closed list by adding its own language: "The risk . . . under Article 5.5 is not only risk ascertainable in a science laboratory . . . but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die."<sup>103</sup> This suggests a scenario in which a party can include cultural preferences and social values in its risk assessment. Thus, the precautionary principle rejected by the panel, is revived in the Appellate Body decision, albeit in circumscribed form.

### 3. The Arbitration Decision Allowed the U.S. to Impose Countermeasures

The EU claimed that the Appellate Body ruling allowed it to carry out a new risk assessment while keeping the ban in place.<sup>104</sup> The U.S. disagreed, arguing that the ban should now be lifted within the "reasonable amount of time" stipulated by Article 21, paragraph 3 of the DSU.<sup>105</sup> Since neither party could agree on the timing, the matter was submitted to binding WTO arbitration under paragraph 3(c). The arbitrator ordered EU compliance within fifteen months, or by May 13, 1999.<sup>106</sup> In accordance with the U.S. argument, the ruling stipulated that

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100. See WTO Appellate Body Report, *supra* note 8, ¶ 189 (What was required was an "objective situation that persists and is observable between an SPS measure and a risk assessment.").

101. See *id.* ¶ 194.

102. See SPS Agreement, *supra* note 40, art. 5, ¶ 5.

103. See WTO Appellate Body Report, *supra* note 8, ¶ 187.

104. See Rountree, *supra* note 11, at 628.

105. *Id.* at 628–29.

106. WTO Arbitrator Award, *supra* note 9, ¶ 48.

the EU could not hold off legislative change pending a new scientific assessment.<sup>107</sup>

Fifteen months later, the EU had made no attempt to lift the ban, nor had it come up with a new risk assessment. The WTO approved a U.S. request for countermeasures and appointed an arbitration panel to determine the amount. In July 1999, the panel approved 100% ad valorem duties on a list of goods drawn up by the USTR<sup>108</sup> that could be imposed up to an amount of \$116.8 million.<sup>109</sup> The U.S. immediately imposed the duties on selected goods from its list.<sup>110</sup> Although the EU had shown willingness to negotiate before the arbitration decision, it later retreated.<sup>111</sup> This suggests that from the EU point of view, the amount was set too low for Coasean bargaining,<sup>112</sup> or, perhaps, that the socio-political payoff from non-compliance exceeded the harm from the tariffs.

Foreshadowing the protests in Seattle later that same year, local Parisians reacted to the imposition duties by pelting a McDonald's restaurant with apples, and the French town that produces Roquefort cheese placed a 100% per unit tax on Coca-Cola sold in local vending machines.<sup>113</sup> In late November and early December 1999, highly publicized protestors turned an aborted WTO ministerial meeting into the "Battle in Seattle."<sup>114</sup> A loose coalition of environmentalists, trade union members and others accused the WTO, among other things, of denying Europeans the right to eat hormone-free beef.<sup>115</sup> It was a nadir in U.S. trade relations, a view President Clinton conceded to

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107. *See id.*

108. *See* WTO Arbitrators Decision, *supra* note 11, ¶¶ 55, 84.

109. Estimates of the damage to the U.S. cattle industry have ranged from \$100–500 million. *See* Rountree, *supra* note 11, at 610.

110. *See* WTO Arbitrators Decision, *supra* note 11, at Annex II. The list included onions, Roquefort cheese, goose liver, fruit juice, mustard and pork products.

111. *See* Rountree, *supra* note 11, at 633.

112. *See id.* (suggesting the EU lacked incentive to deal).

113. *See* Anne Swardson, *Something's Rotten In Roquefort: A New U.S. Tariff*, WASH. POST, Aug. 21, 1999, at A1.

114. *See, e.g.,* David Postman et al., *Clashes, Protests Wrack WTO; Police Use Tear Gas Against Blockade*, SEATTLE TIMES, Nov. 30, 1999, at A1; John Burgess & Steven Pearlstein, *Protests Delay WTO Opening*, WASH. POST, Dec. 1, 1999, at A1.

