

## *Interaction of civil and criminal penalties for farm program violations*

The Eleventh Circuit recently considered the character of civil penalties under the tobacco marketing program administered by the Department of Agriculture (USDA). *Cole v. USDA*, 133 F.3d 803 (11th Cir. 1998). At issue was the whether the assessment of civil penalties after an acquittal on criminal charges constituted a violation of the Double Jeopardy Clause and whether the penalty violated the Excessive Fines Clause of the United States Constitution. In reaching its decision, the court integrated the most recent Supreme Court opinion on this issue into its analysis, *Hudson v. United States*, 118 S.Ct. 488, 491, (1997). In *Hudson*, the Supreme Court modified the test for determining whether a sanction is criminal or civil for the purposes of double jeopardy analysis, rejecting, in part, the analysis it applied in its earlier decision of *United States v. Halper*, 490 U.S. 435 (1989).

The plaintiff, Mr. Graham Cole, was a tobacco dealer who sold 315,612 more pounds of tobacco than he reported purchasing, in violation of the program rules. Mr. Cole was prosecuted and acquitted of criminal charges in connection with this discrepancy, including conspiracy to defraud the government, fraud, and mail fraud. After he was acquitted of the criminal charges, the USDA assessed civil penalties of almost \$400,000 against Mr. Cole pursuant to 7 U.S.C. § 1314(a), which imposes a penalty of seventy-five percent on the marketing of tobacco in excess of a farm's marketing quota. Mr. Cole challenged the administrative penalty, and the district court found that the assessment violated both the Double Jeopardy Clause and the Excessive Fines Clause. The USDA appealed to the Eleventh Circuit, which reversed.

The Double Jeopardy Clause provides that no "person [shall] be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const., amend. V. The court in *Cole* noted that the Supreme Court has held that this clause "protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *Cole*, 133 F.3d at 804 (quoting *United States v. Halper*, 490 U.S. 435, 440 (1989)). Mr. Cole alleged the first type of violation by arguing that he had already been acquitted of criminal charges in connection with

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### **IN FUTURE ISSUES**

- FSA Emergency Loans and FSA disaster set-aside
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The Farm Service Agency also has a lot of information available via the Internet. Their web site is located at <http://www.fsa.usda.gov/pas/news/releases/index.htm>. There, you can access FSA announcements, program information, and even download some FSA forms. A recent addition to this web site is access to "Current FSA Temporary Directives." These directives are some of the administrative and procedural notices issued by the FSA.

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—Susan A. Schneider, Hastings, MN

marketing over-quota tobacco and that the civil penalties were a second attempt at punishment for the same conduct.

The court held that Mr. Cole's challenge hinged on two questions: 1) whether the second sanction (the civil penalty) dealt with the same offense as the first; and 2) whether the second sanction was, in fact, a punishment. The court stated that if the answer to either of these questions was negative, the penalty could not be found to violate the Double Jeopardy Clause.

Addressing the first question, whether the civil penalty assessed against Mr. Cole dealt with the same offense as the criminal charges, the court noted that "two offenses are different for the purposes of double jeopardy analysis if each requires proof of an additional fact which the other does not." *Cole*, 133 F.3d at 805 (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). With regard to the criminal charges against Mr. Cole, conspiracy to defraud the government, fraud, and mail fraud, the court found that proof of intent and misrepresenta-

tion were requisite elements. *Id.* (citing 18 U.S.C. §§ 371, 1001, 1341). With regard to the civil penalty, the USDA did not need to prove intent, but only needed to prove that Cole failed to remit a penalty to the government. *Id.* (citing 7 U.S.C. § 1314(a)). This latter requirement is not an element required for the criminal offense. Under the "same elements" test, the criminal and civil offenses require proof of different elements and, therefore, the court held that the imposition of the civil penalty did not violate the Double Jeopardy Clause.

Addressing the second question, whether the civil penalty constituted a "punishment," the court turned first to the statute creating the penalty, asking whether the legislature indicated whether the penalty was to be considered civil or criminal. Even in those cases where the legislature indicated an intention to establish a civil penalty, however, the court found that further inquiry was appropriate to determine if the penalty was so punitive so as to transform it into a criminal penalty. *Id.* at 806.

In making this determination, the court relied upon the factors listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963): (1) "[w]hether the sanction involves an affirmative disability or restraint;" (2) "whether it has historically been regarded as a punishment;" (3) "whether it comes into play only on a finding of scienter;" (4) "whether its operation will promote the traditional aims of punishment—retribution and deterrence;" (5) "whether the behavior to which it applies is already a crime;" (6) "whether an alternative purpose to which it may rationally be connected is assignable for it;" and (7) "whether it appears excessive in relation to the alternative purpose assigned." *Cole*, 133 F.3d at 806 (quoting *Kennedy*, 372 U.S. at 168-169).

