



## An Agricultural Law Research Article

# **United States/European Union Trade Relations: The Need for a Solution To The Bovine Trade Disputes**

by

Victoria H. Zerjav

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# UNITED STATES/EUROPEAN UNION TRADE RELATIONS: THE NEED FOR A SOLUTION TO THE BOVINE TRADE DISPUTES

## I. INTRODUCTION

Maintaining stable social and political relations among trading countries presents the global community with an ever increasing challenge. In response to this challenge, nations, both individually and through alliances, have established a system of laws to govern trade disputes.<sup>1</sup> Currently, scholarship on "international economic law" reflects the attitude of business and government toward trade issues.<sup>2</sup> The standards and expectations of alliances, governments and businesses form the basis of the law and, along with arbitration, are useful in dispute resolution without resorting to the Dispute Settlement Body of the World Trade Organization ("WTO"),<sup>3</sup> under the General Agreement on Tariffs and Trade ("GATT"), for assistance.<sup>4</sup> Beyond the economic aspects, social, political and technological factors play influential roles in disputes and dispute settlements. The purpose of this Note is to demonstrate, using bovine trade issues, how all of these factors impact trade disputes and resolutions.

This Note examines the use of the WTO to resolve disputes between the United States and European Union. Part II addresses trade in the United States ("U.S.") and European Union ("EU") in the context of the governments' relations. Part III of this Note is devoted to the history of bovine somatotropin encephalopathy ("BSE"), commonly known as "mad cow disease." Part IV focuses on an example of the EU bovine legislation's impact on the U.S.

This Note discusses the reasons for the trade disputes, including the U.S.'s and EU's positions. Possible explanations for the European Union

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1. This system of laws includes the General Agreement on Tariffs and Trade, Oct. 30, 1947, 51 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter "GATT"].

2. See Joel P. Trachtman, *Introduction: The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33 (1996); see also Kenneth W. Abbott, "International Economic Law": *Implications for Scholarship*, 17 U. PA. J. INT'L ECON. L. 505, 505 (1996).

3. The Uruguay Round of GATT established the World Trade Organization (WTO). See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS RESULTS OF THE URUGUAY ROUND VOL. 1 (1994), 33 I.L.M. 1143, 1144 (1994).

4. See, e.g., *Nafta Arbitral Panel: Final Report of the Panel in the Matter of Tariffs Applied by Canada to Certain U.S. Origin Agricultural Products*, *Arbitral Panel Report*, available in 1997 BDIEL AD LEXIS 24.

legislation, including protectionism, cultural expectations, health and safety concerns and socio-economic power issues are addressed.

Finally, a model for future trade relations, a Trans-Atlantic Agreement, is proposed. This Note does not purport to solve the trade dispute problem. Rather, the purpose herein is to outline the many factors requiring consideration for any solution to the U.S. and EU trade disputes.

## II. THE ROLE OF TRADE IN THE U.S./EU RELATIONSHIP

While other economies have been affected recently by the diminishing values of their markets,<sup>5</sup> the U.S. and the EU remain strong economic powers. U.S. exports compose a large percentage of the EU imports,<sup>6</sup> and the EU supplies nearly one third of all imports into the U.S.<sup>7</sup> Clearly, the relationship between the countries remains very important both for the U.S. economy and for the continued growth and success of the EU.<sup>8</sup> Still disputes often arise between friendly governments, however, under the veil of self-preservation.<sup>9</sup> Yet, the preservation of open trade between the U.S. and EU is as important today as ever, especially because the fragile economic framework of the U.S. and EU depends upon the improvement of the relationship.<sup>10</sup>

Trade disputes between the EU and the U.S. have arisen during the last ten years over products such as bananas<sup>11</sup> and beef.<sup>12</sup> When settled, these

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5. Japan and Russia have seen substantial economic changes in their markets during 1998. See *Heading for a Meltdown?*, ECONOMIST, Sept. 5, 1998, at 13 (addressing the problems in the Russian and Asian economies and examining the effects on the United States markets); *Russia Takes the Plunge*, ECONOMIST, Sept. 5, 1998, at 14 (exploring the attempt to "cajole" Russians into a security program in the wake of their economic despair after the collapse of the Russian economic market); *Asia's Coming Explosion*, ECONOMIST, Feb. 21, 1998, at 15 (examining the political breakdown in Asia following the economic crisis).

