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## **Trade Epidemic: The Impact of the Mad Cow Crisis on EU-U.S. Relations**

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# TRADE EPIDEMIC: THE IMPACT OF THE MAD COW CRISIS ON EU-U.S. RELATIONS

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**Abstract:** When a new illness in cattle appeared in the United Kingdom twenty years ago, its ensuing nationwide and global repercussions could not have been envisioned. Not only did mad cow disease destroy the British cattle industry, it raised the fears of leaders and citizens around the world. Wary of tainted British beef, the European Union stepped in to attempt to curb the crisis while it was in its infancy. Soon the United States, in an effort to protect its own citizens and cattle industry, enacted measures banning European cattle products. The effects of the peculiar cattle disease reverberated through the global economy, heightening trade disputes between the United States and the European Union that have yet to achieve resolution.

## INTRODUCTION

The appearance of mad cow disease in the United Kingdom in the 1980s has forever destroyed the image of “the roast beef of Old England” throughout Europe and the world.<sup>1</sup> Magnifying the gravity of this crisis is the “extreme sensitivity of Europeans about the food they eat.”<sup>2</sup> Most European Union (EU) Member States lay claim to great culinary traditions.<sup>3</sup> The importance of such traditions means that food is taken seriously in the European culture.<sup>4</sup> Food scandals, thus, are disturbing news, and it comes as no surprise that concern over the spread of mad cow disease has had a dramatic effect on beef demand in the EU.<sup>5</sup>

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<sup>1</sup> Graham R. Chambers, *The BSE Crisis and the European Parliament*, in EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS 95, 96 (Christian Joerges & Ellen Vos eds., 1999).

<sup>2</sup> John B. Richardson, *Agriculture in the EU and the United States: Common Values and Converging Policies*, Address Before the National Association of State Departments of Agriculture (Mar. 3, 2000), at <http://www.eurunion.org/news/speeches/2000> (last visited Feb. 2, 2001).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*; CHARLES E. HANRAHAN, *THE EUROPEAN UNION'S BAN ON HORMONE-TREATED MEAT I* (Cong. Research Servs. Short Rep. for Cong. RS20142, 2000).

The interdependent relationship between the EU and the United States rendered an impact on this country inevitable.<sup>6</sup> Together, the EU and the United States produce over 50% of global gross domestic product (GDP).<sup>7</sup> Twenty-four percent of EU exports travel to the United States, and 23% of U.S. exports reach the EU.<sup>8</sup> Two-way trade between the EU and the United States currently grows at a rate of 10% per year, and the job-creating investment of each government in the other's economy sets the relationship apart from all other global trade affiliations.<sup>9</sup> As of June, 2000, European investment in the United States had reached over a half trillion dollars, supporting seven million "well-paid" jobs.<sup>10</sup> In the past, Europeans worried about American takeovers of European business, but recent European takeovers have reversed that trend.<sup>11</sup>

The outbreak of mad cow disease has prompted the EU to take measures in response to the crisis, which include surveillance and withdrawal from the food chain of specified risk material (SRM).<sup>12</sup> The panic over mad cow disease in western Europe led U.S. health officials to take stringent steps to prevent the disease from taking hold on this side of the Atlantic.<sup>13</sup> Furthermore, mad cow disease is credited with creating an environment unfavorable to resolving an ongoing EU-U.S. dispute over the use of genetically modified organisms (GMOs) in food production.<sup>14</sup> The EU's ban on GMOs is governed by the World Trade Organization (WTO) Agreement on Sanitary and

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<sup>6</sup> See generally Fraser Cameron, *The EU and US: Good Friends—Tough Negotiators*, Presentation at the European Chamber of Commerce Lunch (June 12, 2000), at <http://www.eurunion.org/news/speeches/2000>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Cameron, *supra* note 6.

<sup>12</sup> Press Release, Council of Ministers, 2309th Council Meeting—AGRICULTURE—Brussels, (Nov. 20, 2000), available at LEXIS, European Union Library, News File [hereinafter Council Meeting]. SRM include sheep and goat heads, spleens from animals of any age, spinal cords from animals greater than a year old, and the following bovine materials: the entire head—including the eyes but excluding the tongue, spinal cord, thymus, tonsils, spleen, and intestines from cattle greater than six months old. Paul Brown et al., *Bovine Spongiform Encephalopathy and Variant Creutzfeldt-Jakob Disease: Background, Evolution, and Current Concerns*, in EMERGING INFECTIOUS DISEASES (2001), available at <http://www.cdc.gov/ncidod/eid/vol7no1/v7n1.pdf> (as of Dec. 22, 2001).

<sup>13</sup> Sandra Blakeslee, *Stringent Steps Taken by U.S. on Cow Illness*, N.Y. TIMES, Jan. 14, 2001, at A1.

<sup>14</sup> CHARLES E. HANRAHAN, U.S. EUROPEAN AGRICULTURAL TRADE: FOOD SAFETY AND BIOTECHNOLOGY ISSUES 2 (Cong. Research Servs. Rep. for Cong. 98-861, 2001) [hereinafter AGRICULTURAL TRADE].

Phytosanitary Measures (SPS Agreement).<sup>15</sup> The SPS Agreement forbids the implementation of measures that are not based on scientific principles and assessment of risk.<sup>16</sup> Thus, the disagreement over the EU's GMO prohibition is a critical irritant in the EU-U.S. trade relationship.<sup>17</sup>

This Note examines the trade hindrances between the EU and the United States resulting from the mad cow epidemic in Europe. Further, it considers proposals for repairing the trade relationship. Part I provides a background on the disease itself and the ensuing European crisis. Part II focuses on measures enacted by the EU to control the outbreak. Part III examines the U.S. response to the EU actions. Part IV considers the WTO measures and the ensuing GMO dispute between the EU and the United States. Part V explores recent developments and the possibility for resolution of EU-U.S. differences.

## I. BACKGROUND

### A. *Bovine Spongiform Encephalopathy*

Bovine Spongiform Encephalopathy (BSE), commonly known as mad cow disease, is a chronic degenerative disease affecting the central nervous system of cattle.<sup>18</sup> First diagnosed in Great Britain in 1986, BSE derives its name from the sponge-like appearance of infected cattle's brain tissue when sections are examined under a microscope.<sup>19</sup> Animals affected by the epidemic may display changes in temperament, such as nervousness or aggression, abnormal posture, incoordination and difficulty in rising, decreased milk production, or loss of body weight despite continued appetite.<sup>20</sup> Most cases of mad cow disease in the United Kingdom have occurred in dairy cows ranging in age from three to six years.<sup>21</sup> The causative agent of BSE has

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<sup>15</sup> *Id.* at 1.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 3.

<sup>18</sup> U.S. Dep't of Agric. Animal and Plant Health Inspection Serv., *Bovine Spongiform Encephalopathy* (Jan., 2001), at <http://www.aphis.usda.gov:80/oa/pubs/fsbse.html> (last visited Dec. 22, 2001) [hereinafter *BSE* (Jan., 2001)].