The court held that these factors were to be considered in relation to the "statute on its face," and not to the facts of Mr. Cole's particular case. *Id.* See also, *Hudson*, 118 S.Ct. at 494).

Applying these factors to the civil penalty under the tobacco program, the court found that there was not a violation of the Double Jeopardy Clause. The court found it evident that "Congress intended the penalty for violations of 7 U.S.C. § 1314(a) to be civil in nature . . . [because] [t]he authority to issue and collect over-quota marketing penalties is conferred upon the Secretary of the Department of Agriculture." *Cole*, 133 F.3d at 806 (referencing 7 U.S.C. § 1314(b)). The Supreme Court in *Hudson* held that when this authority is conferred upon an administrative agency, it constitutes "prima facie evidence that Congress intended to provide for a civil sanction." *Hudson*, 118 S.Ct. at 495 (citations omitted).

Having determined that Congress in-

tended for the over-quota marketing penalty to be civil, the court turned to the *Kennedy* factors to determine whether the penalties are "so punitive in form and effect as to render them criminal despite Congress's intent to the contrary." *Cole*, 133 F.3d. at 806 (citing *United States v. Ursery*, 518 U.S. 267, —, 116 S.Ct. 2135, 2138 (1996)). First, the court found that the penalty did not involve an "affirmative restraint," such as imprisonment. Second, considering the historical view of the punishment, the court relied upon *Hudson* for the proposition that money penalties have not historically been viewed as punishment *Cole*, 133 F.3d. at 806 (citing *Hudson*, 118 S.Ct. at 495). Third, the court found that penalties did not require a finding of scienter; "they are imposed whenever a producer oversells his quota, regardless of his state of mind." *Cole*, 133 F.3d. at 806.

Considering the fourth factor, whether the penalty promotes the traditional aims of punishment—retribution and deterrence, the court again relied on *Hudson*. There, the Supreme Court recognized that all civil penalties will have some deterrent effect and that deterrence may serve civil as well as criminal goals. *Id.* (citing *Hudson*, 118 S.Ct. at 493.). Applying this to the tobacco program, the court found that the over-quota marketing penalty was intended to deter producers from exceeding their quotas and that the legislative purpose of discouraging the sale of over-quota tobacco was merely a regulatory goal, not a criminal goal. Further, the court found that the penalty promoted the stability of the tobacco price supports and funded the government's enforcement efforts. *Cole*, 133 F.3d. at 806.

Considering the fifth *Kennedy* factor, the court held that "the behavior which triggers the penalty, overselling a tobacco quota, is not a crime." *Id.* With respect to the sixth factor, the court found the penalty to be "rationally related to an alternative, nonpunitive purpose." Finally, with respect to the seventh factor, the court found that the penalty was "not excessive in relation to this alternative purpose." *Id.*

Next, the court addressed the second constitutional claim of the plaintiff, that the civil penalty imposed against him violated the Excessive Fines Clause of the Eighth Amendment. The Supreme Court has not articulated a comprehensive test to use in making this determination. *Cole*, 133 F.3d at 807. It has, however articulated a "bright line rule in one category of cases: '[A] fine that serves purely remedial purposes cannot be considered 'excessive' in any event.'" *Id.* (citing *Austin v. United States*, 509 U.S. 602, 621 n. 14 (1993)).

Applying this to the statute that im-

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AALA Editor.....Linda Grim McCormick Rt. 2, Box 292A, 2816 C.R. 163 Alvin, TX 77511 Phone/FAX: (281) 388-0155 E-mail: legmo@flash.net		
Contributing Editors: Terence P. Stewart, Stewart and Stewart, Washington, D.C.; David S. Johanson, Stewart and Stewart, Washington, D.C.; Christopher R. Kelley, Hastings, MN; Susan A. Schneider, Hastings, MN; Linda Grim McCormick, Alvin, TX.		
For AALA membership information, contact William P. Babione, Office of the Executive Director, Robert A. Leflar Law Center, University of Arkansas, Fayetteville, AR 72701.		
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### Farm program violations/Cont. from p. 2

poses the tobacco marketing penalty, the court held that, as applied to a tobacco dealer like Mr. Cole, the seventy-five percent penalty is "purely remedial, and thus is not excessive." *Cole*, 133 F.3d at 807. The court reached this conclusion by reviewing the statutory penalty provisions at issue. Quoting from the statute, the court explained:

The marketing of...any kind of tobacco in excess of the marketing quota for the farm on which the tobacco is produced... shall be subject to a penalty of 75 per centum of the average market price...for such kind of tobacco for the immediately preceding marketing year. Such penalty shall be paid by the person who acquired such tobacco from the producer but an amount equivalent to the penalty may be deducted by the buyer from the price paid to the producer. ... *Id.* (quoting 7 U.S.C. § 1314(a)). Thus, under the statute, a dealer who purchases over-quota tobacco must pay the penalty, but then the dealer may deduct the amount of the penalty from the purchase price paid to the producer. Thus, the court held that "from the dealer's

perspective, the penalty is totally remedial—i.e., the dealer is required to pay to the government only the precise amount which the dealer is authorized to withhold from the producer." *Cole*, 133 F.3d at 808.

The court then analyzed the penalty from the perspective of a producer and held that even from that perspective, the penalty did not violate the Excessive Fines Clause. *Id.* In reaching this conclusion, the court applied a proportionality test that originated in the case of *United States v. One Parcel Property*, 74 F.3d 1165 (11th Cir.1996). Under this test, the court compares the seriousness of the offense to the severity of the fine. *Id.* at 808-09. Applying this to the tobacco penalty, the question is "whether it is excessive to impose a penalty on a producer who sells more than its quota of tobacco, in the amount of 75% of the price of the over-quota tobacco." *Id.* at 809. The court held that it was not.

To support its holding, the court relied upon the purpose of the tobacco program. According to the statutory language, its purpose is "to establish national production quotas in order to control and/or

eliminate excessive production of tobacco." (*Id.* citing 7 U.S.C. § 1311(a)). In addition, it serves to prevent the "disorderly marketing" of tobacco, which Congress found adversely "affects, burdens, and obstructs interstate and foreign commerce." (*Id.* quoting 7 U.S.C. § 1311(b).) Thus, the court found that "the obvious purpose of the statutory scheme, and in particular the penalty at issue, is to discourage introducing over-quota tobacco into the market." With this goal in mind, the court held that a 75% penalty is proportional to the legitimate government purpose of discouraging over-quota sales. The court added that "[o]nly if the penalty exceeded 100% of the price of the over-quota tobacco introduced into the market would there even begin to be a question of excessiveness."

For these reasons, the court concluded that there had been no violation of either the Double Jeopardy Clause or the Excessive Fines Clause. The judgment of the district court in favor of Mr. Cole was reversed.

—Christopher R. Kelley, Susan A. Schneider, Hastings, MN

### SPS Agreement/Cont. from p. 7

system. The SPS Agreement encourages WTO members to base their SPS measures upon the standards of these organizations. The Codex and OIE are currently well situated to perform the roles provided for them in the SPS Agreement. Although the IPPC in its present form is capable of fulfilling the responsibilities given to it in the SPS Agreement, the IPPC's proposed revisions, if approved, would facilitate the IPPC's ability to support the WTO system.

As demonstrated in the beef hormone decisions of the WTO, the settlement of major international trade disputes can turn at least in part upon the standards of the Codex, IPPC, and OIE, as these organizations' standards are viewed as international benchmark standards under the SPS Agreement. With the heightened importance of international standards, the standard-setting process of the Codex has become more controversial, and consensus on its new standards can no longer be assumed. The establishment of standards by the IPPC and OIE in the future might also become more political, and possibly less scientific, as an indirect result of the SPS Agreement. Such a trend might ultimately damage the credibility of the Codex, IPPC, and OIE.

It is unclear how great a role the specific trade agendas of member countries, as opposed to scientific evidence, might affect the development of future standards. All three organizations have lengthy approval processes for new standards, which should prevent the adop-

## Conference Calendar

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tion of numerous scientifically questionable standards. In addition, although delegates to these organizations are government officials, they are scientists as well, and their professional integrity as well as the goodwill that has developed among them when working together might also limit the potential of the Codex, IPPC, and OIE to create standards that are scientifically sound.

Although the possible increased politicization of the standard-setting processes of these organizations is regrettable, it is perhaps inevitable. Under the SPS Agreement, the outcome of international trade disputes can be influenced by the conformity of a WTO member's SPS measures with international stan-

## Federal Register in brief

The following selection of items were published in the *Federal Register* from Jan. 21, 1998 to Feb. 20, 1998.

1. Farm Service Agency; Tree Assistance Program; final rule; effective date 1/26/98. 63 Fed. Reg. 3791.

2. CCC; Announcement of the Market Access Program for FY 1998. 63 Fed. Reg. 7746.

3. Foreign Agricultural Service; Announcement of the Foreign Market Development Cooperator Program for FY 99. 63 Fed. Reg. 7750.

