WORLD TRADE ORGANIZATION

WT/DS26/ARB
12 July 1999

(99-2855)

EUROPEAN COMMUNITIES – MEASURES CONCERNING MEAT AND MEAT PRODUCTS (HORMONES)

ORIGINAL COMPLAINT BY THE UNITED STATES

RECOURSE TO ARBITRATION BY THE EUROPEAN COMMUNITIES UNDER ARTICLE 22.6 OF THE DSU

DECISION BY THE ARBITRATORS

The Decision of the Arbitrators on European Communities - Measures Concerning Meat and Meat Products (Hormones) - Recourse to arbitration by the European Communities under Article 22.6 of the

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I. INTRODUCTION

1. On 17 May 1999, the United States ("US"), pursuant to Article 22.2 of the DSU, requested the Dispute Settlement Body ("DSB") to authorize the suspension of the application to the European Communities ("EC") and its member States of tariff concessions covering trade in an amount of US$ 202 million per year.[1] In a letter dated 2 June 1999, the EC objected to the level of suspension proposed by the US and requested that the matter be referred to arbitration. In its submissions, the EC quantified the level of trade impairment caused by the hormone ban on US bovine meat and meat products at a maximum of US$ 53,301,675. The EC also asked that the arbitrators request the US to submit a list with proposed suspension of concessions equivalent to the level of nullification or impairment, once this level had been determined by the arbitrators.

2. At its meeting of 3 June 1999, the DSB - referring to both the US and the EC request - noted that, pursuant to Article 22.6 of the DSU, the matter shall be referred to arbitration. Article 22.6 provides as follows:

> "When the situation described in paragraph 2 occurs [if the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21], the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. *However, if the Member concerned objects to the level of suspension proposed … the matter shall be referred to arbitration.* Such arbitration

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> "The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment".

4. In this case, the arbitrators are called upon to "determine whether the level of … suspension [of tariff concessions, as proposed by the US] is *equivalent* to the level of nullification or impairment"[4] caused to the US by the EC ban on imports of hormone treated beef and beef products.

5. The organisational meeting at which time-table and working procedures were adopted, was held on 4 June. On 7 June we received a paper from the US explaining the methodology it applied in calculating the proposed level of suspension. First written submissions were received from both parties on 11 June. Rebuttals were filed on 18 June. A meeting with the parties was held on 22 June. On 25 June we received answers to a list of questions we had submitted to the parties.

6. The main arguments of the parties are summarized below when examining each of the claims before us.

II. PRELIMINARY ISSUES

A. THIRD-PARTY RIGHTS

7. Following a request by Canada for third-party rights and after careful consideration of the parties' arguments made at the organisational meeting of 4 June 1999 and in their written submissions, the arbitrators ruled as follows:

> The US and Canada are allowed to attend both arbitration hearings, to make a statement at the end of each hearing and to receive a copy of the written submissions made in both proceedings.
>
> The above ruling was made on the following grounds.
>
> - DSU provisions on panel proceedings, referred to by analogy in the arbitrators' working procedures, give the arbitrators discretion to decide on procedural matters not regulated in the DSU (Article 12.1 of the DSU) in accordance with due process.[5] The DSU does not address the issue of third-party participation in Article 22 arbitration proceedings.
>
> - US and Canadian rights may be affected in both arbitration proceedings:
>
>   First, the estimates for high quality beef ("HQB") exports, foregone because of the hormone ban, are to be based on a tariff quota that allegedly needs to be shared between Canada and the US. A determination in one proceeding may thus be decisive for the determination in the other.

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[4] Article 22.7 of the DSU, emphasis added.

[5] In this respect see footnote 138 in the Appellate Body Report on *EC – Measures Concerning Meat and Meat Products (Hormones)*, adopted on 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R: "[T]he DSU, and in particular its Appendix 3, leave panels a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated. Within this context, an appellant requesting the Appellate Body to reverse a panel's ruling on matters of procedure must demonstrate the prejudice generated by such legal ruling".