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

not been characterized completely, and currently there is no treatment to prevent the disease.<sup>22</sup> All infected cattle die.<sup>23</sup>

A time period of two to eight years ensues from the point at which an animal becomes infected until it first shows signs of BSE.<sup>24</sup> Following the onset of clinical signs, the condition deteriorates until the cow dies or is destroyed; this process takes between two weeks and six months.<sup>25</sup> Because at this time there is no process by which to detect the disease in a live animal, veterinary pathologists must confirm BSE by postmortem microscopic examination of an animal's brain tissue.<sup>26</sup> The only method available to study the possible presence of BSE in live cattle is to inoculate other animals (usually mice) with material that may be infected with the disease.<sup>27</sup> Detecting the agent through mouse inoculation studies, however, may take a long time (up to 700 days), "and failure to identify it in tissues may indicate either true absence of the agent or simply the limited sensitivity of current diagnostic methods."<sup>28</sup>

Data suggests that mad cow disease is an extended common source epidemic involving animal feed containing contaminated meat and bone meal as a protein meat source.<sup>29</sup> No evidence exists indicating that BSE spreads horizontally—between unrelated adult cattle or from cattle to other species.<sup>30</sup> Limited research shows that vertical or maternal transmission may occur at a negligible level.<sup>31</sup> Results of research conducted in the United Kingdom indicate that there is roughly a nine percent increase in the occurrence of BSE in offspring of BSE-affected cattle.<sup>32</sup> This research suggests that the BSE epidemic cannot be attributed to maternal transmission alone.<sup>33</sup> BSE in the United Kingdom may be attributed to feeding cattle protein produced from carcasses of other cattle or sheep infected with a related

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<sup>22</sup> *Id.*

<sup>23</sup> *BSE* (Jan., 2001), *supra* note 18.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *BSE* (Jan., 2001), *supra* note 18.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> U.S. Dep't of Agric. Animal and Plant Health Inspection Serv., *Bovine Spongiform Encephalopathy (BSE)*, at <http://www.aphis.usda.gov:80/oa/bse/index.htm> (last visited Feb. 2, 2001) [hereinafter *BSE* factsheet].

<sup>33</sup> *Id.*

disease.<sup>34</sup> Scientists believe that changes in the animal feed production process in the early 1980s allowed the sickening agent in infected carcasses to survive, thereby contaminating the protein supplement and infecting live cattle.<sup>35</sup> BSE is classified as a transmissible spongiform encephalopathy (TSE), forms of which affect sheep and goats (scrapie), deer and elk (chronic wasting disease), domestic and wild cats (feline spongiform encephalopathy), and humans (Creutzfeldt-Jakob Disease, hereinafter CJD).<sup>36</sup>

### B. *New Variant Creutzfeldt-Jakob Disease*

Shortly after the 1986 identification of the first case of BSE in the United Kingdom, people expressed concern about the possibility that humans might become infected with the disease.<sup>37</sup> The United Kingdom established the CJD Surveillance Unit, although concerns about human infection were muted by the presumptions that BSE originated from scrapie and that it was not a human pathogen.<sup>38</sup> Alternatively, if BSE originated from a spontaneous mutation, early studies of the new TSE were unable to predict whether or not humans might be infected.<sup>39</sup> Regardless of scientists' ability to foresee transmission of BSE to humans, reported cases of CJD in high risk groups did not increase in the ten years after the first case of BSE was identified.<sup>40</sup> Instead, CJD continued to occur in the general population at the same rate as before BSE appeared.<sup>41</sup> Then, between May and October, 1995, the CJD Surveillance Unit received notification that CJD had been identified in three patients, aged sixteen, nineteen, and twenty-nine.<sup>42</sup> What was particularly unusual about these diagnoses was the comparative youth of the three victims.<sup>43</sup> By March, 1996, a total of ten cases of CJD in young people had been reported in the United Kingdom, and scientists had confirmed that no "young CJD patients in other European countries had the clinical and neuropathologic features of the UK cases."<sup>44</sup> A report of the ten cases concluded that a

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<sup>34</sup> BSE (Jan., 2001), *supra* note 18.

<sup>35</sup> Brown, *supra* note 12.

<sup>36</sup> BSE (Jan., 2001), *supra* note 18.

<sup>37</sup> Brown, *supra* note 12.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Brown, *supra* note 12.

<sup>43</sup> *See id.*

<sup>44</sup> *Id.*

previously unrecognized form of CJD occurs in persons forty-five years of age and younger.<sup>45</sup>

New variant Creutzfeldt-Jakob Disease (nvCJD) affects humans and has been linked to consumption of BSE-infected beef, augmenting global fears about the spread of mad cow disease.<sup>46</sup> The identification of nvCJD came nearly a decade after the earliest reports of BSE.<sup>47</sup> Thus, assuming that the first case of nvCJD echoes the earliest exposure to BSE, the incubation period for the human illness could be ten to fifteen years.<sup>48</sup> If this is true, the rapid increase of cattle infected with BSE in the late 1980s could lead to a parallel increase of nvCJD in the next few years.<sup>49</sup>

### C. Crisis in Europe

Since November, 1986, 183,215 head of cattle have been diagnosed with BSE.<sup>50</sup> The mad cow epidemic peaked in January, 1993, when roughly 1000 new cases were reported each week.<sup>51</sup> As a result of the disease, the British livestock industry has suffered a substantial blow—179,804 cases of BSE have been confirmed in the United Kingdom alone.<sup>52</sup> Agriculture officials in the UK have taken a series of actions to eradicate BSE.<sup>53</sup> These actions include making BSE a notifiable disease, prohibiting the inclusion of mammalian meat and bone meal in feed for all food-producing animals, barring the inclusion of animals more than thirty months of age in the animal and human food chains, and destroying all cattle showing signs of BSE and other cattle at high risk of developing the disease.<sup>54</sup> UK veterinary officials, however, made no attempt to conceal their hostility to EU inspectors looking at BSE issues and expressed resentment at EU implications that BSE is a “political issue.”<sup>55</sup> The result of the UK hostility meant that there were no inspections by the EU between 1990 and

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<sup>45</sup> *Id.*

<sup>46</sup> See BSE (Jan., 2001), *supra* note 18.

<sup>47</sup> Brown, *supra* note 12.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Court of Auditors, Follow up to Special Report No. 19/98 on BSE, together with the Commission's Replies, 2001 O.J. (C 324) 1, 7 [hereinafter Follow up]. Statistics current as of May 31, 2001. *Id.*

<sup>51</sup> BSE (Jan., 2001), *supra* note 18.

<sup>52</sup> *Id.*; Follow up, *supra* note 50, at 7.

<sup>53</sup> BSE (Jan., 2001), *supra* note 18.

<sup>54</sup> *Id.*

<sup>55</sup> Chambers, *supra* note 1, at 99.

1994—crucial years in the development of the UK epidemic.<sup>56</sup> The EU inspections could have discovered that a cattle identification scheme employed by the United Kingdom worked better in theory than in practice, that production of the meat and bone meal causing the problem continued, and that it was cross-contaminating ruminant feed in the United Kingdom and being exported to the rest of Europe without adequate labels and without being traced to end-use.<sup>57</sup> Officials now attribute the primary emergence of BSE in the United Kingdom to the proportion of sheep carcasses in protein supplements, noting that scrapie infections in British sheep most likely were higher in the United Kingdom than elsewhere.<sup>58</sup>

In addition to the epidemic in the United Kingdom, mad cow disease also has been confirmed in native-born animals in Belgium, Denmark, France, Germany, Ireland, Liechtenstein, Luxembourg, the Netherlands, Northern Ireland, Portugal, Spain, and Switzerland.<sup>59</sup> Germany is the most recent victim of the crisis in Europe.<sup>60</sup> After persistently denying that the problem concerned the nation, Germany admitted the presence of BSE-affected cattle on their soil, and in early 2001, announced their plan to slaughter 400,000 animals.<sup>61</sup>

In September, 2001, a mad cow was discovered in Japan, and a second case of the disease was confirmed two months later.<sup>62</sup> Although the risk of BSE emerging had been apparent since the 1990s because of Japan's past imports of livestock as well as meat from the United Kingdom and other EU countries, the Japanese government appears to have ignored the warnings.<sup>63</sup> Officials have not detected any cases of BSE in the United States, and the one case of BSE in Canada was found in a single cow imported from the United Kingdom.<sup>64</sup> Animal health officials in Canada destroyed the affected cow and all of its herd-mates, as well as other cattle determined to be at risk.<sup>65</sup>

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Brown, *supra* note 12.

<sup>59</sup> BSE (Jan., 2001), *supra* note 18.

<sup>60</sup> See Tony Judt, *Europe Is One—Until Disaster Strikes*, N.Y. TIMES, Feb. 6, 2001, at A19.

<sup>61</sup> *Id.*

<sup>62</sup> Bethan Hutton, *It Took Just One Dairy Cow to Change the Lives of Millions*, FIN. TIMES (LONDON), Nov. 22, 2001, at 14.

<sup>63</sup> *Id.*

<sup>64</sup> BSE factsheet, *supra* note 32.