4. Foreign Agricultural Service; Notice of FY Emerging Markets Program and solicitation of private sector proposals. 63 Fed. Reg. 8424.

—Linda Grim McCormick, Alvin, TX

dards. Therefore, one can expect that many governments, to the extent they can, will try to protect their existing or possible future SPS measures. This will likely lead to less consensus within the Codex, IPPC, and OIE than during the time prior to the implementation of the SPS Agreement. If lack of consensus becomes the norm, the harmonization objective will likely be harmed. Such a development may lead to increased calls for consensus standard-setting within the three entities.

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## The SPS Agreement and international organizations<sup>®</sup>

By Terence P. Stewart and David S. Johanson

One of the objectives of the drafters of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) was to harmonize the sanitary and phytosanitary (SPS) measures of the World Trade Organization (WTO). To achieve this goal, the SPS Agreement encourages WTO members when creating or maintaining SPS measures to rely upon the SPS standards established by three international organizations: the Codex Alimentarius Commission (Codex), the International Plant Protection Convention (IPPC), and the International Office of Epizootics (OIE). These organizations address, respectively, issues concerning human, plant, and animal life and health.

These three organizations are recognized by the world's food and agricultural communities as the premier international organizations for the establishment of SPS standards and for the coordination of information concerning SPS issues. The standards they set are voted upon by the delegates of each member country; these delegates are generally scientists employed by their respective national governments. While the participation of their numerous members has ensured that these organizations have never been immune to politics, the Codex, IPPC, and OIE are scientific bodies whose decisions have traditionally not been the subject of great political concern. The standards they promulgate are advisory and thus not legally binding, so their standards rarely receive significant attention outside of scientific circles.

The Codex, IPPC, and OIE were created well prior to the adoption of the Uruguay Round Agreements, and they are now adjusting to the new role in the international trading system that was established for them through the SPS Agreement. The reliance on these three organizations within the SPS Agreement has already brought changes to these

international bodies. As the final panel reports of the WTO beef hormone disputes show, the adjudication of major international trade conflicts can now turn at least in part upon the standards of the Codex, IPPC, and OIE. Following the beef hormone decisions, some even contend that the SPS Agreement can in effect transform the non-binding standards of the Codex, IPPC, and OIE into binding standards for WTO members. Even if these standards remain solely advisory, the stakes for WTO members in international SPS standards have become higher, and the potential exists for increased political pressure to be put upon the Codex, IPPC, and OIE when they set new standards. Questions have also arisen within these organizations as to their structural capabilities to fulfill their new roles.

### The SPS Agreement

References to the Codex, IPPC, and OIE are made directly and indirectly in various articles located throughout the SPS Agreement. These three bodies are the only international organizations mentioned by name in the SPS Agreement. Accordingly, whenever the SPS Agreement refers to the "relevant" or "appropriate" international organizations, it is presumably referring to the Codex, IPPC, and OIE among possibly others.

### Harmonization

The Codex, IPPC, and OIE are designated to play a major role in the harmonization process of SPS measures envisioned in the SPS Agreement. Article 3.1 obligates members to base their SPS measures on international standards, guidelines, and recommendations "where they exist." The Agreement at Annex A specifically defines "international standards, guidelines or recommendations" as the standards, guidelines, or recommendations established by the Codex, IPPC, or OIE.

However, Article 3.3. permits members to maintain higher standards than the international norm as established by international standards, guidelines, and recommendations if a member's measures are based upon science or if such measures are the "consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with paragraphs 1 through 8 of Article 5." Article 5 requires WTO members to base their SPS measures upon risk assessments.

In regard to disputes arising under the SPS Agreement, Article 3.2 provides perhaps the most important provision per-

taining to the roles of the Codex, IPPC, and OIE. It states that SPS measures of WTO members that are in conformity with international standards, guidelines, or recommendations shall be "presumed to be consistent with the relevant provisions of this Agreement." Therefore, in an SPS dispute adjudicated through the WTO's dispute settlement process, if a member adopts measures that are identical or similar to the standards promulgated by the Codex, IPPC, or OIE, the member's measures will presumably be found consistent with its obligations under the SPS Agreement. The member would thus likely prevail in its dispute.

Article 3.4 states that WTO members must participate "within the limits of their resources" in the relevant international bodies, and "in particular" the Codex, IPPC, and OIE. Accordingly, members are expected to promote the development of standards within these international organizations. Under Article 3.5, the WTO Committee on Sanitary and Phytosanitary Measures (SPS Committee) will monitor international harmonization activities and will coordinate this effort with the "relevant international organizations," which presumably include the Codex, IPPC, and OIE.

