Comments

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Professor Hudec and Mr. Maruyama's papers provide cogent analyses of the WTO decisions that define the scope of national regulations. My comments focus on the dispute on *EC Measures Concerning Meat and Meat Products*, the so-called *Beef Hormones* case. I focus on the *Beef Hormones* case for two reasons. First, this case is the first to interpret the new Agreement on Sanitary and Phytosanitary Measures.[1] The SPS Agreement was a key element of the Uruguay Round's Agriculture Agreement. It is fair to say that if the SPS Agreement is not effective, the Agriculture Agreement—indeed the entire Uruguay Round—will be seen as a failure by many agricultural interests in the United States and elsewhere. Second, the *Beef Hormones* Appellate Body report provides instruction and guidance on certain procedural issues that have applicability beyond the SPS Agreement.

I. Burden of Proof

The panel in *Beef Hormones* made some key procedural decisions that arguably could be outcome-determinative in that and other cases. The first important procedural issue dealt with the burden of proof.

The panel determined that the complaining party has the burden of making a prima facie case that the measure complained of is inconsistent with the SPS provision at issue. Once a prima facie case has been made, the burden then shifts to the defending party to refute the alleged inconsistency.

The panel further found that the SPS Agreement allocated the "evidentiary

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1. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND (1994) [hereinafter SPS Agreement].

burden'' to the Member imposing the measure. The panel's reasoning for allocating this burden was based on three rationales. First, the panel pointed to wording in several provisions of the SPS Agreement requiring that ''Members shall ensure that [SPS measures are applied] only to the extent necessary to protect human, animal or plant life or health. . . .''[2] Second, the panel pointed to the right of a Member to obtain an explanation of a party's SPS measure.[3] Third, the panel referred to Article 3.2 of the SPS Agreement, which establishes a presumption of consistency with relevant provisions of that agreement and GATT 1994 if a measure conforms to international standards. The panel reasoned that failure to conform to an international standard means that the Member imposing the measure bears the burden of proving consistency with the SPS Agreement. The EC, whose standard could not be justified by claimed reliance on an international standard, contested this aspect of the panel's decision.

The Appellate Body agreed with the panel that the complaining party had the burden of presenting a prima facie case and that this burden shifts to the defending party once the prima facie case has been made. The Appellate Body, however, dismissed the panel's reasoning that either the requirement to ensure that measures are applied only to the extent necessary or the requirement to respond to a Member's inquiries governed the allocation of burden of proof. Further, the Appellate Body rejected the notion that nonconformity with an international standard shifts the evidentiary burden:

> The presumption of consistency with relevant provisions of the SPS Agreement that arises under Article 3.2 in respect of measures that conform to international standards may well be an *incentive* for Members so to conform their SPS measures with such standards. It is clear, however, that a decision of a Member not to conform a particular measure with an international standard does not authorize imposition of a special or generalized burden of proof upon that Member, which may, more often that not, amount to a *penalty*.[4]

This statement by the Appellate Body may well have a great deal of practical significance in future cases. It will not be enough to shift the evidentiary burden for a complaining party to show that a measure is inconsistent with an international standard. Consistency with international standards may offer some protection in defending a measure, but inconsistency will neither cause the measure to be rejected, nor the evidentiary burden to shift.

In addition, the Appellate Body emphatically rejected the panel's conclusion that the evidentiary burden shifts because of what the Appellate Body characterized as the panel's view of the ''general rule—exception'' relationship between articles 3.1 and 3.3.

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2. *Id.* art. 2.2.
3. *Id.* art. 5.8.
4. *EC Measures Concerning Meat and Meat Products (Hormones)—AB-1997-4—Report of the Appellate Body*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter Appellate Body Report] (visited June 21, 1998) <http://www.wto.org/wto/online/ddf.htm> [hereinafter WTO Website].