<sup>65</sup> *Id.*



On March 20, 1996, the UK's Spongiform Encephalopathy Advisory Committee (SEAC) announced the identification of ten cases of nvCJD.<sup>66</sup> The probable explanation for the incidents was linkage to BSE exposure before a 1989 measure banning human consumption of brain, spinal cord, and other organs with potential BSE infectivity.<sup>67</sup> As of September 22, 2001, there had been 110 cases of nvCJD worldwide: 106 in the UK, three in France, and one in Ireland.<sup>68</sup> The reports of nvCJD have turned what was initially a veterinary problem into a public health problem.<sup>69</sup> Young people are falling victim to a disease that historically has affected only people over fifty.<sup>70</sup>

For many European consumers, their rejection of beef was not necessarily the apprehension of developing nvCJD, but the revelation that "the agro-industry was producing beef by feeding ground-up dead cattle to live ones (turning herbivores into carnivores and carnivores into cannibals, as some observers put it)."<sup>71</sup> The depicted industry which, from one point of view, is an effective method for "recycling protein and dealing in Europe with twelve million tons a year of animal waste which otherwise has to be disposed of, is an industry which operates in the shadows of public knowledge. Very few people want to know what happens there."<sup>72</sup> BSE illuminated this operation, "and the public, for the most part, did not like what was revealed."<sup>73</sup> As a result, the outbreak of mad cow disease in Europe has highlighted the issue of hygiene in slaughterhouses, factories, and butcher shops.<sup>74</sup>

## II. EU ACTION

As a result of the mad cow crisis, public health and food safety, which gradually were entering the political agenda of both the EU and its Member States, have been forced into the foreground.<sup>75</sup> In response to early reports of a crisis in the United Kingdom, the EU took preventative measures by adopting a directive on livestock pro-

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<sup>66</sup> BSE (Jan., 2001), *supra* note 18.

<sup>67</sup> *Id.*

<sup>68</sup> Kevin Toolis, *Epidemic in Waiting*, THE GUARDIAN (LONDON), Sept. 22, 2001, at 20.

<sup>69</sup> Chambers, *supra* note 1, at 96.

<sup>70</sup> *See id.*

<sup>71</sup> *Id.* at 97.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Chambers, *supra* note 1, at 97.

<sup>75</sup> *Id.* at 96-97.

duction.<sup>76</sup> Effective January 1, 1989, the directive banned the use of growth-promoting hormones in livestock production.<sup>77</sup> Although there is no link between GMOs and the BSE crisis, consumers often make one, and the EU has been pressured to act accordingly.<sup>78</sup> The 1989 directive also banned the use of hormones in meats and meat products imported into the EU on or after January 1, 1989.<sup>79</sup> Thus, the ban effectively eliminated most U.S. red meat and meat product exports to the EU, costing the U.S. beef industry an estimated \$97 million per year.<sup>80</sup>

On July 28, 1989, the EU placed restrictions on the dispatch of certain live cattle from the United Kingdom, as a result of the BSE outbreak.<sup>81</sup> The following year, the EU limited the dispatch of calves under six months old, restricted the dispatch of certain bovine tissues and organs from the United Kingdom, and mandated notification of confirmed cases of BSE.<sup>82</sup> The dispatch of live cattle and all cattle products from the United Kingdom was banned completely in March, 1996.<sup>83</sup> From 1996 on, as officials diagnosed BSE in cattle in individual Member States, eradication programs were put into place and revised, as needed.<sup>84</sup> To date, EU eradication programs for BSE govern in Portugal, the United Kingdom, France, and Ireland.<sup>85</sup>

In a November, 2000 European Council (EC) meeting on agriculture, EU officials confirmed the need to guarantee the highest level possible of consumer protection and to win back consumer confidence.<sup>86</sup> The EC also reiterated the importance of measures taken with regard to traceability, including labeling of processed products and the withdrawal of SRM.<sup>87</sup> Recapping EU measures already in place, the EC listed surveillance measures for the detection,

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<sup>76</sup> Terrence P. Stewart et al., *Trade and Cattle: How the System Is Failing An Industry in Crisis*, 9 MINN. J. GLOBAL TRADE 449, 500 (2000).

<sup>77</sup> *Id.*

<sup>78</sup> See Marjorie Miller, *Europe Has New Beef with Biotech Foods*, L.A. TIMES, Jan. 7, 2001, at C1.

<sup>79</sup> Stewart et al., *supra* note 76, at 500.

<sup>80</sup> *Id.*

<sup>81</sup> For a description of such restrictions, see generally European Comm'n, *Community Legislation on BSE*, at [http://www.europa.eu.int/comm/food/fs/bse/bse15\\_en.pdf](http://www.europa.eu.int/comm/food/fs/bse/bse15_en.pdf) (last visited Mar. 4, 2001) [hereinafter *Community Legislation*].

<sup>82</sup> See *id.*

<sup>83</sup> *Id.*

<sup>84</sup> See *id.*

<sup>85</sup> *Id.*

<sup>86</sup> Council Meeting, *supra* note 12.

<sup>87</sup> *Id.*

control, and eradication of BSE, a ban on feeding mammalian meat and bone meal to ruminants, policies on the treatment of animal waste, withdrawal from the food chain of SRM from the bovine species, and the implementation of a monitoring program.<sup>88</sup> The EC further noted that the Member States bear the responsibility of ensuring that all EU measures are implemented strictly and emphasized EC harmonization of the approach to combating BSE.<sup>89</sup> Furthermore, officials at the EC meeting on agriculture took note of France's actions, which have included destruction of SRM and a ban on the export of products that have been banned or suspended in France—such as T-bone steaks, meat and bone meal, and fats from bones—until the situation has been assessed fully at the EC level.<sup>90</sup> Finally, the EC announced that Member States of destination may apply precautionary measures to the exportation of whole carcasses and living cattle.<sup>91</sup>

On December 4, 2000, the EC announced a decision concerning certain protection measures with regard to TSEs and the feeding of animal protein.<sup>92</sup> This decision was enacted to prevent cases of BSE from entering into the feed chain and was passed pursuant to an opinion of the EU's Scientific Steering Committee, which was adopted in November, 2000.<sup>93</sup> Cited as a precautionary measure, the decision temporarily bans the use of animal proteins in animal feed, effective January 1, 2001.<sup>94</sup> To accomplish this objective, the ban prohibits feeding processed animal proteins to farmed animals that are kept, fattened, or bred for production of food.<sup>95</sup> Moreover, it prohibits placing on the market processed animal proteins intended for feeding farmed animals which are kept, fattened, or bred for the production of food.<sup>96</sup> Another Council decision, also effective January 1, 2001, requires testing for all slaughtered cattle over the age of thirty months.<sup>97</sup> The Council believes that testing all slaughtered animals over thirty months will provide a fuller picture of the true extent and

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Council Meeting, *supra* note 12.

<sup>92</sup> Council Directive 2000/766/EC, 2000 O.J. (L 306) 32.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Council Decision 2001/8/EC, 2001 O.J. (L 2) 28.

distribution of mad cow disease.<sup>98</sup> In addition to mandatory testing, the European Commission (Commission) developed a purchase for destruction scheme in December, 2000.<sup>99</sup> Under this plan, bovine animals over thirty months of age can be purchased for destruction instead of being slaughtered for human consumption.<sup>100</sup> The mandatory testing provisions for slaughtered cattle over thirty months apply to animals that are purchased for destruction.<sup>101</sup>

European Commissioner for Health and Consumer Protection David Byrne stated that the decisions effective January 1, 2001 are the minimum measures necessary to begin the process of rebuilding consumer confidence in the safety of European beef.<sup>102</sup> The discovery of BSE in animals under thirty months, however, raises the question of whether the age limit for testing for mad cow disease should be reduced from the current requirement of thirty months.<sup>103</sup> Furthermore, the case for further EU measures in relation to mechanically recovered meat is very strong.<sup>104</sup> While the EU has taken significant measures to combat the BSE epidemic, individual Member States, especially those with the highest occurrence of the disease, continue to implement their own measures.<sup>105</sup>

A follow up report released by the Court of Auditors on November 20, 2001 found that the EU action plan that has been developed to deal with the BSE crisis is adequate, but implementation by Member States remains problematic.<sup>106</sup> Poor surveillance and poor implementation of the ban on mammalian meat and bone meal in ruminant feed have been cited as potential explanations as to why BSE has not been eradicated.<sup>107</sup> According to the Court of Auditors' report, there is evidence that the agro-feed industry has not been rigorous in

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<sup>98</sup> For a greater description, see David Byrne, Latest Developments in Relation to BSE, Address to Agricultural Committee of the European Parliament (Jan. 23, 2001), at [http://europa.eu.int/comm/dgs/health\\_consumer/library/speeches/speech78\\_en.htm](http://europa.eu.int/comm/dgs/health_consumer/library/speeches/speech78_en.htm) [hereinafter Latest Developments].