### Risk assessment

Article 5 of the SPS Agreement, which requires risk assessments for the establishment and maintenance of SPS measures, creates a role for the Codex, IPPC, and OIE. Article 5.1 states that in developing risk assessments for SPS measures, members must take into consideration the risk assessment processes developed by the "relevant international organizations," which can be assumed to include the Codex, IPPC, and OIE. If scientific evidence is lacking concerning an SPS measure, Article 5.7 provides that members are permitted to adopt provisional measures based upon available information, such as that developed by the "relevant international organizations." Under Article 5.8, in situations where a member believes that a measure of another member does not conform with the "relevant international standards, guidelines or recommendations," and the measure either interferes with or has the potential to interfere with that country's exports, that member can request that the other member provide it with explanations for the measure, and the other member will be obligated to respond.

### Differing regional conditions

Article 6 requires WTO members to recognize that pests and diseases occur

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*Terence P. Stewart is the managing partner and David S. Johanson is an associate attorney at the law offices of Stewart and Stewart, which focuses on international trade, including international trade and multilateral trade agreements.*

in distinct regions and do not necessarily inflict all areas of a country. For example, a member would most likely violate its WTO obligations if it prevented imports of all fruit from the United States due to the presence of the Mediterranean fruit fly in only one state, Hawaii. According to Article 6.1, members should take into consideration the guidelines of the "relevant international organizations" in determining pest- and disease-free areas.

#### *Dispute settlement*

Article 11.3 states that the SPS Agreement does not impair the rights of members to utilize the dispute settlement procedures of other international organization. For example, two members of the both the WTO and IPPC could choose to settle a dispute through either the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding) of the WTO or through the non-binding and seldom used dispute settlement mechanism of the IPPC. Under Article 11.2 of the SPS Agreement, dispute settlement panels should in disputes involving technical or scientific issues consult with experts in the relevant fields. In doing so, a panel may create a technical experts group or consult with the "relevant international organizations."

The Dispute Settlement Understanding (DSU), which is a separate instrument from the SPS Agreement, restates in Article 13 the provisions of the SPS Agreement that dispute settlement panels can obtain information from experts in the relevant fields. Article 13.2 of the DSU goes on to provide that "a panel may request an advisory report in writing from an expert review group." Appendix 4 of the DSU elaborates upon the establishment and functions of expert review groups.

The panels in the beef hormone disputes declined to form an expert review group. The panels expressed concerns that expert review groups would have to find consensus on certain matters, which would complicate the groups' processes. Instead, the panels sought scientific information from individual experts. The Codex provided the panels with names of possible nominees to serve as experts, and a scientist from the Secretariat of the Codex, whose nationality was not given, became an expert for the panel. Whether or not future panels establish expert review groups, the Codex, IPPC, and OIE will likely be substantially involved in providing scientific assistance to panels.

#### *The SPS Committee*

The functioning of the SPS Committee, which is established in Article 12, relies

heavily upon the Codex, IPPC, and OIE. Article 12.2 states that the SPS Committee is required to encourage WTO members to base their measures upon international standards, guidelines, or recommendations. The Committee under Article 12.3 should discuss scientific and technical matters with international SPS organizations, and in particular the Codex, IPPC, and OIE, with the aim of obtaining the best scientific information. Article 12.6 provides that the Committee may also ask these organizations to examine matters concerning certain SPS standards.

Article 12.4 requires the SPS Committee to establish a procedure to follow the progress of international harmonization efforts and the utilization of international standards, guidelines, and recommendations. The SPS Committee is expected to work with the "relevant international organizations" to develop a list of international standards, guidelines, and recommendations that affect international trade. Members should indicate which of these standards they require for the importation of products. If a member does not use an international standard, guideline, or recommendation, the member should explain why its policies vary from the international standard. When a member ceases using an international standard, guideline, or recommendation, it should either explain its action to the Secretariat of the WTO and to the "relevant international organizations" or through the procedures elaborated in Annex B of the SPS Agreement, which concerns transparency.

The SPS Committee is beginning the process of monitoring the international harmonization of SPS measures, and it implemented a provisional procedure for this purpose at its meeting in October 1997. The Committee plans to review the success of this provisional procedure eighteen months after the procedure's adoption.