12. There is, however, a difference between our task here and the task given to a panel. In the event we decide that the US proposal is *not* WTO consistent, i.e. that the suggested amount is too high, we should not end our examination the way panels do, namely by requesting the DSB to recommend that the measure be brought into conformity with WTO obligations. Following the approach of the arbitrators in the *Bananas* case – where the proposed amount of US$ 520 million was reduced to US$ 191.4 million -- we would be called upon to go further. In pursuit of the basic DSU objectives of prompt and positive settlement of disputes[8], we would have to estimate the level of suspension we consider to be equivalent to the impairment suffered.[9] This is the essential task and responsibility conferred on the arbitrators in order to settle the dispute. In our view, such approach is

impairment, to then request a specific product list from the US and to finally determine whether both are "equivalent". The US objects to this EC request.[13]

15. The arbitrators are unable to follow the EC request. No support for this request can be found in the DSU.

16. The authorization given by the DSB under Article 22.6 of the DSU is an authorization "to suspend [the application to the Member concerned of] concessions or other obligations [under the covered agreements]".[14] In our view, the limitations linked to this DSB authorisation are those set out in the proposal made by the requesting Member on the basis of which the authorisation is granted. In the event tariff concessions are to be suspended, only products that appear on the product list attached to the request for suspension can be subject to suspension. This follows from the minimum requirements attached to a request to suspend concessions or other obligations. They are, in our view: (1) the request must set out a specific level of suspension, i.e. a level equivalent to the nullification and impairment caused by the WTO inconsistent measure, pursuant to Article 22.4[15]; and (2) the request must specify the agreement and sector(s) under which concessions or other obligations would be suspended, pursuant to Article 22.3.[16]

17. Neither can support for the EC request be found in other provisions of Article 22. Instead, they prescribe the following: (1) the "DSB shall not authorize suspension of concessions or other obligations if a covered agreement prohibits such suspension" (Article 22.5); (2) "[c]oncessions or other obligations shall not be suspended during the course of the arbitration" (Article 22.6 *in fine*); and (3) the suspension "shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached" (Article 22.8).

18. In our view, the determination of other aspects related to the suspension remain the prerogative of the Member requesting the suspension. We note, in particular, that the Member in respect of whom concessions or other obligations would be suspended, can object to "*the level* of suspension proposed"[17] and that an arbitrator has to "determine whether *the level* of such suspension is equivalent to *the level* of nullification or impairment".[18] Arbitrators are explicitly prohibited from

[13] In contrast to this case, in the *Bananas* dispute the list of products attached to the US request for suspension corresponded, at least according to US calculations, to the US estimate of trade impairment of US$

"examin[ing] *the nature* of the concessions or other obligations to be suspended"[19] (other than under Articles 22.3 and 22.5).

19. On these grounds, we cannot require that the US further specify the nature of the proposed suspension. As agreed by all parties involved in this dispute[20], in case a proposal for suspension were to target, for example, only biscuits with a 100 per cent tariff *ad valorem*, it would not be for the arbitrators to decide that, for example, cheese and not biscuits should be targeted; that a 150 per cent tariff should be imposed instead of a 100 per cent tariff; or that tariff increases should be levied on a product weight basis, not *ad valorem*. All of these are *qualitative* aspects of the proposed suspension touching upon the "nature" of concessions to be withdrawn. They fall outside the arbitrators' jurisdiction.

20. What we do have to determine, however, is whether the overall proposed level of suspension is *equivalent* to the level of nullification and impairment. This involves a *quantitative* - not a qualitative - assessment of the proposed suspension. As noted by the arbitrators in the *Bananas* case, "[i]t is impossible to ensure correspondence or identity between two levels if one of the two is not clearly defined".[21] Therefore, as a prerequisite for ensuring equivalence between the two levels, we have to be able to determine, not only the "level of the nullification and impairment", but also the "level of the suspension of concessions or other obligations". To give effect to the obligation of equivalence in Article 22.4, the Member requesting suspension thus has to identify the level of suspension of concessions it proposes in a way that allows us to determine equivalence.

21. In this case the US has to – and did -- identify the products that may be subject to suspension in a way that allowed us to attribute an annual trade value to each of these products when subject to the additional tariff proposed, namely a 100 per cent tariff (assuming this tariff is prohibitive). We have carried out that task in Section IV below. Once this is done, however, the US is free to pick products from that list – not outside the list -- equalling a total trade value that does not exceed the amount of trade impairment we find. In our view, this obligation to sufficiently specify the level of suspension flows directly from the requirement of ensuring equivalence in Article 22.4, the substantive provision we have to enforce here. It is part of the first element under the minimum requirements we outlined above, namely to set out a specific level of suspension, i.e. a level equivalent to the nullification and impairment caused by the WTO inconsistent measure.

