# EUROPEAN COMMUNITIES - MEASURES CONCERNING MEAT AND MEAT PRODUCTS (HORMONES)

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

Award of the Arbitrator
Julio Lacarte-Muró
WT/DS26/15, WT/DS48/13

*Circulated to Members on 29 May 1998*

## I. INTRODUCTION

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

2. On 26 March 1998, consultations were held between the European Communities and the United States and Canada in order to reach agreement on a "reasonable period of time" for the implementation of the recommendations and rulings of the DSB adopted on 13 February 1998. These consultations, and further written communications between the parties, did not lead to an agreement. There-

[1] WT/DS26/AB/R, WT/DS48/AB/R.
[2] Complaint by the United States, WT/DS26/R ("US Panel Report"); Complaint by Canada, WT/DS48/R ("Canada Panel Report").
[3] As noted at paragraphs 2-5 of the Appellate Body Report, the "measures" at issue in this dispute were Council Directive 81/602/EEC of 31 July 1981, Council Directive 88/146/EEC of 7 March 1988 and Council Directive 88/299/EEC of 17 May 1988, which were codified and replaced by Council Directive 96/22/EC of 29 April 1996 ("Directive 96/22"), which came into effect on 1 July 1997, Official Journal, No. L 125, 23 May 1996, p. 3.
[4] Done at Marrakesh, Morocco, 15 April 1994.
[5] WT/DSB/M/43, 8 April 1998, p. 8.

fore, the European Communities requested, on 8 April 1998, that the "reasonable period of time" be determined by binding arbitration pursuant to Article 21.3(c) of the DSU.[6]

3. In the absence of an agreement between the parties on the appointment of an arbitrator within 10 days after referring the matter to arbitration, the European Communities requested, in a letter dated 18 April 1998 and received on 20 April 1998, and the United States and Canada requested, on 20 April 1998, the Director-General of the World Trade Organization ("WTO") to appoint the arbitrator, as provided for in footnote 12 to Article 21.3(c) of the DSU. After consultations with the parties, the Director-General decided, on 30 April 1998, to appoint H.E. Mr. Celso Lafer and myself as the arbitrators in this matter. Subsequently, Ambassador Lafer informed the Director-General that he was unable to accept the nomination. The Director-General informed the parties on 7 May 1998 that, given the very strict timeframe within which this arbitration must be conducted, he believed that the best course of action was to continue this arbitration with me acting as the sole arbitrator.

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

## II. ARGUMENTS OF THE PARTIES

### *A. European Communities*

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

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

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

risk assessments for all the hormones, as clarified by the Appellate Body, including an evaluation of the risks posed to human health from failure to observe good veterinary practice; and second, to review the measure at issue in the light of the results of that risk assessment and propose to abolish, amend or maintain it, as appropriate.[7]

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

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

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

Referring to the finding of the Appellate Body at paragraph 129 of the Appellate Body Report that the phrase "as appropriate to the circumstances" in Article 5.1 "makes clear that the Members have a certain degree of flexibility in meeting the

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

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

9 *Ibid*.

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

requirements of Article 5.1", the European Communities asserts that "the flexibility to which Members are entitled" under Article 5.1 "would be wrongfully abrogated if this arbitration does not allow the EC a reasonable period of time in which to perform the hormone-specific and residue-specific risk assessment which the Appellate Body for the first time in this case held is required."[11]

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

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

11. With respect to the first phase of its proposed implementation of the DSB recommendations and rulings, the European Communities states that it intends to carry out a series of research projects that, it considers, constitute "the risk assessment specified by the Appellate Body report."[16] In view of the type and nature of the experiments involved, some of these projects, such as those testing the carcinogenicity and genotoxicity of residues in meat of the parent compounds and their metabolites, cannot be completed in less than two years from the time they are commenced. This time period of two years is incompressible. The Euro-

[11] Written submission of the European Communities, para. 52.
[12] Written submission of the European Communities, para. 56.
[13] Written submission of the European Communities, para. 71.
[14] *Ibid*.
[15] *Ibid*.
[16] Written submission of the European Communities, para. 79.

pean Communities states that in order to identify missing scientific information, avoid duplication of scientific work and reduce as far as possible the time necessary to complete the risk assessment, the EC Commission requested in writing, on 8 April 1998, relevant information from the United States, Canada, Australia and New Zealand. It also intends to send a similar request for information to the Codex Alimentarius Commission.