#### *Transparency*

Annex B of the SPS Agreement states that if a member's proposed SPS measure deviates from an international standard, guideline, or recommendation, or if no such international standard exists, and if the measure has a major impact on trade, the member must notify other countries of this proposed measure "at an early stage." If requested, the member must explain to other members how the proposed measure varies from international standards, guidelines, or recommendations.

#### **The beef hormone decisions**

The existence of international SPS standards shaped the decisions of the first

and currently only WTO panel reports concerning disputes arising under the SPS Agreement. The decisions of the panels in the beef hormone disputes involving Canada and the European Communities (EC) (WT/DS48) and the United States and the EC (WT/DS26), as well as the report of the WTO Appellate Body (WT/DS26/AB/R; WT/DS48/AB/\$) regarding the appeals of these decisions, provide examples of the importance given to the standards established by the Codex, IPPC, and OIE in resolving disputes that come from the WTO.

In 1988, the EC prohibited the use of growth-promoting hormones in beef production, and an import ban on hormone-treated meat was implemented in 1989. The United States and Canada claimed that the use of hormones for growth promotion purposes in beef cattle is safe and poses no threat to human health. They contended that the EC's policy was scientifically unfounded and was designed to protect EC beef producers from competition. The EC countered by stating that beef hormones threaten human health and claimed that science supported its policy.

WTO dispute settlement panels were formed, and final reports were released in August 1997. Included among their arguments before the panels, the United States and Canada contended that the EC's prohibition on the importation of hormone-treated beef violated the EC's obligations under Article 3.1 of the SPS Agreement as the EC failed to base its measures concerning the relevant hormones upon international standards. The Codex standards consist of maximum residue levels for five of the six hormones under dispute. According to the Codex, these five hormones, when used according to sound veterinary practices for purposes of growth promotion in beef cattle, do not pose risks to human health. The panels determined that the EC's measures varied from the international standards of the Codex and thus were not in conformity with Article 3.1.

Article 3.3 makes it clear that a WTO member is not required to base its SPS measures upon international standards. Article 3.3 provides that a member may maintain higher standards than the international norm, but only if such measures are based upon science or if they operate "as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5." Article 5 requires that members base their measures upon risk assessments.

The EC claimed that risk assessments supported its position. The panels deter-

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mined, however, that the EC failed to demonstrate that its measures were indeed based upon risk assessment as required in Article 3.3. Therefore, the panels held that the EC's policy on beef hormones contravened the EC's obligations under the SPS Agreement. The EC appealed the findings of the panels. While the Appellate Body's decision rejects a number of arguments put forward by the panels, it affirms the panels' conclusions that the EC's policy was not supported by science.

### The Codex Alimentarius Commission

Of the standards established by the three international organizations named in the SPS Agreement, those of the Codex have perhaps the greatest potential to lead to conflicts among WTO members.

#### Background on the Codex

The Codex establishes standards relating to human health, and its standards can concern additives, contaminants, and veterinary drug and pesticide residues in foods. The Codex was founded in 1962 by the Food and Agricultural Organization (FAO) of the United Nations and the World Health Organization (WHO). It currently has 158 member countries and is based in Rome. The stated goal of the Codex is "to guide and promote the elaboration and establishment of definitions and requirements for foods, to assist in their harmonization and, in doing so, to facilitate international trade."

Most of the work of the Codex is conducted through its various committees, which consist of delegates from its member states. Examples of these committees are the Committee on Food Additives and Contaminants and the Committee on Processed Fruits and Vegetables. Standards of the Codex are established through a lengthy eight step process that provides members with the opportunity to comment on the proposed standards. Throughout the Codex's history, most of its standards have been adopted by consensus.

#### Recent controversial Codex decisions

##### Beef hormones

As the standards established by the Codex relate to human health, they have caused more concerns for the populations of members of the WTO than have the standards of the IPPC and OIE, which deal respectively with plant and animal health. Controversy increasingly surrounds the establishment of certain Codex standards, and the adoption of Codex standards through consensus can no longer be assumed.

The first indication of such controversy following the conclusion of the Uruguay Round occurred with the non-consensus

approval of maximum residue levels for five growth-promoting hormones, which would become the focus of the beef hormone disputes at the WTO, at the Twenty-First Session of the Codex in July 1995, just seven months after the implementation of the SPS Agreement. At the request of the United States, a secret vote was held on these standards, and they were approved with 33 delegates favoring their adoption, 29 opposing them, and 7 delegates abstaining from the vote.

Following the vote, the Observer of the EC stated that the secret vote was unfortunate as it deviated from the Codex's goal to operate transparently. The Observer also said that the vote brought into question the validity of the Codex's standards and that the EC might reconsider its participation in this body. The delegations of the Netherlands, Sweden, Finland, Spain, and the United Kingdom dissociated themselves from parts or all of the remarks made by the EC Observer after the vote.