115. *See* Jodie T. Allen & Dori Jones Yang, *Trade's Battle Hits Seattle*, U.S. NEWS & WORLD REP., Dec. 13, 1999, at 20, 20.

the distress of some observers, when he agreed with some of the protestors' complaints.<sup>116</sup>

### III. FORCING COMPLIANCE THROUGH TRADE SANCTIONS

#### A. WTO Countermeasures

The DSU encourages prompt compliance with recommendations and rulings of the Dispute Settlement Body ("DSB").<sup>117</sup> Under Articles 21 and 22, however, the DSU contemplates three levels of response to non-compliance with a DSB decision. Under Article 21, paragraph 3, the DSU allows that if an immediate implementation of the DSB recommendation is "impracticable," the non-compliant country may have a "reasonable period of time" in which to comply.<sup>118</sup> A reasonable period can be proposed by the non-compliant party if approved by the DSB.<sup>119</sup> If the DSB does not approve, the time may be mutually agreed-upon by both parties.<sup>120</sup> If this too fails, the period of time will be determined by binding arbitration within ninety days of the adoption of the DSB ruling,<sup>121</sup> as was the case in the beef hormone case. Article 21, paragraph 3(c) suggests that the arbitrator not exceed a period of fifteen months, although it allows discretion for a shorter or longer period.

The second level of response is for the parties to negotiation a "mutually acceptable compensation."<sup>122</sup> Compensation is not monetary, but involves the lifting of trade barriers by the losing party, thereby supporting free trade principles.<sup>123</sup> Compensation is offered not only to the prevailing party, but to all WTO members.<sup>124</sup> It is, however, rarely used. By contrast,

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116. *See id.*

117. DSU, *supra* note 5, art. 21, ¶ 1. The DSB was established under Article 2 of the DSU. *Id.* art. 2.

118. *Id.* art. 21, ¶ 3.

119. *Id.* ¶ 3(a).

120. *Id.* ¶ 3(b).

121. *Id.* ¶ 3(c).

122. DSU, *supra* note 5, art. 22, ¶¶ 1-2.

123. *See* Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules-Toward a More Collective Approach*, 94 AM. J. INT'L L. 335, 337 (2000).

124. *See, e.g.,* Japan-Taxes on Alcoholic Beverages, Mutually Acceptable Solution on Modalities for Implementation, WT/DS10/19, Doc. No. 98-0138

the third level of response, is purely bilateral in nature. It allows the prevailing country to suspend "concessions or other obligations under the covered agreements" to the non-compliant country.<sup>125</sup> Article 22, paragraph 3 lists the principles and procedures that determine approval of the proposed concessions that are to be suspended.<sup>126</sup> In general, the DSU requires, where possible, that suspended concessions affect the same sector(s) as those implicated in the DSB decision, or, failing that, sector(s) covered by the same trade agreement.<sup>127</sup> It also requires that the level of suspensions are equivalent to the level of "nullification or impairment" found by the DSB.<sup>128</sup> If the non-compliant country objects to the level of suspensions proposed, or claims that the principles and procedures of Article 22, paragraph 3 were not followed, the country can refer the matter to arbitration, during which time concessions may not be suspended.<sup>129</sup>

Although the Uruguay Round improved GATT rules for settling disputes, the DSU countermeasures reflect the GATT scheme of privately negotiated, bilateral treaties in contrast to the obligations of public international law. If a non-compliant country does not agree to comply, the WTO cannot force compliance. Instead, the prevailing country urges compliance by restricting its trade concessions.<sup>130</sup> In addition, unlike public international law, the DSU offers no remedy of reparation. There is only prospective relief, and this relief may be delayed by the reasonable period of time allowance and by arbitration.<sup>131</sup> The bilateral nature of the suspension of concessions can disfavor prevailing countries who are politically or economically weaker than the non-compliant member. A small country may not want to suspend concessions against a larger country that may have greater economic

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(Jan. 12, 1998), at [http://www.wto.org/english/tratop\\_e/dispu\\_e/distabase\\_wto\\_members3\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members3_e.htm) (Japan offered compensation in the form of tariff concessions for its delay).

125. DSU, *supra* note 5, art. 22, ¶¶ 1-3.

126. *Id.*

127. *Id.* ¶ 3(a)-(b).

128. *Id.* ¶ 4.

129. *See Id.* ¶¶ 6-7.