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

13. The European Communities maintained in its written submission that if the results of the risk assessment indicate the need to take legislative action, the legislative process for the implementation of the DSB recommendations and rulings in this case could be completed within approximately two years. In the oral hearing, the European Communities stated that it would need 15 months for the legislative process. The European Communities disagrees with the United States and Canada concerning the appropriate legislative basis - and, consequently, concerning the legislative process that must be followed within the European Communities - for any measure abolishing or amending the current measure banning imports of meat and meat products derived from cattle administered with certain hormones for growth promotion purposes. According to the European Communities, even if Directive 96/22 was based on Article 43 of the *Treaty Establishing the European Community*[18] (the "*EC Treaty*") and was adopted pursuant to the consultation procedure, this is no longer the correct legal situation in the European Communities.[19] As the principal objective of the measure in question is to protect human health, an act to abolish or amend Directive 96/22 will require a Directive of the Council and the European Parliament based on Article 100a of

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

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

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

the *EC Treaty*. Any act based on Article 100a must be adopted in accordance with the co-decision procedure provided for in Article 189b of the *EC Treaty*.[20]

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

### *B. United States*

15. The United States argues that the "reasonable period of time" for implementation of the DSB recommendations and rulings in this case is 10 months, i.e., by 1 January 1999. The most relevant factors affecting the decision on the length of the reasonable period of time for implementation are: (i) the legal form of implementation necessary (e.g., legislation, regulations, decree, etc.); (ii) the nature of the legislative or regulatory changes to be made; and (iii) the period of time in which the implementing Member can achieve the proposed legal form of implementation, assuming that the Member applies itself in good faith. Based on these criteria, an implementation period of 10 months is "reasonable" in this instance in light of the action that is required of the European Communities to comply with the DSB recommendations and rulings, i.e., removal of the import ban, and the nature of the regulatory/legislative process applicable to issues involving agriculture, such as the import ban in question, under the current law of the European Communities.

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

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

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

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

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

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

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

### *C. Canada*

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

20. In Canada's view, the "reasonable period of time" does not include time for the European Communities to conduct a risk assessment. Rather, the "reasonable period of time" is provided to allow the European Communities to take the necessary legislative steps to remove its inconsistent measures. In the present case, the impugned measures of the European Communities have been found inconsistent with the obligations of the European Communities under the *SPS Agreement*. Withdrawal of the measures is the only way to bring them into conformity with the *SPS Agreement*. While the European Communities is free to undertake risk assessments for any of the hormones concerned at any time, conducting such a risk assessment does not constitute compliance with the DSB recommendations and rulings. Accordingly, the European Communities should have already started taking the necessary legislative steps to withdraw the inconsistent measures.

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

22. Finally, Canada submits that the European Communities could complete the required legislative process in significantly less than 15 months. As the measures that must be brought into conformity with the *SPS Agreement* are based on Article 43 of the *EC Treaty*, amendment or repeal of these measures could be done pursuant to the consultation procedure and, under the existing law of the

European Communities[24], would not legally require the co-decision procedure under Articles 100a and 189b of the *EC Treaty*. The consultation procedure required by Article 43 of the *EC Treaty* can be completed in a period much shorter than 15 months, i.e., in a period of approximately eight months. Canada submits that a policy choice by the European Communities in favour of the co-decision procedure under Article 189b of the *EC Treaty*, which goes beyond the strictly legal requirements of European Community law, should not be taken into account as "particular circumstances" that would impact on the determination of what constitutes a "reasonable period of time". Even if the co-decision procedure were necessary, there is evidence that this procedure would take 18 months on average, and can take less than 15 months.

## III. ARTICLE 21.3 OF THE DSU

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

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

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

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

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

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

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

## IV. LONGER PERIOD THAN 15 MONTHS

28. The European Communities maintains that, in this case, there are "particular circumstances" justifying a reasonable period of time of 39 months[26] in

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

[26] In its written submission, para. 115, the European Communities stated that it would require a period of approximately four years, consisting of two years to conduct a risk assessment and approximately two years for any legislative process that may be necessary in light of the results of the