6. See *Trade Relations with Europe and the New Trans-Atlantic Economic Partnership: Hearings Before the Subcomm. On Trade of the House Comm. on ways and means, 105<sup>th</sup> Cong.* (1998) (statement of Honorable Charlene Barshefsky, U.S. Trade Representative) at 1. [hereinafter "Trade Hearings"] "America's trade and investment relationship with the European Union is the largest in the world." *Id.*

7. See *Trade Hearings*, *supra* note 6, at 2. Representative Barshefsky stated that the United States and European Union's investment in each other's countries in 1997 exceeded \$750 billion, "almost perfectly balanced." *Id.*

8. See *Trade Hearings*, *supra* note 6.

9. See *Trade Hearings*, *supra* note 6.

10. See World Trade Organization, EC Measures Concerning Meat and Meat Products (Hormones): Report of the Appellate Body (Jan. 16, 1999) [http://www.wto.org/english/tratop\\_e/dispu\\_e/distab\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm) [hereinafter *WTO Appellate Decision*]; Through the Trans-Atlantic Economic Partnership, the United States and European Union will be able to "address" some of their trade problems.

11. See *World Trade Organization: Report of the Appellate Body on the European Communities Regime for the Importation, Sale, and Distribution of Bananas*, 37 INT'L LEGAL MATERIALS 243

disputes have usually been resolved by negotiation between the two countries or by an arbitration panel. More recently, disputes have been submitted to the WTO for a determination of compliance with GATT.<sup>13</sup> When the WTO determines that the measures, sanctions, or legislation of a particular country violate GATT, that country is expected to follow the guidelines of the treaty or the mandate of the WTO.<sup>14</sup> In the EU specifically, trade has been difficult as the international community has sought to overcome "internal obstacles" to accessing the European market.<sup>15</sup> One example of an internal obstacle to the European Market is the European reaction to technological developments, especially in the area of food products.<sup>16</sup> The EU has been

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(1998). The European Union was found to be in violation of the GATT in attempting to enforce hurricane licenses for the importation of bananas. The term "banana wars" is used to refer to the European Union's continued defiance of the WTO decision on the banana trade dispute. The United States recently retaliated against the European Union's actions by imposing double tariffs on certain products such as cheeses from France and olive oil from Italy, in accordance with the rights granted by the WTO for failure of a member state to comply with its dispute settlement body decisions. This authorized retaliation may have significant impact on the targeted industries. (CITE: Newsweek, etc.)

The E.U.'s citizens also opposed the introduction of genetically engineered corn and have attempted to keep the product out of their market. See 105 CONG. REC. S1481 (daily ed. Feb. 24, 1997) (statement on introduced bills and joint resolution).

12. See World Trade Organization, *EC Measures Concerning Meat and Meat Products (Hormones); Complaint by the United States; Report of the Panel* (Aug. 18, 1997) [http://www.wto.org/english/tratop\\_dispu\\_e/distab\\_e.htm](http://www.wto.org/english/tratop_dispu_e/distab_e.htm) [hereinafter "*WTO Decision*"]. The bovine disputes include the BST Controversy relating to products from hormone-injected cows and, recently, pharmaceutical and cosmetic products containing certain bovine products due to an alleged BSE threat.

13. See *id.* The tariff dispute in this case is an example of the type of dispute the World Trade Organization was established to settle.

14. The findings of the WTO are only as enforceable as the international community permits. The GATT is a binding treaty with which the European Union is expected to comply, yet there are no evident sanctions for failure to comply with the mandates of the WTO. In the present dispute, the decision of the Dispute Settlement Body (DSB) and the Appellate Report were interpreted by an arbitrator, giving the European Union an additional fifteen months from the date of the Arbitrator's report to comply with the decisions. The countries did not see the effect of the decision until July of 1999. See World Trade Organization, *EC Measures Concerning Meat and Meat Products (Hormones): Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes* (May 29, 1998), at 21. <[http://www.wto.org/ddf/cgi-bin/dispdoc.pl?url=/ddf/cgi-bin/vdtkw\\_cgi@8001/](http://www.wto.org/ddf/cgi-bin/dispdoc.pl?url=/ddf/cgi-bin/vdtkw_cgi@8001/)>[hereinafter "*WTO Arbitration Report*"]; see also Stephen J. Rothberg, *From Beer to BST: Circumventing the GATT Standards Code's Prohibition on Unnecessary Obstacles to Trade*, 75 MINN. L. REV. 505, 515 (1990).

