WORLD TRADE ORGANIZATION

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

ORIGINAL COMPLAINT BY CANADA

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 DSU - is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 12 July 1999 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1).

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I. INTRODUCTION

1. On 20 May 1999, Canada, 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 CDN$ 75 million per year.[1] In a letter dated 2 June 1999, the EC objected to the level of suspension proposed by Canada 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 Canadian bovine meat and meat products at a maximum of CDN$ 3,537,769. The EC also asked that the arbitrators request Canada 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 Canadian 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 shall be carried out by the original panel, if members are available, or by an arbitrator appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration".[2]

The arbitration was carried out by the original panel (hereafter referred to as "the arbitrators"), namely:

Chairman:	Mr. Thomas Cottier
Members:	Mr. Peter Palecka
	Mr. Jun Yokota

3. The jurisdiction of the arbitrators and the effect of this arbitration report is set out in Article 22.7 of the DSU:

> "*The arbitrator* acting pursuant to paragraph 6 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 …* The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request".[3]

The substantive provision at issue here is contained in Article 22.4 of the DSU:

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[1] WT/DS48/17.
[2] Footnote omitted and emphasis added.
[3] Ibid.

> "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 Canada] is *equivalent* to the level of nullification or impairment"[4]

Second, several methodologies are proposed to calculate lost export opportunities. Given the fact that the product scope (HQB and edible bovine offal ("EBO")) and relevant trade barriers (hormone ban and HQB tariff quota) are the same in both proceedings, both arbitration panels (composed of the same three individuals) may consider it necessary to adopt the same or very similar methodologies. This is all the more necessary because the arbitrators are called upon to arrive at a specific determination on the amount of nullification and impairment caused by the ban.[6] They are therefore not limited, as in most panel proceedings, to ruling only on the consistency of the amounts proposed by the US and Canada with DSU provisions. Due process thus requires that all three parties receive the opportunity to comment on the methodologies proposed by each of the parties.

- In contrast, the EC has not shown how third-party participation would prejudice its rights. No specific arguments were made demonstrating that third party participation would substantially impair the EC's interests or due process rights.

B. BURDEN OF PROOF AND THE ROLE OF ARBITRATORS UNDER ARTICLE 22 OF THE DSU

12. There is, however, a difference between our task here and the task given to a panel. In the event we decide that the Canadian proposal is *not* WTO consistent (i.e. 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

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weight basis, not *ad* v ese are *qualitative* aspects of the pr touching upon the "nat ns to be withdrawn. They fall outs jurisdiction.

20. What we do hav ever, is whether the overall proposed le *equivalent* to the level of pairment. This involves a *quantitative* -- assessment of the pro As noted by the arbitrators in the *Ba* impossible to ensure co ntity between two levels if one of the defined".[20] Therefore, as nsuring equivalence between the two le able to determine, not o e nullification and impairment", but als suspension of concessio ons". To give effect to the obligation Article 22.4, the Memb pension thus has to identify the level concessions it proposes i us to determine equivalence.

21. In this case Can -- identify the products that may be su in a way that allowed us ual trade value to each of these produ the additional tariff prop 0 per cent tariff (assuming this tariff i have carried out that tas low. Once this is done, however, Ca products from that list – st - equalling a total trade value that c amount of trade impairm ur view, this obligation to sufficiently suspension flows direc irement of ensuring equivalence in substantive provision w here. It is part of the first element u requirements we outlin to set out a specific level of susp equivalent to the nullific nt caused by the WTO inconsistent me

III. CALCULATIC VEL OF NULLIFICATION AND CAUSED BY T NE BAN

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they were recorded during the years concerned. The level of nullification and impairment identified by the EC in respect of HQB using this approach is zero given that the value of current Canadian exports of HQB to the EC is higher than that prior to the ban.

30. The EC further submits that in the period prior to the ban, Canada's share of the tariff quota never amounted to more than 3 per cent of the total in-quota quantity. The EC argues that Canadian export prices of HQB are significantly higher than US prices, rendering the Canadian product entirely non-competitive when compared to US beef. In addition, the EC submits that in the period from 1988 to 1998, Canadian beef producer prices increased, whereas EC beef producer prices dropped substantially, in particular following the reform of the common agricultural policy of the EC (as from 1992).