<sup>99</sup> Commission Regulation 2777/2000, 2000 O.J. (L 321) 47; see Council Decision 2001/8/EC, 2001 O.J. (L 2) 28.

<sup>100</sup> See Council Decision 2001/8/EC, 2001 O.J. (L 2) 28.

<sup>101</sup> See *id.*

<sup>102</sup> Latest Developments, *supra* note 98.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Comm'n of the European Communities, *Frequently Asked Questions about BSE*, RAPID, Nov. 29, 2000, available at LEXIS, European Union Library, News File.

<sup>106</sup> Follow up, *supra* note 50, ¶ 47.

<sup>107</sup> *Id.* ¶ 48.

its implementation of the EU's BSE legislation.<sup>108</sup> In consideration of these shortcomings, the report recommends consideration of whether the Commission should be given temporary emergency powers when Member States disagree with proposals related to protection of animal or human health.<sup>109</sup> The report further suggests the possibility of excluding funding from market measures where inspections reveal significant non-compliance with EU measures.<sup>110</sup>

### III. U.S. ACTION

In the United States, the Animal and Plant Health Inspection Service (APHIS) and the Food Safety and Inspection Service (FSIS), divisions of the U.S. Department of Agriculture (USDA), joined together to lead the USDA's actions in the prevention, monitoring, and control of BSE in U.S. livestock and food supply.<sup>111</sup> In 1988, the USDA established a BSE working group to review available science and recommend appropriate regulatory controls.<sup>112</sup> The next year, a ban was enacted on the importation of live ruminants, including cattle, sheep, and goats, and most ruminant products from the United Kingdom and other countries reporting cases of BSE.<sup>113</sup> The USDA began educational outreach and initiated active surveillance of brains of U.S. cattle in 1990.<sup>114</sup> Surveillance measures expanded throughout the 1990s; notably, in 1993 the USDA increased to include examination of brain tissue from "downer cows," and in 1994, new technology of testing brains was incorporated.<sup>115</sup>

In 1997, the U.S. Food and Drug Administration (FDA) issued regulations to prohibit feeding most mammalian proteins to animals at risk of developing TSEs.<sup>116</sup> The FDA regulation took effect on June 5, 1997 and was designed as a preventive measure to protect animals

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<sup>108</sup> *Id.* ¶ 52.

<sup>109</sup> *Id.* ¶ 55.

<sup>110</sup> *Id.*

<sup>111</sup> For the text of the USDA's efforts, see U.S. Dep't of Agric., Animal and Plant Health Inspection Serv., *Bovine Spongiform Encephalopathy (BSE) Response Plan Summary* (Oct., 1998), available at <http://www.aphis.usda.gov/oa/bse/bseum.pdf> [hereinafter *Response Plan*].

<sup>112</sup> U.S. Dep't of Agric., Animal and Plant Health Inspection Serv., *USDA Actions to Prevent Bovine Spongiform Encephalopathy (BSE)*, available at <http://www.aphis.usda.gov> (last visited Feb. 2, 2001) [hereinafter *USDA Actions*].

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

from BSE and related diseases as well as to “minimize any potential risk to humans.”<sup>117</sup> Also in 1997, the USDA prohibited importation of live ruminants and most ruminant products from all of Europe.<sup>118</sup> Finding that BSE could become established in the United States if certain meat and other animal products and byproducts from BSE affected cattle were imported and fed to animals in the United States, APHIS stated that the ban on products from all of Europe was based on evidence that the BSE agent might be present throughout Europe.<sup>119</sup> Surveillance of fallen stock increased even further in 2000, and the USDA regionalized states in order to increase coverage.<sup>120</sup> As of December 7, 2000, the USDA prohibited all imports of rendered animal protein products, regardless of species, from Europe.<sup>121</sup> The USDA cited a recent determination by the EU that feed of non-ruminant origin was potentially cross-contaminated with the BSE agent.<sup>122</sup>

On January 17, 2001, a standard check at a Purina Mills plant in Gonzales, Texas revealed that ruminant material accidentally had been mixed with cattle feed, in violation of the 1997 FDA regulation banning mammalian protein in sheep and cattle feed.<sup>123</sup> The company immediately notified federal officials and reclaimed all of the feed, although 1222 animals consumed the feed before any action was taken.<sup>124</sup> The discovery of ruminant material in the feed rose speculation that potential problems in U.S. defenses against mad cow disease might exist.<sup>125</sup> After testing the feed, however, the FDA “determined that each animal could have consumed, at most and in total, five-and-one-half grams—approximately a quarter ounce—of prohibited material.”<sup>126</sup> The FDA also noted that the prohibited material was of U.S.

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<sup>117</sup> U.S. Food and Drug Admin., *FDA Talk Paper, FDA Prohibits Mammalian Protein in Sheep and Cattle Feed*, (June 3, 1997), at <http://vm.cfsan.fda.gov/~lrd/tpprotei.htm>.

<sup>118</sup> *USDA Actions*, *supra* note 112.

<sup>119</sup> Restrictions on the Importation of Ruminants, Meat and Meat Products from Ruminants, and Certain Other Ruminant Products, Fed. Reg. 406, 407 (Jan. 6, 1998) (to be codified at 9 C.F.R. pts. 94, 96).

<sup>120</sup> *USDA Actions*, *supra* note 112.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> The FDA announced the finding in Press Release, U.S. Food and Drug Admin., *FDA Announces Test Results from Texas Feed Lot* (Jan. 30, 2001), available at <http://www.fda.gov/bbs/topics/news/2001/new00752.htm> [hereinafter Test Results]; Tina Hesman, *Purina Mills Recalls Feed after Some Is Found to Contain Banned Material*, ST. LOUIS POST-DISPATCH, Jan. 27, 2001, at 6.

<sup>124</sup> *Id.*

<sup>125</sup> Hesman, *supra* note 123, at 6.

<sup>126</sup> Test Results, *supra* note 123.

origin and, therefore, not likely to contain BSE-infected ruminants.<sup>127</sup> Despite the negligible risk that the feed was contaminated, Purina Mills voluntarily purchased all 1222 of the animals that mistakenly were fed the material.<sup>128</sup> Therefore, meat from those cattle will not enter the human food supply.<sup>129</sup> According to the FDA, “[t]his episode indicates that the multi-layered safeguard system put into place is essential for protecting the food supply.”<sup>130</sup>

On March 23, 2001, the USDA removed a flock of roughly 126 quarantined sheep in Vermont; this action followed the removal of 234 sheep from another Vermont farm a few days earlier.<sup>131</sup> When the sheep were imported from Belgium and the Netherlands in 1996, they were placed under federal restrictions as a part of the USDA’s scrapie control efforts.<sup>132</sup> In 1998, the State of Vermont imposed a quarantine on the flocks after the USDA learned that sheep from Europe probably had been exposed to BSE-contaminated feed.<sup>133</sup> In July, 2000, several sheep from the flocks tested positive for a TSE, leading the USDA to issue a declaration of extraordinary emergency to acquire the sheep.<sup>134</sup> The owners of the flocks contested the USDA action, but a U.S. District Court ordered the removal of the sheep.<sup>135</sup> The USDA planned to euthanize the sheep humanely and collect tissue samples for diagnostic testing.<sup>136</sup>

On November 30, 2001, the USDA released a study conducted by the Harvard Center for Risk Analysis showing that the danger of BSE occurring in the United States was “extremely low.”<sup>137</sup> The report indicated that early protection systems implemented by the USDA and the U.S. Department of Health and Human Services (HHS) in large part have been “responsible for keeping BSE out of the U.S. and

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> See generally Press Release, U.S. Dep’t of Agric., USDA Removes Quarantined Sheep from Second Vermont Farm (Mar. 23, 2001), available at <http://www.usda.gov/news/releases/2001/03/0053.htm> [hereinafter Quarantined Sheep].