2. The EC objection to a "carousel" type of suspension of concessions

22. The EC raised an additional objection in respect of the product coverage of the US proposal for suspension. Referring to statements made by the US Trade Representative, the EC submits that the US claims to be free to resort to a "carousel" type of suspension where the concessions and other obligations subject to suspension would change every now and then, in particular in terms of product coverage. The EC claims that in doing so the US would decide not only which concessions or other obligations would be suspended, but also unilaterally decide whether the level of such suspension of concessions or other obligations is in fact equivalent to the level of nullification and impairment determined by arbitration. Replying to our questions, the US submitted that "[a]lthough nothing in the DSU prevents future changes to the list [of products subject to suspension] …, the United States has no current intent to make such changes".[22] We thus assume that the US -- 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.

23. As explained above[23], we do not have jurisdiction to set a definite list of products that can be subject to suspension. It is for the US to draw up that list. In our view, it has to do so within the bounds of the product list put before the DSB. We also agree with the EC that once this list is made or once the US has defined a method of suspension, that list or method necessarily needs to cover trade in an amount not exceeding (i.e. equivalent to or less than) the nullification and impairment we find. This matter of equivalence is not one to be determined exclusively by the US.[24] The US has an obligation to ensure equivalence pursuant to Article 22.4 of the DSU.[25] In its reply to our questions, the US submitted that it "will scrupulously comply with the requirement that the level of suspension of concessions not exceed the level of nullification or impairment to be found by the Arbitrator".[26]

III. CALCULATION OF THE LEVEL OF NULLIFICATION AND IMPAIRMENT CAUSED BY THE EC HORMONE BAN

A. SUMMARY OF THE PARTIES' BASIC METHODOLOGIES

1. United States

24. The US submits that the EC hormone ban impairs US exports in two respects. First, because of the ban US high quality beef ("HQB") that has been treated with hormones, cannot be imported into the EC market. More particularly, US hormone-treated HQB does not qualify for importation under the 11,500 tonnes tariff quota for HQB granted by the EC.

25. Second, because of the ban US edible beef offal ("EBO") for human consumption that has been treated with hormones is not allowed for importation into the EC.[27] For such imports the EC does not apply a tariff quota.

26. The US adopted the following approach in respect of both HQB and EBO: (1) it examined relevant actual US exports during a recent period in which the EC was, in the US view, failing to comply with its WTO obligations; and (2) it estimated the relevant exports that would have existed during the same period if: (a) the EC were acting in compliance with its WTO obligations; (b) the long-term economic adjustments resulting from compliance were reflected; and (c) all other factors were held constant. The US refers to the estimate in (2) as "the counterfactual". Harm to US exports is estimated as the difference between the actual value of exports in (1) and the estimated value in the counterfactual (2).

27. In respect of the amount to be deducted as actual value of exports ("current exports") -- entering the EC notwithstanding the hormone ban -- the US submits that the existing level of US exports of beef and beef offal will not continue in the future due to the EC's decision of 30 April 1999. This decision implied a ban on *all* imports of US beef and beef products -- including those that, according to the US, have *not* been treated with hormones -- as of 15 June 1999.[28] It was taken by the EC following sampling and analyses for the detection of residues of hormones in fresh bovine meat and liver imported from the US that had shown the presence of xenobiotic growth

[23] See paragraphs 18-19.
[24] See paragraphs 20-21.
[25] See Section IV below.
[26] US answers to arbitrators' Questions 1, 2, 4, 9, 10 and 11, *Introduction*, p. 1.
[27] EBO treated with hormones is considered by the EC as unsuitable for human consumption. It cannot enter the EC market under the tariff headings summed up in footnote 44. However, such beef offal – treated with hormones – still enters the EC for use in pet food under other tariff headings, not subject to the ban.
[28] Commission Decision 1999/301/EC of 30 April 1999, US Exhibit 2.

over the last 12 years increased significantly, while the consumption of offal decreased. As a result, the EC, originally a net importer of offal, became a net exporter.