130. *Id.* art. 3, ¶ 7. *See also* DSU, *supra* note 5, art. 22, ¶¶ 2-3.

131. *See* DSU, *supra* note 5, art. 21, ¶ 3.

impact on the withholding country, but may nevertheless affect the larger country's political decisions, such as granting aid. Less obviously, a large, politically powerful party such as the U.S. confronts a similar dilemma when enticing compliance through trade restrictions, as WTO rules lack binding authority.

The power to authorize countermeasures has been widely perceived as a way of giving backbone to a previously milquetoast GATT dispute settlement process.<sup>132</sup> The threshold problem with this remedy is an inherent ideological contradiction that arises when an organization founded on the principle of free trade employs a measure that restricts trade.<sup>133</sup> If this objection is waived, the effectiveness of sanctions can derive from their power to bring parties to the bargaining table. The threatened sanctions should, therefore, present a credible threat. In coming in at the low end of the harm, the WTO arbitration decision against the EU in the Beef Hormone dispute achieved the opposite result. It appears the EU has decided that the cost of non-compliance is affordable. Its political and cultural differences with the U.S. on this matter, and perhaps most importantly, the protection of its own beef industry, appears to be worth the punishment of export taxes. In this way, the tariffs do little to remedy the initial harm complained of by the U.S., while causing further harms to small American businesses as well as their European counterparts through import duties. Furthermore, the problem with countermeasures that are set too low to induce compliance is that they call into question the effectiveness of the dispute settlement processes. Countermeasures that were intended to be temporary<sup>134</sup> continue from year to year, and attention shifts

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132. See, e.g., Carolyn B. Gleason & Pamela D. Walther, *The WTO Dispute Settlement Implementation Procedures: A System in Need of Reform*, 31 LAW & POL'Y INT'L BUS. 709, 709 (2000).

133. But see Daniel R. Murray, *Foie Gras?: Making Economic Sense of the 1999 U.S. Tariffs on Gourmet European Goods*, 5 J. INT'L LEGAL STUD. 243, 256 (1999) (arguing that the tariffs are not protectionists but simply equivalent to the amount the U.S. has paid to subsidize EU beef producers).

134. "The suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time." DSU, *supra* note 5, art. 22, ¶ 1.

to the failure of the settlement process to enforce compliance, rather than the lack of compliance itself.

Sanctions are a double-edged sword that hurt a large importing country, such as the U.S., as well as the exporting country they are intended to punish. This applies tenfold when the countries have the interdependent trading relationship like the one existing between the EU and U.S.<sup>135</sup> A glance at the products on the U.S. tariff list approved by WTO arbitrators in the Beef Hormone case reveals a tendency toward high-end food imports that presumably are calculated to strike a balance of minimum harm to the U.S. and maximum harm to the EU.<sup>136</sup> The process, however, does not rule out short-term casualties. The long-term harm is less tangible, but it clearly runs counter to U.S. goals of global free trade.

### *B. Section 301 Sanctions*

Since 1974, the principal means of addressing allegedly discriminatory trade practices by foreign governments that adversely affect U.S. trade has been sections 301-310 of the Trade Act of 1974 (collectively "Section 301").<sup>137</sup> The provisions of the Act empower the President, through the USTR (an executive appointee)<sup>138</sup> to retaliate unilaterally with trade sanctions against any unjustifiable or discriminatory act or policy of a foreign country.<sup>139</sup>

Although some trading partners thought that Section 301 would be replaced by the DSU, U.S. officials have stated with intricate reasoning that Section 301 measures may actually be more effective with the DSU.<sup>140</sup> In 1998, the U.S. invoked

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135. See generally NATO REPORT, *supra* note 12, at tbls.

136. See Murray, *supra* note 133, at 252.

137. Trade Act of 1974 §§ 301-310, 19 U.S.C. §§ 2411-20 (2000).

138. See Jay L. Eizenstat, Comment, *The Impact of the World Trade Organization on Unilateral United States Trade Sanctions Under Section 301 of the Trade Act of 1974: A Case Study of the Japanese Auto Dispute and the Fuji-Kodak Dispute*, 11 EMORY INT'L L. REV. 137, 139-40 (1997) (arguing that although Article II of the U.S. Constitution gives Congress the power to "regulate Commerce with foreign nations," that body has delegated authority to the executive branch in order to project a pro-sovereignty position in trade negotiations).