31. In respect of EBO, the EC notes that edible offal is a by-product of meat production. It submits that consumer behavior in respect of offal follows the same pattern as that observed for meat. If consumption of meat declines, for example, because of a negative perception of the meat produced, a similar decline will take place in the consumption of offal. The EC refers to the constant drop in beef consumption within the EC in recent years, as well as to the BSE crisis, and argues that this decline is also reflected in a drop of consumption of bovine offal. The EC submits that only offal for human consumption is affected by the import ban. It adds that overall production of offal in the EC 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 into a net exporter.

32. The EC estimates Canadian 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 Canadian 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 CDN$ 3,537,769.

B. GENERAL APPROACH OF THE ARBITRATORS

33. 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.[23]

34. Based upon the record before us, in particular evidence submitted by the EC demonstrating that the Canadian assessments were not always appropriate, we consider that the EC established a *prima facie* case that the level of suspension proposed by Canada is *not* equivalent to the level of nullification and impairment caused by the ban. In our view, Canada failed to rebut this presumption. We were, therefore, not able to accept in full the estimates proposed by Canada. We were not convinced either by all of the EC alternatives. We could, however, accept certain elements of both the Canadian and the EC methodologies. As explained earlier[24], in such circumstances, the essential task and responsibility of the arbitrators is to make their own estimate, on the basis of all arguments and evidence submitted by the parties. In doing so, we follow the rules on burden of proof set out in paragraphs 9-11.

[23] See Section II.B.
[24] See paragraph 12.

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

quota tariff rate of 20 per cent *ad valorem*.[30] This quota is to be shared between the US and Canada. The out-of-quota rate is considered by all parties to be prohibitive.

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

45. Canada 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).

46. 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 Canadian 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 Canada

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

48. Our approach here is based on Canada's and the US' 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 Canadian and US HQB exports in third country export markets, such as Japan, Korea, Switzerland and Taiwan. The Canadian share of HQB exports has been below 6 per cent in these markets in the 1996-98 period, except in Taiwan where Canadian exports averaged 10 per cent over the last three years. Secondly, the general proportions of Canadian and US beef exports. Canada's share of North American beef exports to the rest of the world was 4per cent on average in 1996-98, although Canada's share, including Canada-US trade, was approximately 30 per cent. Thirdly, the proportions of Canadian and US beef exports to the EC (a 6 per cent share for Canada in 1998). Fourthly, changes in the relative proportions of Canadian and US exports. The general tendency in both the EC and third country markets in recent years has been an increase of Canada's share at the expense of the US.

49. Taking these elements into account, we consider a Canadian share of 8 per cent a reasonable estimate.

4. Estimated prices under the counterfactual

50. Canada suggests a price of CDN$ 10,805 per tonne which corresponds, according to Canada, to the 1998 average price for North American choice ribeye roll and choice beef loin cuts, both top quality beef cuts. Considering evidence submitted by the EC on current average prices obtained for Canadian beef and relevant price ratios before the ban, we are of the view that the suggested price is too high.

51. In this respect, we refer to the price suggested by the US, a third party in this dispute (US$ 5,342 per tonne). In response to questions from the arbitrators, Canada submits that in the absence of the ban one can expect that Canadian and US prices for HQB would be very similar as

[30] The tariff classification for this category in respect of which Canada 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).

similar cuts would be shipped. We agree with Canada that it is reasonable to expect that without the hormone ban a considerable share of the tariff quota would be filled with high quality hormone-treated cuts fetching higher prices than current Canadian exports that include all types of cuts, of both

58. We consider average Canadian exports of EBO in 1986-1988 to be a representative starting-point for our calculations of total exports under the counterfactual, i.e. assuming the ban would have been lifted on 13 May 1999. However, it is clear to us that these pre-ban figures reflect a market situation that is quite different from the current market situation for EBO in the EC. We must therefore make certain adjustments.