33. The EC estimates US exports of EBO but for the ban, using the 1986-1988 average value as a base from which to deduct "current exports", defined as the 1996-98 average value of US exports of EBO to the EC. The EC further notes that EC imports of EBO were subject to a general downward trend irrespective of the origin of the products, warranting a downward adjustment in value of 25.47 per cent. It also submits that the prohibition of growth hormones only concerns the quantities of EBO actually used for human consumption, not those used for pet food. For these reasons, the EC makes an additional downward adjustment in quantities of 31.7 per cent. The EC accordingly estimates the level of nullification and impairment with regard to EBO for human consumption to be US$ 51,618,325.

B. GENERAL APPROACH OF THE ARBITRATORS

34. We carefully examined the claims, arguments and evidence submitted by the parties in light of the rules on burden of proof and the role of arbitrators under Article 22 of the DSU outlined above.[30]

35. Based upon the record before us, in particular evidence submitted by the EC demonstrating that the US assessments were not always appropriate, we consider that the EC established a *prima facie*

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Agreement, an agreement only in existence from 1 January 1995 onwards.[32] The EC does not contest that it has not brought the measure into conformity with its WTO obligations. Nor does it contest that the "counterfactual" we need to look at in these proceedings is a situation without the ban. The EC did not propose that we examine any other alternative that would meet its obligations under the SPS Agreement.

39. We are, furthermore, of the view that the effect of suspending concessions should not exceed that of the EC bringing the measure into conformity with WTO rules on 13 May 1999. This stems directly from the DSU itself. The DSU characterizes full and prompt implementation of DSB recommendations as the *first* objective and *preferred* solution. The suspension of concessions, in contrast, is only a temporary measure of last resort to be applied only until such time as full implementation or a mutually agreed solution is obtained.[33] To allow the effect of suspension of concessions to exceed that of bringing the measure into conformity with WTO rules would not be justifiable in view of DSU objectives.

40. We note further that we agree with the arbitrators in the *Bananas* case that

> "the authorization to suspend concessions or other obligations is a temporary measure pending full implementation by the Member concerned. … this *temporary* nature indicates that it is the purpose of countermeasures to *induce compliance*. But this purpose does not mean that the DSB should grant authorization to suspend concessions beyond what is *equivalent* to the level of nullification or impairment. In our view, there is nothing in Article 22.1 of the DSU, let alone in paragraphs 4 and 7 of Article 22, that could be read as a justification for counter-measures of a *punitive* nature".[34]

41. The question we thus have to answer here is: what would annual prospective US exports of hormone-treated beef and beef products to the EC be if the EC had withdrawn the ban on 13 May 1999? An answer to this question, like any question about future events, can only be a reasoned estimate. It is necessarily based on certain assumptions. In making those estimates and assumptions, we need to guard against claims of lost opportunities where the causal link with the inconsistent hormone ban is less than apparent, i.e. where exports are allegedly foregone not because of the ban but due to other circumstances.[35]

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counts for a panel is competitive opportunities and breaches of WTO rules[36], not actual trade flows. A panel does not normally need to further assess the nullification and impairment caused; it can presume its existence. We, in contrast, have to go one step further. We can take it for granted here that the hormone ban is WTO inconsistent. What we have to do is to estimate the nullification and impairment caused by it (and presumed to exist pursuant to Article 3.8 of the DSU). To do so in the present case, we have to focus on trade flows. We must estimate trade foregone due to the ban's continuing existence beyond 13 May 1999.

43. Both products referred to by the US – high quality beef and edible beef offal – once certified as *not* having been treated with hormones, do currently enter the EC market, with the ban in place. To assess the trade impairment caused by the hormone ban, we first estimate, for each product category, the *total* value of US beef or beef products – hormone treated or not -- that would enter the EC annually if the ban would have been withdrawn on 13 May 1999. To estimate the nullification and impairment caused by the hormone ban we then deduct from that total value the current value of US exports of HQB and EBO, i.e. those that have *not* been treated with hormones. We assume that these "current exports", adjusted for other factors as explained below, are representative of the exports that will occur in the future with the ban in place. The end result provides us the estimated value of hormone treated HQB and EBO exports that would enter the EC but for the ban's continuing existence beyond 13 May 1999.