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Quarantined Sheep, *supra* note 131.

<sup>137</sup> See generally Press Release, U.S. Dep’t of Agric., Harvard Study Shows Very Low Risk of BSE in the United States (Nov. 30, 2001), available at <http://www.usda.gov/news/releases/2001/11/0241.htm>.

would prevent it from spreading if it ever did enter the country."<sup>138</sup> Despite identifying the low risk of BSE, the Harvard report outlined actions that would continue strengthening U.S. programs to reduce that threat.<sup>139</sup> Actions the USDA and HHS plan to take in response to the report include increasing the number of BSE tests conducted in fiscal year 2002, outlining additional regulatory actions that may be taken to reduce the potential risk of exposure and ensure potential infectious materials do not enter the U.S. food supply, and publishing an Advance Notice of Rulemaking to consider additional regulatory options for disposal of dead stock on farms and ranches.<sup>140</sup>

#### IV. EU-U.S. TRADE

##### A. BSE and the Meat Market

In January, 2001, European Commissioner for Agriculture and Rural Development Franz Fischler announced that BSE has had a significant impact on the EU's beef market.<sup>141</sup> Specifically, Mr. Fischler declared that, because of other countries' bans on EU beef, "a considerable backlog of production that should normally have taken place in 2000 [was] carried over into 2001."<sup>142</sup> Globally, the reduction in beef consumption in 2000 may have been more than 10%.<sup>143</sup> In the EU, beef consumption in 2000 had plunged by 27%.<sup>144</sup> The rejection of EU beef by countries, including the United States, meant that the EU could expect a surplus of 795 metric tons in 2001, assuming a 10% drop in consumption and full use of the EU's purchase for destruction scheme.<sup>145</sup> If used by qualifying EU Member States, the purchase for destruction scheme alone could comprise 500 metric tons of the EU's 2001 beef surplus.<sup>146</sup> Roughly 57,000 animals had been slaugh-

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> See generally Press Release, European Commission, Outcome of the Agriculture Council, 29 January 2001, BSE and the Beef Market (Jan. 30, 2001), available at [http://europa.eu.int/comm/dgs/health\\_consumer/library/press/press105/en.htm](http://europa.eu.int/comm/dgs/health_consumer/library/press/press105/en.htm) [hereinafter BSE and the Beef Market].

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> See BSE and the Beef Market, *supra* note 141. As of January 30, 2001, the purchase for destruction scheme had begun in France, Ireland, and to a lesser extent, in Spain and Luxembourg; Germany, Italy, Portugal, and Greece had not started implementing the plan. Finland, Sweden, the Netherlands, and Denmark are exempt from the plan, and



tered under the purchase for destruction scheme, as of January 30, 2001.<sup>147</sup> According to the U.S. Meat Export Federation, the full or partial bans that more than forty countries have placed on imports of EU beef affected about 240,000 metric tons of beef during the first half of 2001.<sup>148</sup>

While the EU beef market has suffered as a result of the BSE crisis, the USDA announced in December, 2000 that U.S. exporters may benefit from the EU's ban on the use of meat and bone meal in livestock feed rations.<sup>149</sup> For the United States, the more important repercussions of the meat and bone meal ban would be the prohibition of trade of this product into and from the EU and the arising U.S. export opportunities.<sup>150</sup> As of December 1, 2000, the EU was the world's largest exporter of meat and bone meal.<sup>151</sup> In 1999, the EU exported 561,241 metric tons of meat and bone meal, while U.S. exports of the product totaled 381,493 metric tons in the same year.<sup>152</sup> Because of the EU's recent restrictions, countries that import meat and bone meal from the EU "may be forced to seek alternate suppliers of animal protein meals."<sup>153</sup> The possible increase in U.S. exports as a result of the BSE crisis in the EU will depend "upon [U.S.] supply availability, prices, and whether . . . potential export markets are aware of the quality of [U.S. meat and bone meal]."<sup>154</sup>

In March, 2001, the *Wall Street Journal* reported that, after years of dwindling sales, "the horse-meat business is booming," largely because horses do not carry BSE.<sup>155</sup> A good deal of the horse meat comes from the United States and Canada, where "the dogs of the horse world are selling at wildly high prices thanks to a sudden increase in demand

Austria and Belgium have asked for exemptions. *Id.* Before the passage of the EU legislation, the United Kingdom already had its own purchase for destruction scheme in place for animals over thirty months. *Id.*

<sup>147</sup> *Id.* France and Ireland accounted for 60% and 28%, respectively. *Id.*

<sup>148</sup> Holly Hubbard Preston, *Cattle Crises Reverberate Through the World Economy*, INT'L HERALD TRIB., Aug. 18, 2001 at 13.

<sup>149</sup> U.S. Dep't of Agric., Foreign Agric. Serv., *Does the EU's BSE Crisis Present Opportunities for U.S. Exporters?*, WKLY. MKT. REP.: DAIRY, LIVESTOCK, & POULTRY, Dec. 1, 2001, available at [http://www.fas.usda.gov/dlp/highlights/00-12/wmr\\_1201.pdf](http://www.fas.usda.gov/dlp/highlights/00-12/wmr_1201.pdf) [hereinafter *Opportunities for U.S. Exporters*].

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Opportunities for U.S. Exporters*, *supra* note 149.

<sup>155</sup> Jonathan Eig, *Horse d'Oeuvres? Mister Ed Becomes the Other Red Meat*, WALL ST. J., Mar. 30, 2001, at A1.

for horse meat in Europe.”<sup>156</sup> At a recent horse auction in Indiana, the biggest horses sold for around \$900, “up more than [50%] from what they would have fetched [in September, 2000] and nearly as much as a full-grown cow might sell for.”<sup>157</sup> In 1996, the United States exported roughly 17,000 tons of horse meat to Europe, but the numbers fell to less than 10,000 tons in 2000.<sup>158</sup> Exports rose in January, 2001, however, and “meat companies [said] slaughter rates [were] climbing.”<sup>159</sup> Although demand has risen for horse meat, supply has remained nearly constant, so “U.S. exporters may not profit much from the upswing” in demand.<sup>160</sup> The price of horse meat in Europe rose about 20% in the first three months of 2001, and producers have expressed concerns that if the prices continue to increase, demand might stop.<sup>161</sup>

### C. *The Hormone-Treated Meat Dispute*

#### 1. The EU Hormone Ban

The Commission enacted its ban on production and importation of meat derived from animals treated with growth-promoting hormones in 1985, and the ban took effect on January 1, 1989.<sup>162</sup> The Commission’s justification for the ban was that it was necessary to protect the health and safety of European consumers from the illegal and unregulated use of hormones in livestock production in several countries.<sup>163</sup> Political and economic considerations reinforced consumer concerns about the use of hormones; these concerns may have played a role in the Commission’s prohibition of their use.<sup>164</sup> Under the EU’s Common Agricultural Policy (CAP), beef benefited from high domestic subsidies in the form of price supports and high tariffs to protect it from import competition.<sup>165</sup> By 1985, beef surpluses were so immense, the EU policy-makers were willing to support any measure that would limit beef imports that might compete with domestic production and

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Eig.*, *supra* note 155, at A1.