59. We consider it reasonable to make a downward adjustment to the pre-ban exports to take account of the demonstrated decline in "apparent consumption" of EBO in the EC market since the imposition of the ban.[34] At the same time, we note that part of this decline in apparent consumption was caused by the hormone ban itself. Data for 1988 compared to 1989 -- when the ban was first imposed -- show a sharp drop in EBO imports. In order to take account of this decline related to the ban, we calculated the absolute *difference* between (i) the *trend* import volumes for the years 1989-91 (estimated by way of an extrapolation of the actual import volumes for the period 1981-88) and (ii) the *actual* import volumes for the years 1989-91. The annual average of this *difference* was then added to actual imports in each of the years 1995-97. The apparent consumption of edible beef offal for 1995-97 was calculated on the basis of these adjusted import figures. As a result of this approach, we estimate the downward adjustment factor for apparent consumption to be 18.4 per cent. We assume that the volume of Canadian exports to the EC but for the ban would have declined in proportion to the decline in apparent consumption.

60. On this basis, we estimate annual Canadian exports of EBO in case the ban had been lifted on 13 May 1999 to be 2,630 tonnes. We note that our estimate for the Canadian share in total North American EBO exports to the EC is lower than the share claimed by Canada. We recall, however, that our estimate (4.7 per cent) is considerably higher than the current Canadian share in North American EBO exports to the EC with the ban in place. From 1996-1998 Canada only exported 2 tonnes of EBO to the EC. For these reasons, we consider our estimate to be reasonable.

2. Estimated price of Canadian EBO exports under the "counterfactual"

61.

64. Canada suggests deducting 1998 imports. We consider it more appropriate to deduct a 1996-1998 average of actual Canadian exports to the EC in light of the point made by the EC that short-term effects need to be eliminated.

65. On this basis we calculate that the value of current exports to be deducted from the estimated exports under the counterfactual to be CDN$ 2,151.

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

66. All data provided by the parties in respect of EBO – on the basis of which both the estimated *total* value of Canadian exports but for the ban and *current* Canadian exports with the ban in place, were calculated – do not distinguish between EBO for human consumption and EBO for pet food. In contrast, Canada's 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 Canada that is used in pet food at 31.7 per cent. Canada agrees that 10 per cent of all EBO is used in pet food.[37] 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 10per cent only.

5. Estimate of nullification and impairment in respect of EBO

67. Following our estimates developed above, we calculate the total amount of nullification and impairment caused by the hormone ban on Canadian exports of EBO to be **CDN$ 5,633,823**.

F. TOTAL NULLIFICATION AND IMPAIRMENT

68. As a result of both calculations developed above, we estimate the total nullification and impairment caused by the EC hormone ban on Canadian exports of beef and beef products at **CDN$ 11.3 million**. The elements of this estimate are reproduced in Annex I to this report.

IV. ASSESSMENT OF THE PROPOSED LEVEL OF SUSPENSION OF CONCESSIONS

69. In reply to questions by the arbitrators, Canada submitted for each product on the proposed suspension list the average import value of EC exports to Canada over a three-year period (1996-1998). We consider the calculations thus provided to be reasonable. They are reproduced in Annex II to this report.

70. As noted in paragraph 21 above, Canada is free to pick products from the proposed list as long as the total trade value is lower than or equivalent to the amount of nullification and impairment we have found, namely CDN$ 11.3 million.

71. We received confirmation from Canada that the actual level of suspension once implemented will be equivalent to the level of nullification and impairment we have found. All we can do at this stage is to encourage Canada to stand by this confirmation and to abide by Article 22.4 of the DSU. In the event of a future dispute on this issue, we note that the EC could start normal - or arguably even

[37] Annex B, p. 2, to Canada's second submission.

expedited - DSU procedures challenging the consistency of the level of the Canadian suspension with Article 22.4.

V. AWARD OF THE ARBITRATORS

72. For the reasons set out above, the arbitrators determine that the level of nullification or impairment suffered by Canada in the matter *European Communities – Measures Concerning Meat and Meat Products (Hormones)* is **CDN$ 11.3 million** per year.

73. Accordingly, the arbitrators decide that the suspension by Canada of the application to the European Communities and its member States of tariff concessions and related obligations under GATT 1994 covering trade in a maximum amount of CDN$ 11.3 million per year would be consistent with Article 22.4 of the DSU.

ANNEX I

High quality beef: **CDN$ 5,640,637**

= [(11,500 * 1) * 0.08 * 8,594] - 2,265,843

TRQ	TRQ fill	Can share	price/t (f.o.b.)	current exports (f.o.b.)

Edible beef offal: **CDN $12 Tf 0 T[.25 TD /F0 14.25 Tf594] -529.5 6433,ual2.5 0.**