The panel stated that article 3.1 of the SPS Agreement imposes on all Members an obligation to base their sanitary measures on international standards except as otherwise provided for in the SPS Agreement and in particular article 3.1 thereof. According to the panel:

> In this sense, Article 3.3 provides an *exception* to the general obligation contained in Article 3.1. Article 3.2, in turn, specifies that the complaining party has the burden of overcoming a presumption of consistency with the SPS Agreement in case of a measure based on international standards. It thereby suggests by implication that when a measure is not so based, the burden is on the respondent to show that the measure is justified under the exceptions provided for in Article 3.3.[5]

The Appellate Body, though, found the panel's approach to be erroneous. The Appellate Body rejected the idea that the relationship between articles 3.1, 3.2 and 3.3 was similar to the relationship between articles I and II and XX of the GATT. Unlike article XX of the GATT, which provides exceptions to the requirements of articles I and II, there is no obligation-exception relationship between or among the relevant SPS provisions. Thus, the Appellate Body found the panel erred by shifting the burden to the defending party in this case.

II. The Standard of Review

While winning an important victory concerning the burden of proof, the EC did not convince the Appellate Body about the standard of review. Indeed, the Appellate Body enunciated a standard of review quite at odds with the one that the EC has advanced.

The EC argued for a deferential standard in determining whether a national authority was correct both factually and procedurally. The EC argued that the standard embodied in article 17.6(i) of the Antidumping Agreement should be applied to SPS disputes. The Antidumping Agreement provides:

> 17.6 In examining the matter referred to in paragraph 5:
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> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation should not be overturned.[6]

The EC referred to this standard as a "deferential reasonableness standard."[7]

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5. *EC Measures Concerning Meat and Meat Products (Hormones)—Complaint by the United States—Report of the Panel*, WT/DS26/R/USA, ¶¶ 8.86 & 8.87 (Aug. 18, 1997), *at* WTO Website, *supra* note 4; *EC Measures Concerning Meat and Meat Products (Hormones)—Complaint by Canada—Report of the Panel*, WT/DS48/R/CAN, ¶¶ 8.89 & 8.90 (Aug. 18, 1997), *at* WTO Website, *supra* note 4.

6. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A [hereinafter Antidumping Agreement].

7. Appellate Body Report, *supra* note 4.

It was quite ironic for the EC to be urging adoption of the antidumping standard of review. For most of the Uruguay Round, negotiators for virtually all the parties did not pay particular attention to the standard of review that would be applied in the Antidumping Agreement or in the Dispute Settlement Understanding (DSU). In the last few months of the negotiations, U.S. negotiators raised the idea of a deferential review standard for disputes. No other country particularly supported the U.S. position. When it became apparent that a deferential standard would not likely be adopted across the board, U.S. negotiators focused on obtaining a deferential standard in the Antidumping Agreement. The EC was not a strong proponent of this standard, although it did ultimately concur with it. Thus, there was no small irony that in *Beef Hormones* the EC proposed, and the United States opposed, application of the antidumping standard of review to the SPS Agreement.

Although the Appellate Body did not refer to the negotiating history, it decisively rejected the EC argument. The Appellate Body noted that the SPS Agreement is silent on the matter of standard of review. Moreover, the Appellate Body observed that only the Antidumping Agreement has language on the standard of review to be employed by panels engaged in fact assessment.[8] The Appellate Body found that there was no indication Members intended to incorporate into the SPS Agreement the standard of review found in the Antidumping Agreement.

The Appellate Body found that the appropriate standard of review to be applied in this case was contained in article 11 of the DSU. Article 11 provides that:

> [a] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided in the covered agreements.[9]

The Appellate Body stressed that the applicable standard is neither de novo review nor "total deference," but rather the "objective assessment of the facts."[10] The Appellate Body reaffirmed the wisdom of earlier panels that had rejected de novo review but emphasized as well that "total deference to the findings of the national authorities . . . could not ensure an objective assessment of the facts. . . ."[11]

The Appellate Body did not define further the phrase "objective assessment of the facts." A review of how the Appellate body applied this standard to the facts of *Beef Hormones*, however, indicates that the standard was not applied in a particularly deferential way. The Appellate Body engaged in a thorough and searching inquiry, adopting some factual findings of the panel and rejecting others.

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8. *Id.*

9. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND (1994), 33 I.L.M. 1226 (1994).