44. Our calculations are based on exports at the f.o.b. stage - excluding insurance and freight - an approach which all parties have used in their calculations. We use f.o.b. prices to ensure comparability with the customs valuation method of the suspension of concessions proposed by the US.

D. THE VALUE OF "CURRENT EXPORTS"

45. With reference to the EC Decision on test and hold, the US requests that no amount be deducted for "current exports".[37] The EC submits that the full amount of "current exports", i.e. annual average 1996-1998 exports, should be deducted. The test and hold effect on US exports has been alleged by the US. It is thus for the US to prove it.[38] According to US export certificates issued for May and June 1999, exports of US HQB to the EC declined by about 75 per cent compared to the same period in 1998. The decline in respect of EBO is on the order of 98 per cent.

46. It is difficult to assess the lasting trade impact of the recent EC measures. The available data relates to a short period of time. The sudden drop of EC imports from the US may be temporary but so should the suspension of concessions. If the parties reach an agreement on appropriate control and oversight, trade flows may normalise. Referring to the EC statement that "[t]he Commission does not plan to stop the existing imports of hormone-free bovine meat" and the US intention to meet current EC import requirements, we are hopeful that such agreement can be reached. In the meantime, we 46.fa5ilabl23 Tc 1.5754oa -12.6eireemuthe c6f -0.190be deducted. Tn acortoccurbmihich ading r ficates 4hat these

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E. NULLIFICATION AND IMPAIRMENT IN RESPECT OF HIGH QUALITY BEEF

1. Volume of the tariff quota

48. All parties, including Canada as a third party, agree that the EC market for HQB exports from the US *and* Canada – with or without the ban -- is limited by a tariff quota of 11,500 tonnes at an in-quota tariff rate of 20 per cent *ad valorem*.[39] This quota is to be shared between the US and Canada. The out-of-quota rate is considered by all parties to be prohibitive.

49. In addition, the US considers that whatever the amount of Canadian imports under the tariff quota, that amount needs to be topped up with the US share under the tariff quota so that the US alone is allowed to export a total of 11,500 tonnes. The US submits that it has this right to an annual amount of 11,500 tonnes as a consequence of bilateral US-EC and US-Austria agreements in this respect. For 10,000 tonnes of the 11,500 tonnes, the US refers, in particular, to an 1981 US-EC exchange of letters confirming that even if Canada would take a share of the quota, the US could still count on exporting the full amount of 10,000 tonnes.[40] In respect of the remaining 1,500 tonnes, the US refers to the fact that this volume was originally negotiated bilaterally between the US and Austria and was only later, as a consequence of Austria's accession to the EC, added to the 10,000 tonnes tariff quota opened by the EC in favour of the US and Canada.

50. We cannot agree that but for the ban, i.e., the situation we have to consider here, the US would be allowed to export a total of 11,500 tonnes irrespective of the amount exported by Canada. The autonomous quota rights claimed by the US – irrespective of their legal status and consistency with WTO rules -- are not rights under any of the WTO agreements covered by the DSU. The rights thus alleged are derived from bilateral agreements that cannot be properly enforced on their own in WTO dispute settlement.[41] If the EC were to agree that it would grant these independent rights, i.e., that 11,500 tonnes of US HQB could be exported to the EC once the ban is lifted, we could be required to take this autonomous quota amount into account in our estimates as a matter of fact, provided that these rights are consistent with WTO rules. However, the EC contests that the US has such rights. Moreover, the legal validity and enforceability of such rights and bilateral agreements invoked by the US is questionable for the following reasons.

51. Both bilateral agreements were concluded *before* the relevant EC schedules that explicitly allocated the quota to both the US and Canada. Moreover, both bilateral agreements were negotiated in a GATT/WTO context where concessions are normally negotiated first on a bilateral level and then "multilateralized" through binding schedules. Once this is done, the bilateral agreement, as a result of which the concession is granted, is superseded by the multilateral schedule. Both the bilateral agreements and the relevant parts of the EC schedule deal with the same subject-matter. Considering the GATT/WTO specific circumstances of their conclusion, the bilateral agreements would appear to be incompatible with the multilateral EC schedule – a quota allocated to only one Member as opposed to a quota allocated to two Members. On these grounds we consider it appropriate to conclude that

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[39] The tariff classification for this category in respect of which the US alleges trade impairment is: HS 0201 (Meat of Bovine Animals, Fresh or Chilled), HS 0202 (Meat of Bovine Animals, Frozen), HS 0206 1095 (Edible Offal of Bovine Animals, Fresh or Chilled, Thick Skirt and Thin Skirt) and HS 0206 2991 (Edible Offal of Bovine Animals, Frozen, Thick Skirt and Thin Skirt).