<sup>161</sup> *Id.*

<sup>162</sup> HANRAHAN, *supra* note 5.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

interfere with the operation of the CAP.<sup>166</sup> Even though the BSE epidemic bears no relation to hormone use, concern about mad cow disease in Europe has created a climate adverse to resolution of the meat hormone issue.<sup>167</sup>

## 2. World Trade Organization Agreement on Sanitary and Phytosanitary Measures

The WTO's SPS Agreement entered into force on January 1, 1995.<sup>168</sup> As defined in the SPS Agreement, an SPS measure is any parameter applied:

- 1) To protect animal or plant life or health within the territory of the member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms, or disease-causing organisms;
- 2) to protect human or animal life or health within the territory of the member from risks arising from additives, contaminants, toxins, or disease-causing organisms in foods, beverages, or foodstuffs;
- 3) to protect human life or health within the territory of the member from risks arising from diseases carried by animals, plants, or products thereof, or from the entry, establishment, or spread of pests; or
- 4) to prevent or limit other damage within the territory of the member from the entry, establishment, or spread of pests.<sup>169</sup>

Under the SPS Agreement, each country may set its own food safety and animal and plant health standards based on risk assessment and a determination of an acceptable level of risk.<sup>170</sup> A member's right to take measures necessary for the protection of human, animal, or plant life or health is qualified, however, by three limitations.<sup>171</sup> SPS measures "must be applied only to the extent necessary, must be based on scientific principles, and must not be maintained without sufficient scientific evidence."<sup>172</sup> While the SPS Agreement does recognize the right of individual countries to maintain standards that are

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<sup>166</sup> *Id.*

<sup>167</sup> AGRICULTURAL TRADE, *supra* note 14, at 2.

<sup>168</sup> Stewart et al., *supra* note 76, at 500.

<sup>169</sup> Kevin C. Kennedy, *Resolving International Sanitary and Phytosanitary Disputes in the WTO: Lessons and Future Directions*, 55 FOOD DRUG L.J. 81, 83-84 (2000).

<sup>170</sup> HANRAHAN, *supra* note 5.

<sup>171</sup> Kennedy, *supra* note 169, at 84.

<sup>172</sup> *Id.*

stricter than international standards, it requires nations to justify those stricter standards by science or a nondiscriminatory lower level of acceptable risk that does not target imports selectively.<sup>173</sup>

Regarding human and animal life or health, the SPS Agreement defines risk assessment as: “[t]he evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, toxins, or disease-causing organisms in food, beverages, or foodstuffs.”<sup>174</sup> Article 5 of the SPS Agreement specifies that a nation must have scientific evidence to justify levels of protection higher than the international standards or must show that it is “the appropriate level of . . . protection.”<sup>175</sup> As long as it demonstrates a scientific justification for a particular SPS standard, a member is free to choose its own level of protection once it determines that a bona fide health or safety risk exists.<sup>176</sup>

### 3. The EU’s Interpretation of the Precautionary Principle

The debate surrounding food safety and animal health issues, including the controversy surrounding the use of hormones in beef production, “raises the question of whether the SPS Agreement’s preference for scientific evidence goes far enough in dealing with possible risks for consumers and producers.”<sup>177</sup> The EU has sought to clarify some of the issues surrounding the application of the Precautionary Principle as it applies to the SPS Agreement.<sup>178</sup>

On February 2, 2000, the Commission submitted a document to the WTO articulating its interpretation of the Precautionary Principle.<sup>179</sup> In this communication, the Commission stated that a “decision to take measures without waiting until all the necessary scientific knowledge is available is clearly a precaution-based approach.”<sup>180</sup> Because “any assessment of risk that is made should be based on the existing body of scientific and statistical data,” and “[m]ost decisions are

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<sup>173</sup> HANRAHAN, *supra* note 5.

<sup>174</sup> Kennedy, *supra* note 169, at 86.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> SPS Committee Completes Draft on Risk “Consistency,” NOTICIAS, Mar. 15–16, 2000, available at [http://www.wto.org/spanish/news\\_s/news00\\_s/sps\\_s.htm](http://www.wto.org/spanish/news_s/news00_s/sps_s.htm) [hereinafter SPS Committee Completes Draft].

<sup>178</sup> *Id.*

<sup>179</sup> WTO Committee on Trade and Environment, *Communication from the European Commission on the Precautionary Principle*, WTO Doc. WT/CTE/W/147 (June 27, 2000), available at <http://docsonline.wto.org> [hereinafter PRECAUTIONARY PRINCIPLE].

<sup>180</sup> *Id.* ¶ 4.

taken where there is sufficient information available," the decision of whether to invoke the Precautionary Principle is one that is exercised where scientific data is insufficient, inconclusive, or uncertain.<sup>181</sup> Furthermore, the Precautionary Principle, under the Commission's interpretation, is applied "where there are indications that the possible effects on the environment, or human, animal or plant health may be potentially dangerous and inconsistent with the chosen level of protection."<sup>182</sup>

The Precautionary Principle was recognized in international law in the World Charter for Nature, adopted by the United Nations (U.N.) General Assembly in 1982.<sup>183</sup> At the 1992 U.N. Conference on Environment and Development in Rio de Janeiro, a declaration was adopted which stated, "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."<sup>184</sup> The Commission asserts that the Precautionary Principle "has been progressively consolidated in international environmental law and so it has since become a full-fledged and general principle of international law."<sup>185</sup> While the term is never used explicitly, according to the Commission, the Precautionary Principle is reflected in Article 5.7 of the SPS Agreement.<sup>186</sup> Article 5.7 states:

[I]n cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available scientific information, including that from the relevant international organizations as well as from sanitary and phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.<sup>187</sup>

The Commission notes that the WTO Appellate Body on Hormones has recognized "that there is no need to assume that Article 5.7 ex-

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<sup>181</sup> *Id.* ¶¶ 7, 8.

<sup>182</sup> *Id.* ¶ 8.

<sup>183</sup> *Id.* ¶ 24.

<sup>184</sup> PRECAUTIONARY PRINCIPLE, *supra* note 179, ¶ 25.

<sup>185</sup> *Id.* ¶ 26.

<sup>186</sup> *Id.* ¶ 29.

<sup>187</sup> *Id.*

hausts the relevance of a Precautionary Principle.”<sup>188</sup> The Commission further contends that the Precautionary Principle is reflected in the Members’ “right to establish their own level of sanitary protection, which level may be higher . . . than that implied in existing international standards, guidelines and recommendations.”<sup>189</sup> In accordance with this interpretation of the Precautionary Principle, the Commission adopted its 1989 ban on GMOs.<sup>190</sup>

#### 4. The Dispute

After the SPS Agreement took effect, the United States requested a panel on April 25, 1996 and instituted formal dispute settlement proceedings under the WTO’s Dispute Settlement Understanding (DSU) in May, 1996.<sup>191</sup> Thereafter, a panel was established on May 20, 1996.<sup>192</sup> The legal issue in the dispute was the scientific validity of the rationale for the EU’s hormone ban, specifically, whether the use of GMOs in cattle could harm humans who consume the beef produced therefrom.<sup>193</sup> If the EU’s objective for the ban was found to be no more than political concern about the unpopularity of GMOs among European consumers and farmers, the ban would violate the EU’s obligations under the SPS Agreement.<sup>194</sup>

In August, 1997, the WTO panel issued its report, finding that the hormone ban was not based on scientific evidence, risk assessment, or relevant international standards.<sup>195</sup> The panel found the Commission’s “ban on imports of meat and meat products from cattle treated with any of six specific hormones for growth promotion purposes” inconsistent with three articles of the SPS Agreement.<sup>196</sup> Looking to evidence presented during the dispute process, the panel found that beef growth hormones do not present any proven risk to human health.<sup>197</sup>

The EU submitted notice of its intention to appeal certain issues of law and some of the WTO panel’s legal interpretations on Septem-

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<sup>188</sup> *Id.* Annex II.

<sup>189</sup> PRECAUTIONARY PRINCIPLE, *supra* note 179, Annex II.

<sup>190</sup> See HANRAHAN, *supra* note 5.

<sup>191</sup> Stewart et al., *supra* note 76, at 496, 500.