15. See World Trade Organization, *WTO Implementation and Single Market Completion Lead to Greater Liberalization in the European Union* (Nov. 12, 1997) <[http://www.wto.org/ddf/cgi-bin/dispdoc.pl?url=/ddf/cgi-bin/vdtkw\\_cgi@8001/xab30c5ae-93...](http://www.wto.org/ddf/cgi-bin/dispdoc.pl?url=/ddf/cgi-bin/vdtkw_cgi@8001/xab30c5ae-93.../)>.

16. The European Union has a tradition of objecting to technological developments reflected in food products. See discussion of "*Banana Wars*", *supra* note 11; see also, Kirsten S. Beaudoin, *On Tonight's Menu: Toasted Cornbread with Firefly Genes? Adapting Food Labeling Law to Consumer Protection Needs in the Biotech Century*, 83 MARQ. L. REV. 237, 242 (1999) (reviewing the Food and Drug Administration's challenges in the United States for labeling food products, addressing the risks of genetically modified foods in areas from economics to health and safety standards, and confirming the apathy of the FDA in dealing with populace concerns with potentially harmful effects of

developing trade policies and regulations to make trade more accessible.<sup>17</sup> The EU must take further steps, however, to alleviate the tension surrounding trade, including liberalizing their trade legislation.<sup>12</sup>

### A. *International Economic Law*

International law has evolved to address economic issues relating to trade and tariff restrictions.<sup>18</sup> The GATT, a complex multilateral agreement signed in 1947,<sup>19</sup> is illustrative of twentieth century attempts to establish and enforce a system of rules to help in dispute settlement, with the ultimate purpose of avoiding an international armed conflict.<sup>20</sup>

Today, the area of international law that deals with business transactions is called "international economic law."<sup>21</sup> This term encompasses economic, business, and trade issues in the legal community.<sup>22</sup> The rules and institutions that affect international economic activity include the WTO, NAFTA,<sup>23</sup> and other institutions.<sup>24</sup> Scholars of international economic law suggest this area of the law is very broad and includes many disciplines, affecting law in its development, application and enforcement.<sup>25</sup> The example of beef trade between the United States and European Union is representative of their commercial relations and illustrates the breadth of complexity of this emerging system of law.

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genetically modified foods.

17. See *Beaudoin*, *supra* note 16.

18. The traditional role of international law has been to address laws of war and peace and other areas of public law. International economic law impacts the private sector, affecting industries as well as governments and economies.

19. See *supra* note 1.

20. For an examination of the treaty state of the international community after the second World War, see George K. Walker *Anticipatory Collective Self Defense in the Charter Era: What the Treaties have Said*, 31 CORNELL INT'L L. J. 321.

21. See Trachtman, *supra*, note 2 (evaluating the definitions of private and public international law and their application to business goals, and proposing future goals for the area of international economic law).

22. See *id.*

23. North American Free Trade Agreement.

24. See Abbott, *supra* note 2. There are three identified developments in the "economic" aspect of international economic law. The first is the increased demand for consistency in national regulatory programs for trade and investment ("level playing field"). *Id.* at 508. The second area of development is the convergence of environmental and economic concepts in policy making (sustainable development). See *id.* at 509. The third area is the "linking of economic and social policy." *Id.* The final area is already an integral part of the European Union. See *id.*

25. See Abbott, *supra* note 2.

## B. Bovine Somatotropin Trade Dispute

One bovine trade dispute between the U.S. and the EU has been over U.S. bovine products (milk and beef) containing the genetically engineered hormone bovine somatotropin (BST).<sup>26</sup> Since 1987, the U.S. has been fighting to reopen the doors of the EU to U.S. beef.<sup>27</sup> In 1988, the European Council enacted a directive<sup>28</sup> that banned certain bovine food products, including those containing BST.<sup>29</sup> This directive has been modified several

26. For the purposes of this Note, rBST (recombinant bovine somatotropin) and BST (bovine somatotropin) are the same thing, but to preserve the language of certain texts, the rBST reference may be used in footnotes, while BST is used in the text. Not only does this dispute over U.S. bovine products with BST concern the beef that entered the European Market, but the dispute also concerns the use of hormones in dairy products. See Terence P. Stewart, *The SPS Agreement of the World Trade Organization and the International Trade of Dairy Products*, 54 Food & Drug L.J. 55 (1999).