139. See 19 U.S.C. § 2411(a)-(b)(1).

140. See, e.g., *Overview of the Results of the Uruguay Round: Hearing Before the Senate Committee on Commerce, Science, and Transportation*,

Section 301 against the EU in the EU-bananas dispute ("Bananas")<sup>141</sup> in which the EU also had an adverse WTO ruling, and the U.S. contemplated countermeasures pursuant to Article 22 of the DSU.<sup>142</sup> The EU protested the use of Section 301 as an instance of unilateral enforcement by the U.S. inconsistent with its Article 23 obligations that endorsed multilateral enforcement of WTO decisions through the DSU.<sup>143</sup> The EU instigated a separate legal inquiry into the legitimacy of Section 301 within the dispute settlement process.<sup>144</sup> With great diplomacy, the WTO panel determined that despite the discretionary elements of the statute in sections 304, 305, and 306 that appeared to generate a *prima facie* inconsistency, the U.S. had pledged both before the WTO panel and in a Statement of Administrative Actions that it would not exercise this discretion contrary to its Article 23 obligations, and therefore exercising Section 301 sanctions were permissible.<sup>145</sup>

Historically, the U.S. has used sanctions to open up otherwise inaccessible markets.<sup>146</sup> It has been an effective tool

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103rd Cong. 12 (1994) (statement of Hon. Michael Kantor, U.S. Trade Representative); *Results of Uruguay Round Trade Negotiations: Hearings Before the Senate Committee on Finance*, 103rd Cong. 195 (1994) (statement of John H. Jackson, Hessel E. Yntema Prof. of Law, The University of Michigan Law School).

141. This U.S.-EU case concerned the preferential treatment the EU gives banana imports from certain countries. *See generally* European Community – Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States, Report of the Panel, WT/DS27/R/USA, Doc. No. 97-2070 (May 22, 1997), at [http://www.wto.org/english/tratop\\_e/dispu\\_e/distabase\\_wto\\_members2\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members2_e.htm) [hereinafter EC-Bananas Panel Report]. The nine-year-old Bananas dispute was resolved by the Bush administration on Apr. 11, 2001. *See* Press Release, Office of the United States Trade Representative, U.S. Government and European Commission Reach Agreement to Resolve Long-Standing Banana Dispute (Apr. 11, 2001), available at <http://www.useu.be/issues/bana0411.htm>.

142. *See* EC-Bananas Panel Report, *supra* note 141, ¶ II.21.

143. *See* Seung Wha Chang, *Taming Unilateralism Under the Multilateral Trading System: Unfinished Job in the WTO Panel Ruling on U.S. Sections 301-310 of the Trade Act of 1974*, 31 LAW & POL'Y INT'L BUS. 1151, 1155 (2000).

144. *See id.*

145. *See id.* *See also* United States – Sections 301-310 of the Trade Act of 1974, Report of the Panel, WT/DS152/R, Doc. No. 99-5454 (Dec. 22, 1999), at [http://www.wto.org/english/tratop\\_e/dispu\\_e/distabase\\_wto\\_members4\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members4_e.htm).

146. *See* Chang, *supra* note 143, at 1157.

that is popular with Congress. Since 1974, over ninety-eight cases have been filed under Section 301.<sup>147</sup> According to one study, the threat of sanctions led to trade liberalization in 70% of cases,<sup>148</sup> indicating that the successful use of sanctions can be attributed largely to the credible threat of retaliation and not in actually levying them.<sup>149</sup> The clear implication for the Beef Hormone arbitration is that the WTO did not furnish the U.S. with an award that presented a credible threat.