The EC would later argue before the WTO panels in the beef hormone disputes that the failure of the Codex to adopt the beef hormone maximum residue levels through consensus demonstrated the very controversy of using these standards. The EC also stated that Codex members were accustomed to adopting non-binding measures and were unaware that these standards for beef hormones would in effect become mandatory for the member states of the EC through the operation of the SPS Agreement and the Dispute Settlement Understanding of the WTO. The panels held, however, that nothing in the SPS Agreement requires that votes on the measures of the relevant international organizations be by consensus, so the EC's argument was irrelevant.

#### Twenty-Second Session of the Codex

The Twenty-Second Session of the Codex was held in Geneva in June 1997 and provided further examples of disagreements over the adoption of new standards. The release of the interim panel reports in the beef hormone disputes only one month before this session most likely influenced the decisions that were made there.

##### Bovine somatotropin

At the Twenty-Second Session of Codex in June 1997, a vote was held on a draft standard for maximum residue levels for BST. The delegations opposing the adoption of the standard claimed that new evidence demonstrated that the administration of BST can increase the likelihood of viral and bacterial infections and mastitis in cattle, which could lead to the further usage of antibiotics in dairy cattle. Upon motion of the Nether-

lands, a vote was held to postpone the consideration of the adoption of the proposed BST maximum residue level pending the reevaluation of the scientific information and an examination of other factors, most likely including consumer preferences. This resolution passed with 38 members voting for it, 21 delegations against it, and 13 countries abstaining. The member states of the EU, as well as most countries seeking admission to the EU, voted in favor of the resolution while the United States, Canada, Australia, and New Zealand were among the countries opposing its adoption.

#### Future Codex standards

It is likely that non-consensus decisions will become more common in the standard-setting process of the Codex. With the heightened importance of Codex standards, the circle of those who follow this body closely has grown beyond scientists and selected government officials and now includes others, most notably environmentalists and consumer advocates. The Codex is in the process of formulating draft standards on genetically modified organisms (GMOs), and GMOs will almost certainly become one of the next areas of controversy in the Codex.

### The International Plant Protection Convention

While the Codex has experienced controversy surrounding the adoption of some of its standards since the implementation of the SPS Agreement, the IPPC is undergoing a major structural change to prepare it for its new responsibilities in the world's trading system as a result of the SPS Agreement.

#### Background on the IPPC

The IPPC came into force in 1952, and some 105 countries were contracting parties to it as of 1997. According to Article I of the IPPC, the purpose of this organization is to secure "common and effective action to prevent the spread and introduction of pests of plants and plant products and to promote measures for their control." The IPPC was amended in 1979, and the amended text became operative in 1991.

A Secretariat was established for the IPPC in 1989 by the FAO Conference, but the Secretariat did not begin functioning until 1993 during the Uruguay Round. The function of the Secretariat is to coordinate international efforts concerning plant quarantine issues, to compile information concerning plant pest outbreaks, and to provide technical assistance to members on phytosanitary issues. Like the Codex, the IPPC Secretariat is located in Rome and operates under the

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#### *Revision of the IPPC*

Of the three international organizations named in the SPS Agreement, the IPPC is currently the least prepared to fulfill the role envisioned by the WTO. Recognizing this, the FAO Conference decided in 1995 to amend the IPPC to adapt it to the new responsibilities anticipated for it in the SPS Agreement. In 1996, an Expert Consultation proposed a revised draft of the IPPC, which was distributed to contracting parties for comments. After a review by members of the IPPC, a proposed revised convention was presented to the IPPC Conference in Rome in November 1997. The revised IPPC will go into effect after two-thirds of the IPPC's contracting parties approve it. Amendments that are deemed to create new obligations for members will go into force for each contracting party upon acceptance of such amendments.

The biggest change proposed in the amendments is the creation of a new standard-setting focus for the IPPC. The IPPC itself does not contain provisions relating to the establishment of standards. Instead, an ad hoc standard-setting process, which is viewed by many as unsatisfactory, was developed in 1993 for the IPPC and was approved by the FAO Conference. Consequently, unlike the Codex and the OIE, the IPPC does not have an extensive history of establishing new standards. The revisions will provide the IPPC with the structure and the capability to become a major standard-setting organization like the Codex and the OIE.

The amendments propose other notable changes to the IPPC. While the provisions of the current IPPC do not mention a Secretariat, the suggested revisions do. The proposed revisions also codify within the IPPC some of the principles of the SPS Agreement, such as the use of risk assessments, pest free areas, and harmonization. Both the current and proposed amended conventions contain non-binding dispute settlement mechanisms.