27. See *WTO Decision*, *supra* note 12, at 13. "In March 1987, the United States raised the issue of the EC ban under the Tokyo Round Agreement on Technical Barriers to Trade ("TBT Agreement")." *Id.* The United States advanced "retaliatory" measures on imports from European Union member states in 1989. These measures were not lifted until 1996 when a panel was established to examine the "rights and obligations of Parties deriving from Article 14.25 [of the TBT Agreement]." *Id.* (citing to GATT document TBT/M/Spec/7, p.9, para. 34).

28. The European Council of Ministers enacts directives only in urgent matters. See Emil Noel, *Working Together. The Institutions of the European Community Office for the Publications of the European Community*, in *THE CONSTITUTIONAL LAW OF THE EUROPEAN UNION* 23 (J.D. Dinnage & J.F. Murphy, eds., 1996). The European Union's legislation is developed by three bodies given power under Article 189 of the EC Treaty. See *id.* The European Commission is responsible for initiating action by proposing legislation. See *id.* at 28. The European Council of Ministers, composed of government heads, then reviews the proposals and chooses to pass the legislation by a majority, turn down the proposal, or amend the proposal by unanimous consent. See *id.* The European Parliament, composed of elected figures from each member state, then reviews the legislation and can submit its evaluations to the Council. See *id.* at 27. The Parliamentary function is not binding, though it remains politically influential. See *id.* at 28.

There are three different types of legislation in addition to the three different bodies that participate in legislative development. See Article 189, Maastricht Treaty, Feb. 7, 1992, which states:

In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make reservations or deliver opinions. (1) A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. (2) A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. (3) A decision shall be binding in its entirety upon those to whom it is addressed. Recommendations and opinions shall have no binding force."

For an official interpretation of Article 189, in part, see *Confederation Nationale des Producteurs de Fruits a Legumes v. Council*, (1962) ECR 471, (1963) CMLR 160, in *THE CONSTITUTIONAL LAW OF THE EUROPEAN UNION*, 115 (J.D. Dinnage & J.F. Murphy, eds., 1996) (A regulation is of general scope and is directly applicable in all member states, whereas a decision is obligatory only for designated persons.); *Van Duyn v. Home Office*, (1974) ECR 1337, (1975) 1 CMLR 1, in *CONSTITUTIONAL LAW OF THE EUROPEAN UNION* 19 (J.D. Dinnage & J.F. Murphy, eds., 1996) (Directives may reflect a comprehensive policy in a specific area of law and cannot be invoked before the time limit for state implementation has expired.)

29. EC Council Directive 88/146/EEC, cited in *WTO Decision*, *supra* note 12, at 11. Adopted by

times,<sup>30</sup> but states that no food products with genetically engineered hormone stimulants will be allowed into the EU. The European Community stated that the health and safety of its citizens was the purpose for the regulation.<sup>31</sup> The result, however, is that the enforcement of the directive banned a majority of U.S. beef products.<sup>32</sup> Despite the ban, the use of BST in the U.S. has increased since 1989.<sup>33</sup>

BST is a naturally occurring hormone that stimulates the production of milk in cows.<sup>34</sup> Early in the 1980's, researchers<sup>35</sup> found that, if injected with the genetically engineered synthetic growth hormone cows could begin producing milk younger and could produce more milk in a shorter period of time.<sup>36</sup> Introduction of BST into the U.S. market spurred a great deal of controversy.<sup>37</sup> Initially, BST was tested in various markets prior to FDA approval and complete investigation.<sup>38</sup> The conflict within the U.S. continued

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the EC Council on March 16, 1988, this directive combined previously annulled Directive 85/649/EEC, which banned the use of substances, with a 1984 proposal to control three natural growth hormones. *See id.*

30. *See id.*

31. *See WTO Decision, supra* note 12 (providing an examination of the European Communities' argument before the WTO); Edmund L. Andrews, *In Victory for U.S., Europe Ban on Treated Beef is Ruled Illegal*, NY TIMES, May 9, 1997 at A1 (purpose of the restriction in the European Union was to relieve the concern of European consumers over chemicals in food).