[40] Letter dated 28 July 1981 by Mr. Villain, then Director-General of Agriculture at the EC Commission, to the US Agricultural Counsellor in Brussels, US Exhibit 19.

[41] In this respect see the Appellate Body Report on *EC – Measures Affecting the Importation of Certain Poultry Products*, adopted on 23 July 1998, WT/DS69/AB/R, paras. 77-85. Of course, even though the bilateral agreements themselves cannot be enforced through the DSU, the performance of these agreements could give rise to a valid claim under WTO rules.

the EC schedule, in accordance with Article 30 of the Vienna Convention on the Law of Treaties[42], has superseded and prevails over the bilateral agreements.

52. Recalling that, as outlined above in paragraph 10, the US -- as the party that invoked the bilateral agreements -- bears the burden of proving to the arbitrators that these bilateral agreements exist and are enforceable, we consider that the US has not met its burden. We cannot, therefore, take any autonomous quota rights into account when estimating US HQB exports to the EC but for the ban.

53. On these grounds, we consider that a ceiling of 11,500 tonnes is applicable in respect of the combined US *and* Canadian exports of HQB to the EC.

2. Estimated utilisation of the 11,500 tonnes tariff quota

54. The US submits that the entire tariff quota would be filled but for the ban. The EC, referring to the fact that the tariff quota has never been filled in the past - not even before the ban - argues that the tariff quota would only be filled to the same extent as before the ban (1986-1988 average).

55. In this respect, we considered, in particular, the following elements: (1) the fact that the tariff quota represents only a negligible portion of total EC beef consumption; (2) the fact that all HQB tariff quotas allocated by the EC to other countries such as Argentina, Australia, Brazil, New Zealand and Uruguay have over the years been fully or almost fully utilised; and (3) the high production and export capacities of the US beef industry. On these grounds, we can reasonably expect that under the "counterfactual" the tariff quota would be 100 per cent filled.

3. Estimated tariff quota share of the US

56. Given our conclusions above, we next have to estimate the US share in the 11,500 tonnes tariff quota.

57. Our approach here is based on the US' and Canada's past performance with respect to HQB exports as well as beef exports in general. We considered, in particular, the following elements. Firstly, the proportions of US and Canadian HQB exports in third country export markets, such as Japan, Korea, Switzerland and Taiwan. The US share of HQB exports has been above 94 per cent in these markets in the 1996-98 period, except in Taiwan where US exports averaged 90 per cent over the last three years. Secondly, the general proportions of US and Canadian beef exports. The US share of North American beef exports to the rest of the world was 96 per cent on average in 1996-98, although the US share, including US-Canada trade, was approximately 70 per cent. Thirdly, the

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4. Estimated prices under the counterfactual

59. In this respect, we consider the US suggestion of US$ 5,342 per tonne (f.o.b.) to be reasonable.

60. We note that this price is higher than current unit values of US beef entering the EC. A substantial share of current US exports are whole carcasses, not treated with hormones. We consider it reasonable to expect that without the hormone ban a considerable share of the tariff quota would be filled with high quality hormone-treated cuts to maximize the trade value of the tariff quota. If the ban were lifted, an increase in price could thus be reasonably expected.

61. Consequently, we calculate the total value of US HQB exports to the EC under the counterfactual to be US$ 56,518,360.

5. Estimated value of "current exports" to be deducted

62. As noted earlier[43], to estimate the nullification and impairment caused by the hormone ban we have to deduct from the total value of US exports under the counterfactual, the current value of US exports of non-hormone treated HQB.