<sup>192</sup> *Id.* at 496.

<sup>193</sup> *Id.* at 500.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> Stewart et al., *supra* note 76, at 496. The Commission’s ban on GMOs was found inconsistent with Articles 3.1, 5.1, and 5.5 of the SPS Agreement. *Id.*

<sup>197</sup> *Id.* at 500.

ber 24, 1997.<sup>198</sup> On appeal, the Commission defended its measures on the ground that they were based on the Precautionary Principle, which states that as long as there is some scientific basis for adopting a particular SPS measure, the measure complies with the SPS Agreement.<sup>199</sup> The Appellate Body agreed that the Precautionary Principle is reflected in Articles 5.7 and 3.3 of the SPS Agreement but declined to state whether the Principle was part of established international law.<sup>200</sup> Agreeing with the panel, the Appellate Body found that, whatever its status in international law, the Precautionary Principle did not override the risk assessment provisions of the SPS Agreement; thus, the panel's finding was affirmed on January 16, 1998.<sup>201</sup>

The Appellate Body found that the Commission's GMO measures:

[F]ailed to satisfy the SPS Agreement on two counts: 1) all available scientific evidence, as well as the experts consulted by the panel, stated that the hormones in question [were] safe when used in accordance with good practice; and 2) the [Commission] had failed to conduct a risk assessment that satisfied the provisions of the SPS Agreement.<sup>202</sup>

The Appellate Body report and the panel report, as modified, were adopted on February 13, 1998.<sup>203</sup>

Once the reports were approved, the EU requested four years to implement the recommendations of the Dispute Settlement Body (DSB) and to bring itself into compliance with the SPS Agreement.<sup>204</sup> The United States, however, objected that it could not agree to such a prolonged implementation period.<sup>205</sup> Hence, the matter was referred to a WTO arbitrator, who determined that the reasonable amount of time for implementation was fifteen months; this period would expire on May 13, 1999.<sup>206</sup> At a meeting on April 28, 1999, the EU informed the DSB that it might not be able to comply with the recommendations by the May 13th deadline and stated that it would consider offer-

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<sup>198</sup> *Id.* at 496.

<sup>199</sup> Kennedy, *supra* note 169, at 95.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*; Stewart et al., *supra* note 76, at 501.

<sup>202</sup> Kennedy, *supra* note 169, at 96.

<sup>203</sup> Stewart et al., *supra* note 76, at 496.

<sup>204</sup> *Id.* at 501.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

ing compensation to the United States as an alternative.<sup>207</sup> The United States subsequently requested authorization from the DSB to retaliate against the EU and its members "by suspending tariff concession on imports totaling \$202 million."<sup>208</sup> The DSB referred the issue back to the original arbitration panel, and the arbitrators issued a report on July 12, 1999, concluding the damages suffered by the United States as a result of the EU's failure to conform to SPS Agreement provisions would equal \$116.8 million.<sup>209</sup> Effective July 29, 1999, the United States imposed 100% *ad valorem* tariffs on selected import products from fourteen of the EU members.<sup>210</sup> "The level of trade affected by the action equaled \$116.8 million."<sup>211</sup> The increased tariffs remain in place as the EU has, in effect, chosen to "pay the penalty" for not conforming with the provisions of the SPS Agreement; the EU has sent the message that it would rather live with 100% tariffs on selected exports to the United States than to remove the ban on GMOs.<sup>212</sup>

## V. OUTLOOK FOR RESOLUTION

### A. EU-U.S. Veterinary Agreement

In July, 1999, the EU and the United States signed a veterinary agreement, which entered into force on August 1, 1999.<sup>213</sup> The "agreement [was] the result of long and difficult negotiations."<sup>214</sup> In 1997, the EU and the United States failed to meet an April 1st deadline for a Veterinary Equivalency Agreement (VEA) on poultry and meat inspection standards.<sup>215</sup> Failure to reach such an agreement meant that the EU and the United States continued to set their own measures, "disrupt[ing] transatlantic trade in animal products and potentially contaminat[ing] other facets of the EU-US relation-

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<sup>207</sup> *Id.*

<sup>208</sup> Stewart et al., *supra* note 76, at 501.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 502.

<sup>212</sup> *Id.*

<sup>213</sup> See Press Release, Delegation of the European Commission to the United States, European Union and the United States Sign Veterinary Agreement (Jul. 20, 1999), available at <http://www.eurunion.org/news/press/1999/1999048.htm> [hereinafter Veterinary Agreement].

<sup>214</sup> *Id.*

<sup>215</sup> EU, U.S. Engage in Game of Trade "Chicken," EURECOM (Apr., 1997), at <http://www.eurunion.org/news/eurecom/1997/ecom0497.htm> [hereinafter *Chicken*].



ship."<sup>216</sup> In light of the mad cow epidemic, the EU asserted that the 1997 discussions were about public health, and while VEA measures would have trade implications, the effect on trade was not the main concern.<sup>217</sup>

After the 1999 Veterinary Agreement was signed, the Delegation of the European Commission to the United States announced:

The objective of the agreement is to facilitate trade in live animals and animal products between the EU and the US by establishing a mechanism for the recognition of equivalence of sanitary measures operating in the two regions. The recognition by an importing country of the sanitary measures applied by an exporting country can permit greater efficiency in the utilization of inspection and verification resources.<sup>218</sup>

The 1999 Veterinary Agreement included U.S. acceptance of the EU's regionalization principle, indicating "that an outbreak of an animal disease in a defined and restricted region need not result . . . in a ban on trade."<sup>219</sup> Furthermore, the 1999 Agreement lists commodities for which equivalence is recognized and implements a program to work towards recognition for those commodities where equivalence is not recognized.<sup>220</sup> Approximately \$3 billion in EU-U.S. trade (\$1.5 billion in each direction) was affected by the 1999 Veterinary Agreement.<sup>221</sup> Notably, nothing changed EU legislation, and the 1999 Veterinary Agreement took into account the rights and obligations of the EU and the United States under the SPS Agreement.<sup>222</sup>

### B. WTO Guidelines on Consistency

In March, 2000, the WTO's SPS Committee announced that it had completed a final draft for guidelines on "consistency."<sup>223</sup> Article 5.5 of the SPS Agreement requires WTO members to be consistent in how they deal with risk.<sup>224</sup> Primarily, Article 5.5 seeks to codify the

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<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> Veterinary Agreement, *supra* note 213.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *See id.*

<sup>222</sup> *Id.*

<sup>223</sup> SPS Committee Completes Draft, *supra* note 177.

<sup>224</sup> *Id.*

concept of what "level of protection" the SPS Agreement provides.<sup>225</sup> The levels adopted by individual countries are not easy to specify, measure, and compare, as illustrated by the Hormone-Treated Meat Dispute.<sup>226</sup>

At its meeting on June 21 and 22, 2000, the SPS Committee adopted Guidelines to Further the Practical Implementation of Article 5.5 (Guidelines).<sup>227</sup> Article 5.5 states:

With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. Members shall cooperate in the Committee . . . to develop guidelines to further the practical implementation of this provision.<sup>228</sup>

The SPS Committee specified that the Guidelines address two elements within Article 5.5: "(1) the objective of achieving consistency in the application of the concept of the appropriate level of protection and (2) the obligation to avoid arbitrary or unjustifiable distinctions in the levels considered appropriate" when those distinctions hinder international trade.<sup>229</sup> The Guidelines on consistency are not legally binding but "are intended as tools to help officials" implement the SPS Agreement "when they make decisions on levels of health protection, and adopt and implement measures on food safety, or animal . . . health."<sup>230</sup> Moreover, the Guidelines suggest means for officials to employ in dealing with difficulties in implementing consistent measures.<sup>231</sup>

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<sup>225</sup> *Id.*

<sup>226</sup> *See id.*; see generally HANRAHAN, *supra* note 5.

<sup>227</sup> WTO Committee on Sanitary and Phytosanitary Measures, *Guidelines to Further the Practical Implementation of Article 5.5*, WTO Doc. G/SPS/15 (July 18, 2000), available at <http://docsonline.wto.org> [hereinafter Guidelines].