### C. Carousel Retaliation

In May 2000, the first major trade legislation to pass Congress since 1995, the Africa-Caribbean Basin Initiative Bill ("Africa-CBI Bill") was signed into law by President Clinton.<sup>150</sup> This bill contained provisions that allowed the USTR to employ a carousel approach to trade sanctions by rotating the products on its Section 301 list every six months.<sup>151</sup> House Committee on Agriculture Chairman Larry Combest, a co-sponsor of the "Carousel Retaliation Act," described the economic impact of the provisions as "what comes around, goes around."<sup>152</sup> Carousel sanctions attempt to give teeth to WTO countermeasures by testing the legal limits under Article 22 of the DSU. They do not challenge the bilateral nature of enforcement, nor the prospective nature of the remedy.<sup>153</sup>

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147. See Eizenstat, *supra* note 138, at 159.

148. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 117 (1989). See also Thomas O. Bayard, *Comment on Alan Sykes' "Mandatory Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301,"* 8 B.U. INT'L L.J. 325, 325 (1990).

149. See *id.*

150. See Trade and Development Act of 2000, Pub. L. No. 106-200, 114 Stat. 251.

151. See International Center for Trade and Sustainable Development, *Africa-CBI Trade Bill Passes Senate; Carousel Provisions Ignite EU-US Tensions*, at <http://www.ictsd.org/html/weekly/story1.16-05-00.htm> (last visited Feb. 24, 2002).

152. Press Release, United States House of Representatives Committee on Agriculture, Combest, Stenholm Pursue New Strategy on Trade Violations Carousel Retaliation Act: What Comes Around Goes Around (Oct. 1, 1999), available at <http://agriculture.house.gov/106/pr991001.html>. See also H.R. 2991, 106th Cong. (1999).

153. See Trade and Development Act of 2000, Pub. L. No. 106-200, 114 Stat. 251.



The WTO arbitration decision in the Beef Hormone dispute refers directly to carousel sanctions.<sup>154</sup> The report cites a U.S. promise: "Although nothing in the DSU prevents future changes to the list . . . the United States has no current intent to make such changes."<sup>155</sup> It continues:

We thus assume that the U.S. – in good faith and based upon this unilateral promise – will not implement the suspension of concessions in a carousel manner. We therefore do not need to consider whether such an approach would require an adjustment in the way in which the effect of an authorized suspension is calculated.<sup>156</sup>

Following passage of the Africa-CBI Bill, the EU requested DSU consultations with the U.S. alleging that the sanctions were impermissible:

Section 306, as amended, is in breach of the DSU since it mandates unilateral action without any prior multilateral control. . . . [The EU] further is of the view that the measure is in breach of the obligation of equivalence, in that it creates a structural imbalance between the cumulative level of the suspension of concessions and the level of nullification and impairment as determined under relevant DSU procedures.<sup>157</sup>

The DSU allows sixty days for resolution of disputes through consultation; after that the EU could request a panel to rule on the complaint.<sup>158</sup> To date, the EU has not done this.

As a legal matter, carousel sanctions are not expressly outlawed by the DSU. A recent proposal by the Philippines and Thailand to amend Article 22, paragraph 7 of the DSU in a way that would make it harder to impose carousel sanctions,<sup>159</sup> suggests that the DSU as it stands does not prohibit them. Furthermore, the short time-frame approach of carousel sanctions is supported by a DSU policy that stresses the

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154. See WTO Arbitrators Decision, *supra* note 11, ¶ 22.

155. *Id.*

156. *Id.*

157. Pruzin, *supra* note 31.

158. *Id.*

159. See Daniel Pruzin, *WTO: WTO Members Gear Up for Talks on Dispute Settlement Rules Reform*, INT'L TRADE DAILY (BNA) (Oct. 11, 2001), at WL 10/11/2001 BTd d8.

temporary nature of countermeasures.<sup>160</sup> The EU alleges that carousel sanctions violate the principle of equivalence under Article 22.<sup>161</sup> Paragraph 4 of Article 22 specifically states that “[t]he level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of nullification or impairment.”<sup>162</sup> In Article 22, paragraph 7, the DSU instructs that the arbitrator shall determine equivalence.<sup>163</sup> Since the approved tariffs can be interchanged on a pecuniary level so long as the total does not exceed the amount of nullification and impairment specified by the arbitrator, carousel sanctions do not violate pecuniary equivalence. According to the EU, however, the rotated products create an additional cumulative harm that exceeds equivalence.<sup>164</sup> Unfortunately, it is not clear from the available record, how the EU quantifies this cumulative effect.