63. The EC suggests that US exports in the 1996-1998 period are representative for exports that would occur in the future with the ban in place. The main US argument in this respect was dealt with in paragraphs 45-47. We decided to reduce current US exports by 25 per cent. In other words, we assumed that only 75 per cent of current exports would enter the market in the future due to the 100 per cent test and hold procedure recently imposed by the EC. As a base from which to deduct these 25 per cent we follow the EC suggestion and use the average annual 1996-1998 exports.

64. On this basis we calculate the value of current exports to be deducted from the estimated exports under the counterfactual to be US$ 23,853,584.

ate of nullification a6. Estimate of nullification and impairment in respect of HQB

65. Following our estimates developed above, we calculate the total a611.25 -23.2o-1275 06 current 0 Tae ca

exports under the co1nterfactual to be US$ 23,853,584.

respect of EBO, one of the major tasks is to estimate potential exports of US EBO in the absence of

100 per cent test and hold procedure recently imposed by the EC. As a base from which to deduct these 25 per cent we follow the EC suggestion and use the average annual 1996-1998 exports.

74. On this basis we calculate the value of current exports to be deducted from the estimated exports under the counterfactual to be US$ 1,845,569.

4. Adjustment requested by the EC for US EBO exports used not for human consumption but in pet food

75. All data provided by the parties in respect of EBO - on the basis of which both the estimated *total* value of US exports but for the ban and *current* US exports with the ban in place, were calculated - do not distinguish between EBO for human consumption and EBO for pet food. In contrast, the US claim of trade impairment caused by the ban only extends to EBO for human consumption, not that used for pet food. This is so because the hormone ban itself does not apply to - and therefore does not hamper trade in - EBO used for pet food. It is difficult to estimate how much of the EBO ends up in pet food since both categories of EBO are imported under the same tariff heading. The EC estimates the share of EBO imports from the US that is used in pet food at 31.7 per cent. The US agrees that 5 per cent of all EBO is used in pet food.[48] Neither party has provided documentary evidence in support of these figures. In particular, the EC – the party claiming that a deduction should be made because of EBO use in pet food – has not substantiated its allegation of 31.7 per cent. For these reasons, we made an adjustment of 5 per cent only.

5. The US claim in respect of exports that would have resulted from foregone marketing campaigns

76. The US submits that additional US exports of EBO to the EC – worth US$ 20.1 million -- would have been realized from US marketing and promotional efforts that would have taken place but for the hormone ban. These foregone expenditures, according to the US, a minimum average of US$ 1.189 million each year, would allegedly have continued after 1989 – the year the ban was imposed -- under US government-funded marketing programmes of proven success.

77. We decided not to take these allegedly lost exports into account. As noted in paragraph 38, the estimate we have to make is based on what would have happened had the hormone ban been withdrawn on 13 May 1999. We cannot assume, under the "counterfactual", that the ban was never imposed and, therefore, that US marketing efforts would have continued after 1989 until now. Moreover, even assuming that US marketing efforts would have resumed had the ban been lifted on 13 May 1999, we consider the causal link between the hormone ban and the allegedly lost exports since 13 May 1999 to be too remote. Taking such lost exports into account would, in our view, be too speculative.[49]

6. Estimate of nullification and impairment in respect of EBO

78. Following our estimates developed above, we calculate the total amount of nullification and impairment caused by the hormone ban on US exports of EBO to be **US$ 84,095,731**.

G. TOTAL NULLIFICATION AND IMPAIRMENT

79. As a result of both calculations developed above, we estimate the total nullification and impairment caused by the EC hormone ban on US exports of beef and beef products at **US$ 116.8 million**. The elements of this estimate are reproduced in Annex I to this report.

[48] US first submission, footnote 37.
[49] See paragraph 41.

IV. ASSESSMENT OF THE PROPOSED LEVEL OF SUSPENSION OF CONCESSIONS

80. In reply to questions by the arbitrators, the US submitted for each product on the proposed

ANNEX I

High quality beef:			**US$ 32,664,776**			
= [(11,500	* 1)	* 0.92	* 5,342]	-	(31,804,779	* 0.75)
TRQ	TRQ fill	US share	price/t		current exports	25% reduction

[redacted]

US sb84 i 90.75 0 TD /F0 12 Tf -0.112 Tc 0.112 6(US$) Ti 27 0 TD 0 Tc 0 Tw (32 664 776) Ti ET 66.75 668.25 0.75 13.84 095 7319 5 573.75 0.75