10. Appellate Body Report, *supra* note 4.

11. *Id.*

In sum, the *Beef Hormones* decision is instructive not just because of its important first interpretation of the substantive meaning of the SPS Agreement. The Appellate Body's rulings on burden of proof and standard of review also will affect many other disputes to follow.

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QUESTION AND ANSWER SUMMARY: Paul Rosenthal commented that Warren Maruyama's insight concerning the Appellate Body's discussion of burden of proof in the *EU—Beef Hormones* case is very important. The Appellate Body properly rejected the argument that the burden of proof should shift from the complaining party simply because the defending party has adopted a standard that is different from an international standard (such as the Codex Alimentarius). The defending party should not be penalized simply because it has adopted a standard different from an international standard. The burden of proof must remain with the complaining party to establish its prima facie case, including showing, for instance, that the defending party's regulation is not supported by an adequate risk assessment. Following *EU—Beef Hormones*, most countries likely will be careful in the future to ensure that regulations are supported by adequate risk assessment.

Rosenthal also commented that an important question concerns standard of review: How much deference will panels and the Appellate Body give to national decision making? The Appellate Body dealt with this issue explicitly in the *EU—Beef Hormones* case. It found no separate standard of review in the SPS Agreement.

In that case, the EU had urged the panel, and later the Appellate Body, to adopt the relatively deferential standard of review contained in the Antidumping Agreement. This is ironic in light of the positions taken by the EU during the negotiation of the Antidumping Agreement. Late in the day, when the United States realized that it was going to achieve its goal of automaticity in dispute settlement, it turned its attention to standard of review and urged the parties to adopt a deferential standard, similar to the standard of review of administrative agency decisions in the United States. The parties adopted a somewhat deferential standard in the Antidumping Agreement, but nowhere else.

In *EU—Beef Hormones*, the Appellate Body expressly rejected importing the standard of review from the Antidumping Agreement into the SPS Agreement. Instead, the Appellate Body referred to article 11 of the DSU. Based on the language of article 11, the Appellate Body held that in reviewing a national decision, panels should make an "objective assessment of the facts." The Appellate Body distinguished this standard of review from a de novo review and a deferential review. It viewed the "objective assessment of the facts" standard as coming somewhere in between those two extremes. However, the Appellate Body offered little guidance on how this standard is to be applied, and there is substantial room for argument on that point.

Frieder Roessler questioned whether application of an aim and effects test really favors governments that attempt to hide the discriminatory purpose of legislation and regulations (as Maruyama suggested). Roessler observed that the Appellate Body has ruled that where it is appropriate to apply an aim and effects test under article III, panels must examine the structure and architecture of legislation, not the subjective intent of the legislators. The question is whether the legislation objectively is designed to achieve a discriminatory purpose. Therefore, it seems unlikely that an aim and effects approach to article III would enable countries to circumvent the strictures of the WTO.

Maruyama responded that the trend of decisions of GATT panels, and now WTO panels and the Appellate Body, reflects a shift from an objective effects test, to a subjective intent test, and back to an objective effects test. The GATT panel in *Japan—Alcoholic Beverages I* held that one could look at Japan's regime for taxing alcoholic beverages and determine objectively that there was discrimination in violation of article III. In *U.S.—Auto Taxes* and *U.S.—Beer & Wine*, GATT panels went a step further, requiring a showing of subjective intent to discriminate, which is virtually impossible to do. In *Japan—Alcoholic Beverages II*, the Appellate Body moved back toward an objective effects test in applying article III:2, second sentence. That approach is consistent with the "so as to afford protection" language of article III:1.

Robert Hudec commented that when Maruyama uses the term "protectionist effect," he frequently is referring to protectionist purpose. In fact, the GATT and WTO panels themselves have avoided speaking in terms of purpose. However, the reality is that they are thinking in terms of purpose. Hudec agreed with Roessler and Maruyama that it is unnecessary to examine the subjective intent of national legislators in applying an aim and effects test. However, when the Appellate Body says that panels should look to the architecture and design of legislation, what it means is that they should look to the purpose of the legislation.