During consultations with the EU concerning carousel sanctions, the U.S. refused to disclose details of its carousel selection procedures.<sup>165</sup> While this inscrutability may protect the process from a finding of illegality on the part of the EU, it is ironic coming from a party who has urged that the WTO processes become more transparent.<sup>166</sup> In addition, although U.S. secrecy preserves its right to act unilaterally from multilateral interference, this posture raises questions of sovereignty that generally arise when power is ceded to a

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160. See DSU, *supra* note 5, art. 22, ¶ 8. “Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.” *Id.* art. 21, ¶ 1.

161. See S.K. Ross & Assoc., P.C., *Good Trade – New Law Encourages African and Caribbean Commerce*, at [http://www.skralaw.com/Articles/trade\\_remedies.htm](http://www.skralaw.com/Articles/trade_remedies.htm) (last visited Feb. 24, 2002).

162. DSU, *supra* note 5, art. 22, ¶ 4.

163. “The arbitrator acting pursuant to paragraph 6 [procedure for arbitration] shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment.” *Id.* ¶ 7.

164. See EU Request for Consultations, *supra* note 26.

165. See Telephone Interview, *supra* note 28. The U.S. stated that “carousel sanctions would be applied on a case by case basis, so no generalizations regarding their implementation could be made.” *Id.* The U.S. position makes it “harder for the EU to build a WTO case against the carousel sanctions law.” *Id.*

166. See Pruzin, *supra* note 159.

multilateral institution, rather than an executive appointee.<sup>167</sup> Here, the USTR is appointed without a direct democratic mandate, and with questionable constitutional authority,<sup>168</sup> is given a large amount of discretion to make decisions that adversely affect U.S. businesses.<sup>169</sup>

According to a USTR official, the same methods used to select Section 301 products are used to choose the businesses targeted for carousel sanctions.<sup>170</sup> First, a broad list is compiled by government analysts for the Department of Commerce and USDA, who comb through the tariff rates for every listed product and its accompanying trade statistics.<sup>171</sup> Analysts look for rates that are proportional, and in cases where reciprocal products can be found, they are targeted.<sup>172</sup> For instance, in the Beef Hormone case, the U.S. initially targeted pork products.<sup>173</sup> The overriding goal is to pick those products where duties will hurt the other side more than the U.S., but this process is more art than science.<sup>174</sup> When dealing with the EU, which Member State to target also becomes part of the selection equation.<sup>175</sup> Thus, after selecting pork products, the U.S. scaled back the quantity of products targeted because it did not want to unfairly burden Denmark, the EU's largest pork producer, as Denmark is a relatively small EU Member State lacking large political influence.<sup>176</sup> After compilation, the broad list is then

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167. For further discussion of multilateralism versus sovereignty, see Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71 (2000).

168. See, e.g., Eizenstat, *supra* note 138, at 139, 139 nn.11-12.

169. A limited amount of feedback concerning the targeted products is permitted. See, e.g., Implementation of WTO Recommendations Concerning the European Communities' Regime for the Importation, Sale and Distribution of Bananas, 64 Fed. Reg. 19209, 19210 (Office of the U.S. Trade Rep. Apr. 19, 1999) ("The articles affected by this determination [Section 301 sanctions] were selected in light of the comments submitted to the Section 301 Committee in response to the October 22, November 10, and December 23 notices, and the testimony presented at the public hearing held on December 9, 1998.").

170. See Telephone Interview, *supra* note 28.

171. See *id.*

172. See *id.*

173. See *id.*

174. See *id.*

175. See *id.*

176. See Telephone Interview, *supra* note 28.

published and disseminated throughout government and industry to give notice and solicit comment.<sup>177</sup> Responses to carousel sanctions from industries targeted by Section 301 have been predictable: those already on the list like them because it means they will rotate off more quickly, those off the current list dislike them because they are now at risk of selection in the next time period.<sup>178</sup>

If carousel sanctions are found to be legal, their use by the U.S. in the time-worn Beef Hormone dispute is perhaps irresistible. The arbitration award has had little observable effect on the EU, whereas the mere threat of carousel sanctions has already caused the EU to jump.<sup>179</sup> Beyond the general problems with sanctions – they work better as threats, and when used cut both ways – are those particular to a rotating list of businesses. The first problem is the shadowy product selection process with few procedural safeguards to ensure equity, and even fewer objective measures of substantive equity. A broader range of targets may increase equity by spreading the pain more thinly on the U.S. side while maintaining pressure on the EU, but unless the process is open to analysis, this cannot be studied. A second problem is the ill-will the sanctions will engender in the trans-Atlantic business community.<sup>180</sup> The use of carousel sanctions is a political as well as legal decision, and it affects a widely dispersed range of small businesses on both sides of the Atlantic that may not be politically well organized.