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *SPS Committee Completes Draft*, *supra* note 177.

<sup>231</sup> *Id.*

## B. European Food Authority

In consideration of the BSE scandal and the controversy over meat hormones, the Commission proposed in January, 2000 to overhaul the EU's food safety system.<sup>232</sup> In its White Paper on Food Safety, the Commission proposed a number of "ambitious reforms."<sup>233</sup> The White Paper encompasses "all aspects of food products from "farm to table," and identifies as necessary over eighty separate actions to improve food safety standards."<sup>234</sup>

Included among the Commission's propositions was the creation of a European Food Authority (EFA), which would be "entrusted with a number of key tasks embracing independent scientific advice on all aspects relating to food safety."<sup>235</sup> The EFA's tasks would include the "operation of rapid alert systems, communication and dialogue with consumers on food safety and health issues as well as networking with national agencies and scientific bodies."<sup>236</sup> In designing the proposed European Food Authority, the Commission did not create an independent regulatory body akin to the U.S. Food and Drug Administration, which is authorized to promulgate regulations based on its own scientific findings.<sup>237</sup> That duty, referred to as "risk management" in the White Paper, would be retained by the EU political bodies: the Commission, the EC, and the European Parliament.<sup>238</sup> Under this format, "even a reformed EU food safety policy would continue to be governed by laws distinct from those of the [U.S.], posing barriers to transatlantic trade and triggering conflicts before international bodies such as the [WTO]."<sup>239</sup>

In November, 2000, the Commission put forward a proposal for regulation outlining the general principles of food law and establishing EFA.<sup>240</sup> EU Heads of State determined that efforts should be made to adopt this regulation as quickly as possible so that the EFA could

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<sup>232</sup> See Jeffrey R. Bernstein, *What's So Scary About Trade, the WTO, and Globalization?*, LA FOLLETTE POL'Y REP., Fall, 2001, at 1, 12.

<sup>233</sup> *Id.*

<sup>234</sup> White Paper on Food Safety, WTO Doc. G/SPS/GEN/169 (Mar. 14, 2000), available at <http://docsonline.wto.org>.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> Bernstein, *supra* note 232, at 12.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> For the background of this proposal, see *Towards a European Food Authority*, at [http://www.europa.eu.int/comm/food/fs/efa/index\\_en.html](http://www.europa.eu.int/comm/food/fs/efa/index_en.html) (last visited Dec. 28, 2001) [hereinafter European Food Authority].

begin operating in 2002.<sup>241</sup> Under the proposed regulation, the EFA would have six main functions: (1) independent scientific opinions; (2) advice on technical food issues to underpin policy and regulations; (3) collection and analysis of data to monitor food safety in the EU; (4) identification of emerging risks; (5) day-to-day operation of the rapid alert system covering both food and feed; and (6) a clear communication role to inform the public on all matters under its supervision.<sup>242</sup>

### C. Labeling and GMOs

U.S. federal law requires most imports, including many food items, to bear labels informing the ultimate purchaser of their country of origin.<sup>243</sup> The Federal Meat Inspection Act also requires imports of beef and other meats to be labeled clearly as to their country of origin.<sup>244</sup> Thus, while the U.S. supports labels based on products' origins, it has held firm to the position that genetically modified products are no different from non-genetically modified goods and, therefore, do not require distinct labels.<sup>245</sup> The United States opposes mandatory labeling of products containing GMOs on the basis that available scientific evidence shows that genetically modified products are safe for human and animal consumption.<sup>246</sup>

The EU contends that labels should be mandatory on all foods containing GMOs.<sup>247</sup> According to the Commission's White Paper on Food Safety, labeling rules are necessary to ensure that consumers are provided with sufficient information to make informed decisions.<sup>248</sup> The Commission specifies that labels must include information on product characteristics, composition, storage, and use of the product.<sup>249</sup> In addition, "[o]perators should be free to provide more information on the label, provided this information is correct and not misleading."<sup>250</sup> To achieve its goal, the Commission stated that it will

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<sup>241</sup> *Id.*

<sup>242</sup> For a description of the EFA's functions under the proposal, see Press Release, Food Law from Farm to Table—Creating a European Food Authority (Nov. 8, 2000), at [http://www.europa.eu.int/comm/dgs/health\\_consumer/library/press/press82\\_en.html](http://www.europa.eu.int/comm/dgs/health_consumer/library/press/press82_en.html).

<sup>243</sup> Stewart et al., *supra* note 76, at 502.

<sup>244</sup> *Id.*

<sup>245</sup> AGRICULTURAL TRADE, *supra* note 14, at 5.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> White Paper on Food Safety, *supra* note 234, ¶ 99.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

pursue multilateral guidelines on labeling, given the fact that labeling has become a trade policy issue in regard to the SPS Agreement.<sup>251</sup>

On July 25, 2001, the Commission unveiled two new regulations calling for an EU-wide system to trace and label GMOs.<sup>252</sup> According to the Commission, the new proposals ensure traceability by requiring business operators to transmit and retain information and to identify to whom and from where GMOs are made available.<sup>253</sup> The legislation package also mandates labeling of all foods produced from GMOs and all genetically modified feed.<sup>254</sup> Under the proposals, EFA would perform scientific risk assessment of GMOs, and its opinion would be made available to the public, who would then have the opportunity comment.<sup>255</sup> Addressing the EU's proposed legislation on GMO labeling, David Byrne stated that, "[t]here is an irrational fear of [GMOs] in the EU. On the other hand, there are irrational fears [in the U.S.] about how [Europeans] are proposing to address the issue."<sup>256</sup> Mr. Byrne further articulated that the new regulations, which must be approved by the Member States and thus are unlikely to enter into effect before 2003, were designed to provide reassurance to consumers.<sup>257</sup>

#### CONCLUSION

The mad cow crisis, which began as a veterinary nightmare, has evolved into a trade epidemic, threatening relations between the EU and the United States. Without a common vision and understanding between the two leaders of the global economy, the crisis could deteriorate the relationship further. Chaos marked the onset of the BSE crisis, as exemplified by the UK's failure to implement immediate preventative measures and seek outside counsel. The EU's lack of a cohesive plan of attack exacerbated what was already a grave situation. This state of affairs set the stage for world-wide panic and rendered inevitable preventative trade restrictions, such as those put into place

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<sup>251</sup> *Id.*

<sup>252</sup> Press Release, Commission Improves Rules on Labeling and Tracing of GMOs in Europe to Enable Freedom of Choice and Ensure Environmental Safety (July 25, 2001), at [http://www.europa.eu.int/comm/food/fs/biotech/biotech\\_index\\_en.html](http://www.europa.eu.int/comm/food/fs/biotech/biotech_index_en.html) [hereinafter Commission Improves Rules].

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> The proposed legislation is described by David Byrne, A European Approach to Food Safety and GMOs, Speech at the National Press Club (Oct. 9, 2001), at [http://www.europa.eu.int/comm/food/fs/biotech/biotech\\_index\\_en.html](http://www.europa.eu.int/comm/food/fs/biotech/biotech_index_en.html).

<sup>257</sup> *Id.*; Commission Improves Rules, *supra* note 252.

by the United States in an effort to protect its own cattle industry, as well as its citizens' health. The GMO controversy exemplifies the apprehension in the EU stemming from the mad cow crisis. Now that the EU appears to have developed a comprehensive plan and has passed legislation rationally addressing the disaster, the disagreement over GMOs may be on its way to resolution. The Veterinary Agreement between the United States and the EU is another indication that a mutual understanding between the two governments could be just around the corner. Guidelines from the WTO on the application of preventative measures also may prove to lend a hand in reaching a trade agreement. Although the EU and the United States soon may resolve their trade disagreement resulting from the BSE epidemic, the true battle against the disease will not terminate until scientists and health officials develop adequate methods of attacking both BSE and nvCJD. The EU and the United States clearly would benefit from a common vision on preventative measures in relation to BSE. By putting their trade disagreements behind them, both nations might improve their focus on the problem itself.