With its new standard-setting focus, the decisions of the IPPC could possibly become more controversial as has occurred with some Codex decisions. Indeed, the Secretariat of the IPPC expressed concerns during the IPPC revision process that trade matters were possibly being viewed as more important than plant health issues. However, block voting within the revised IPPC might be less effective than within the Codex. Under Article X.5 of the IPPC, if consensus cannot be reached on a matter that comes before the IPPC's Commission on Phytosanitary Measures, decisions will

be made by a two-thirds majority, not by a simple majority.

#### **The International Office of Epizootics**

Unlike the Codex and IPPC, the OIE has not experienced major changes in either its standard-setting process or its structure since the implementation of the SPS Agreement in 1995.

#### *Background on the OIE*

The OIE coordinates studies of animal diseases, informs governments of animal diseases, and assists in the harmonization of regulations involving the trade of animals and animal products. It was created in 1924 and is based in Paris. As of 1997, some 147 countries were members of this organization. The OIE differs from the Codex and IPPC in that it does not operate under the auspices of the FAO of the United Nations.

The International Committee of the OIE meets at a minimum once a year. This committee, which is comprised of all delegates, approves new standards of the OIE. The OIE has five regional commissions that promote cooperation on animal health issues in their respective geographical areas.

The OIE is the oldest veterinary association in the world and is similar to the Codex in that it too has a long history of establishing advisory international standards. OIE standards are found in the OIE's *Code*, which lists standards for international trade, and *Manual*, which provides the standard diagnostic procedures for animal diseases as well as vaccine standards related to international trade. The Fish Diseases Commission of the OIE issues a separate *Code* and *Manual* pertaining to aquatic life.

#### *The OIE since implementation of the SPS Agreement*

The OIE has undergone relatively few changes since the implementation of the SPS Agreement in 1995. Unlike the Codex, the OIE has not to date experienced significant controversy when creating standards. This lack of controversy can be attributed in part to the nature of the risks which the OIE addresses; the establishment of standards for animals and animal products does not evoke the same concerns for most people as do the standards of the Codex, which relate to human health. And in contrast to the IPPC, the OIE prior to the Uruguay Round Agreements was well suited to establish new standards, so the OIE was not in need of revision.

#### *The OIE and impending disputes*

While the profile of the OIE is possibly lower than those of the Codex and IPPC when considering changes to these orga-

nizations since the implementation of the SPS Agreement, the importance of the OIE in the WTO system will most likely become apparent during the near future. Bovine spongiform encephalopathy (BSE), also known as "mad cow disease," has significantly impacted the international trade of live cattle and beef products, and this disease could lead to disputes before the WTO. Any BSE disputes would probably involve OIE standards on BSE and the OIE's international monitoring of this disease.

One such possible WTO dispute concerns the EU's ban on the use of "specified risk materials" (SRMs) related to transmissible spongiform encephalopathies. The EU bases its policy in part upon OIE standards which state that certain materials, such as bovine brains and spinal cords, originating from countries with cases of BSE, should not be traded internationally. The EU policy restricts exports from the United States; for example many pharmaceutical products produced in the United States are encased in gelatin capsules composed partly of SRMs. The United States contends that it should receive a derogation from the EU's policy as it is free of BSE. US officials contend that the EU's prohibition of such products from the United States is not scientifically justified, and thus violates the EU's obligations under the SPS Agreement, as the United States regularly monitors for BSE according to OIE guidelines.

European countries might take issue with the proposed US policy of restricting the importation of meat and meat products from European countries where BSE might be present, yet has not been detected. The US is considering taking such action as it contends that some European states either have less restrictive import laws than the United States or fail to monitor adequately for this disease. OIE standards concerning BSE would probably become an issue in such a dispute.

In addition, an active panel of the WTO is considering allegations of Canada that Australia's ban on the importation of North American salmon contravenes Australia's WTO obligations under the SPS Agreement. Australian officials claim that uncooked salmon from North America poses threats to its fisheries through the possible transmission of diseases. The decision in this dispute will likely involve OIE standards, and the panel is expected to release its report in the spring of 1998.

#### **Conclusion**

The SPS Agreement of the WTO has expanded the visibility of the Codex, IPPC, and OIE in the international trading

## ***Word processor and e-mail changes***

The editor's new e-mail address is: [lsgrc@flash.net](mailto:lsgrc@flash.net). Now is it possible to send an article as an attached file to an e-mail message. The preferred word processor is now Microsoft Word 6 or 7.