#### IV. ALTERNATE WAYS OF ENFORCING COMPLIANCE

As flaws in the DSU process have become apparent, scholars and international trade experts have proposed solutions.<sup>181</sup>

##### A. *Reforming the DSU*

An obvious solution to questions raised by the Beef Hormone case is to look at the problems with the DSU and attempt

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177. *See id.*

178. *See id.*

179. *See, e.g.,* EU Request for Consultations, *supra* note 26.

180. *See* Yerkey, *supra* note 36.

181. *See, e.g.,* Gleason & Walther, *supra* note 132, at 728-35.

repair by changing the process.<sup>182</sup> The most glaring fault is the time it takes to give an injured party relief.<sup>183</sup> Although it was a goal of the U.S. GATT negotiators to impose "stringent time limits on each step of the settlement process,"<sup>184</sup> the length of time this case has taken despite favorable rulings at each step has brought the U.S. no closer to its desired goal, or indeed that of the DSU as expressed in Article 22, paragraph 1: "neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of recommendation to bring a measure into conformity, with the covered agreements."<sup>185</sup> In practice, temporary suspension has been too long in arriving and lasted too long in operation. The arbitrators in the Beef Hormone dispute interpreted the "reasonable period of time," articulated in Article 21, paragraph 3(c) during which the losing party brings its regulations into conformity, as "the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the [Dispute Settlement Body]."<sup>186</sup> The EU procedures, however, dictated the full fifteen month grace period.<sup>187</sup> Abuse of time by the losing party is not contemplated by the DSU.

A non-compliant party has few obligations during the grace period. Under Article 21, it must provide regular status reports beginning six months after the period begins, but nothing prevents a losing party from using the period to buy additional months of non-compliance.<sup>188</sup> Additional monitoring and surveillance during this period could prevent bad faith simply by its presence or by tolling the time period in the face of abuse.

Incentives under the current regime are also minimal. Since suspension of concessions is not granted retrospectively, the losing country has no reason to speed up implementation even

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182. *See id.* at 734.

183. *See id.* at 713.

184. SAA, *supra* note 22.

185. DSU, *supra* note 5, art. 22, ¶ 1.

186. WTO Arbitrator Award, *supra* note 9, ¶ 26.

187. *Id.* ¶ 48.

188. *See, e.g.,* Gleason & Walther, *supra* note 132, at 720-21 (describing strong evidence of non-compliance well before expiration of the reasonable period in the Bananas case).

if good faith is assumed. Commentators have suggested that requiring compliance, compensation, or withdrawal of concessions at the time of the WTO ruling would be more effective, and has been shown to work in the North American Free Trade Agreement.<sup>189</sup> Alternatively, along with greater surveillance during the grace period, imposition of double and treble damages would discourage bad faith during the implementation period.<sup>190</sup> Others have suggested that the WTO should be permitted to levy retrospective reparations similar to those awarded by the International Court of Justice.<sup>191</sup>

### *B. Other Ideas*

#### 1. Compensating Trade Liberalization Measures

In November 2000, a CEO-level conference of the Trans-Atlantic Business Dialogue suggested that in place of sanctions, the U.S. and EU should look to “compensating trade liberalization measures.”<sup>192</sup> This asks the non-compliant country to lower its tariffs on other goods in such a way as to offset the WTO violation.<sup>193</sup> This proposal takes even more control away from the injured party, but has the virtue of promoting free trade.