ANNEX II

List of products for suspension of concessions proposed by the US [50]

Tariff Item or Heading[51]	Description	Average import value (1996-98) '000 US$

Tariff Item or Heading[51]	Description	Average import value (1996-98) '000 US$
07020040	Tomatoes, fresh or chilled, entered during July 15 to Aug.31 in any year	9,597
07020060	Tomatoes, fresh or chilled, entered from Nov. 15 thru the last day of Feb. of the following year	17,374
07031040	Onions, other than onion sets or pearl onions not over 16 mm in diameter, and shallots, fresh or chilled	5,505
07095200	Truffles, fresh or chilled	3,219
07129010	Dried carrots, whole, cut, sliced, broken or in powder, but not further prepared	3,010
07129074 and 07129078	Dried tomatoes, in powder Dried tomatoes, whole, cut, sliced or broken but not further prepared	5,137[52]
08024000	Chestnuts, fresh or dried, shelled or in shell	9,098
09042020	Paprika, dried or crushed or ground	10,252
10040000	Oats	36,477
11041200	Rolled or flaked grains of oats	513
11042200	Grains of oats, hulled, pearled, clipped, sliced, kibbled or otherwise worked, but not rolled or flaked	1,024
15059000	Fatty substances derived from wool grease (including lanolin)	4,853
1601	Sausages and similar products, of meat, meat offal or blood; food preparations based on these products	5,952
16021000	Homogenized preparations of meat, meat offal or blood, nesoi	2
16022020	Prepared or preserved liver of goose	1,072
16022040	Prepared or preserved liver of any animal other than of goose	347
16023100	Prepared or preserved meat or meat offal of turkeys, nesoi	4
16023200	Prepared or preserved meat or meat offal of chickens, nesoi	0
16023900	Prepared or preserved meat or meat offal of ducks, geese or guineas, nesoi	26
16024110	Prepared or preserved pork ham and cuts thereof, containing cereals or vegetables	0
16024120	Pork hams and cuts thereof, not containing cereals or vegetables, boned and cooked and packed in airtight containers	56,437
16024190	Prepared or preserved pork hams and cuts thereof, not containing cereals or vegetables, nesoi	590
16024220	Pork shoulders and cuts thereof, boned and cooked and packed in airtight containers	27,101
16024240	Prepared or preserved pork shoulders and cuts thereof, other than boned and cooked and packed in airtight containers	57
16024910	Prepared or preserved pork offal, including mixtures	16
16024920	Pork other than ham and shoulder and cuts thereof, not containing cereals or vegetables, boned and cooked and packed in airtight containers	6,437

[52] By 1999, "Tomatoes, dried" (tariff heading 07129075) was sub-divided in the two current sub-headings (07129074 and 07129078). For the new two sub-headings no separate 1996-1998 import data is available. The figure in this table represents the average 1996-1998 import value of the former tariff heading 071129075.

Tariff Item or Heading[51]	Description	Average import value (1996-98) '000 US$
20099040	Mixtures of fruit juices, or mixtures of vegetable and fruit juices, concentrated or not concentrated	6,546
21013000	Roasted chicory and other roasted coffee substitutes and extracts, essences and concentrates thereof	3,935
21033040	Prepared mustard	5,462
121041000	Soups and broths and preparations therefor	5,748
22011000	Mineral waters and aerated waters, not containing added sugar or other sweetening matter nor flavoured	125,261
23099010	Mixed feed or mixed feed ingredients used in animal feeding	44,024
35061050	Products suitable for use as glues or adhesives, nesoi, not exceeding 1 kg, put up for retail sale	26,299
55041000	Artificial staple fibers, not carded, combed or otherwise processed for spinning, of viscose rayon	25,539
55101100	Yarn (other than sewing thread) containing 85% or more by weight of artificial staple fibers, singles, not put up for retail sale	30,462
85102000	Hair clippers, with self-contained electric motor	15,176
87112000	Motorcycles (incl. mopeds) and cycles, fitted w/recip. internal-combustion piston engine w/capacity o/50 but n/o 250 cc	7,914
87113000	Motorcycles (incl. mopeds) and cycles, fitted w/recip. internal-combustion piston engine w/capacity o/250 but n/o 500 cc	10,152