#### 2. Multilateralism

One noted scholar has commented on the DSU (specifically, Articles 3 paragraph 4; 3 paragraph 5; 3 paragraph 7; 11; 19 paragraph 1; 21 paragraph 1; 21 paragraph 6; 22 paragraph 1; 22 paragraph 2; 22 paragraph 8; and 26 paragraph 1(b)) by suggesting that the “overall gist” of the provisions “strongly suggests that the legal effect of an adopted panel report is the international law obligation to perform the recommendation of

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189. *See id.* at 733-34.

190. *See id.* at 734-35.

191. *See Pauwelyn, supra* note 123, at 339.

192. TRANSATLANTIC BUSINESS DIALOGUE, CINCINNATI RECOMMENDATIONS 37 (2000), available at <http://www.tabd.com/recommendations/Cincinnati00.pdf> (last visited Feb. 24, 2002).

193. *See Yerkey, supra* note 36.

the panel report.”<sup>194</sup> Although this is an extreme position to take at this time, and few countries would likely accept an international obligation based on an overall gist, it can be interpreted as a forward-looking statement, signaling the path the WTO is slowly taking toward multilateralism. Support for reading WTO rules and DSU decisions as binding international obligations has been found in DSU Article 3 paragraph 2 that provides that WTO provisions are clarified “in accordance with customary interpretations of public international law.”<sup>195</sup> Multilateral treaties, such as the SPS Agreement, which are no longer based on the traditional balance of trade concessions between parties, indicate that the WTO is venturing beyond the original bilateral GATT framework.<sup>196</sup> Under this analysis, enforcement of WTO obligations will become a multilateral rather than a bilateral concern. In summary:

Once WTO rules have been accepted as international legal obligations that affect individuals and merit collective enforcement for the public good . . . and once this new perception has come to be accepted and entrenched, it will be increasingly difficult to justify both the absence of certain traditional remedies, including reparation, and the lack of a more effective system to induce compliance with WTO rules.<sup>197</sup>

## V. CONCLUSION

The political and cultural differences between the EU and U.S. that have been highlighted by the Beef Hormone dispute relate to differing attitudes toward food and science. They were exacerbated by health crises in EU Member States and the economic and political pressures of multi-million dollar agribusiness. The acceptance of genetically modified organisms is running into similar problems in Europe, and may ultimately raise more complex issues for the WTO.<sup>198</sup> The

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194. John H. Jackson, *The WTO Dispute Settlement: Understanding Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60, 62-63 (1997).

195. Pauwelyn, *supra* note 123, at 341.

196. The customary rationale for enforcement of these agreements has become “less relevant.” *Id.* at 342.

197. *Id.* at 347.

198. See, e.g., Echols, *supra* note 13, at 528-29, 538 (describing the EU's demand that foods containing genetically modified organisms be labeled).

failures of the DSU and SPS Agreement with regard to the Beef Hormone case may ultimately prove fruitful for future amendments to the procedure.

In the meantime, the American beef industry is suffering, and the U.S. has nothing to show after fifteen years of friction with its largest trading partner and many favorable WTO rulings. With regard to this dispute, the use of carousel sanctions, if they are indeed legal, may seem justified by the length of time the dispute has run, the bad faith evidenced by the EU's lack of compliance and the economic equality between these two giant trading partners. It is clear that DSU procedures alone have failed both to enforce timely and appropriate countermeasures on a non-compliant party, and to ensure that the countermeasures are a temporary predecessor to compliance. As suggested, it may be that multilateral treaties such as the SPS Agreement at issue in the Beef Hormone dispute may herald a future where multilateral legal obligations replace bilateral trade sanctions, and prove more effective in policing compliance with WTO rulings. All present indications suggest, however, that progress along these lines will be slow and politically volatile.<sup>199</sup> In reality, trade talks take place in a political climate and in the context of many different disputes and issues.<sup>200</sup> Thus, other considerations altogether may influence the ultimate settlement of the Beef Hormone dispute without regard to its extensively litigated merits.

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199. See *supra* notes 114-16 and accompanying text.

200. Currently, for example, the EU has asked the WTO to consider countermeasures of \$4 billion against the U.S. as a result of its favorable tax treatment to foreign sales corporations, while in early March 2002, the U.S. announced tariffs on imported steel that have alarmed affected WTO member countries. See Pruzin, *supra* note 30.