32. *See WTO Decision, supra* note 12, at 18. In 1988, the European Council measure reduced the annual export of beef and veal to the European Union by \$100 million. After 1989, when the measure took effect, the exports were reduced to virtually nothing. *See id.*

33. BST use in the United States increased after the FDA approved its use in 1994, and has become more widespread due to its cost effectiveness. *See* David Aboulafia, *Pushing RBST: How the Law and the Political Process Were Used to Sell Recombinant Bovine Somatotropin to America*, 15 PACE ENVTL. L. REV. 603 (1998). However, the use of BST in the larger milk producing dairies has caused smaller dairies to go under and has made it more difficult for others to continue to thrive. *See infra* note 38. As smaller Vermont dairies have closed, the use of BST has become a method of survival in the dairy industry.

34. *See* Kristine Cerro, *High Tech Cows: The BST Controversy*, 6 SAN JOUQUIN AGRI. L. REV. 163 (1996).

35. Monsanto Company is the only company with patent on BST in the United States. *See International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996); *Upjohn Co. v. Monsanto Co.*, 1992 U.S. Dist. LEXIS 14917, at 1 (1992) (The Monsanto Company applied for a patent in 1987 for its product called Posilac; the "713 patent" was issued to Monsanto on May 1, 1991, and was described as "a method of delivering prolonged release formulations of bovine somatotropin into the circulatory system of an animal.").

36. *See Stauber v. Shalala*, 895 F. Supp. 1178 (1995); *Upjohn Co.*, 1992 U.S. Dist. LEXIS 14917; *See also* Cerro, *supra* note 34.

37. *See Aboulafia, supra* note 33, at 607. Aboulafia describes in detail the U. S. reaction to the introduction of BST into the consumer food market. *See id.* at 621-26.

38. *See id.* at 606; Emily Marden *Recombinant Bovine Growth Hormone and the Courts: In Search of Justice*, 46 DRAKE L. REV. 617, 619 (1998). The introduction of BST affected the milk industry, driving many smaller milk producers out of business, as they became unable to compete with these new, larger, more efficient producers. *See Int'l Dairy Foods Ass'n* 92 F.3d 67, 78 (Leval, J., dissenting).

as at least one state attempted to subtly override the federal approval of BST in the dairy industry.<sup>39</sup> Concern among U.S. consumers grew after FDA approval, when consumers questioned the validity of the measures and decision of the FDA.<sup>40</sup> Both consumers and small dairy farmers resented the swift approval of BST, which they believed to be premature.<sup>41</sup>

As conflict grew among the states, the EU decided, without explanation, to reject the importation of hormone treated beef into its market.<sup>42</sup> This action was analogous to the FDA's usual policy prior to approval of a drug.<sup>43</sup> However, the European Commission had no intention of ever approving BST food products, maintaining instead that health and safety concerns justified the ban.<sup>44</sup> The concern was that the treated animals would be more likely to

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39. See, e.g. *Int'l Dairy Foods Ass'n* 92 F.3d 67. In this case, the plaintiffs challenged on First Amendment grounds a Vermont statute requiring labeling of dairy products to indicate whether or not the cows had been injected with rBST. The Second Circuit found that the plaintiffs met their burden of demonstrating irreparable harm and had a chance of winning on the merits of the case. See *id.* at 74. The court further noted that Vermont could not reasonably have claimed an interest in protecting public health because the extensive studies and conclusions of the FDA showed that no public health threat existed. See *id.* at 73. The court held that "consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate factual statement," and suggested further that the Vermont statute was probably unconstitutional because no evidence of real harm existed. *Id.* at 74. The court remanded the case to the district court for entry of a proper injunction. See *id.*

40. See *Stauber v. Shalala*, 895 F. Supp. 1178 (W.D. Wis. 1995). In *Stauber*, the plaintiffs, American consumers of dairy products, challenged the FDA approval of Monsanto's patent application for a drug called Posilac, a synthetic bovine growth hormone drug. The plaintiffs claimed that the approval was arbitrary and capricious because the FDA failed to properly assess the health and safety risks of the drug, failed to place a mandatory labeling requirement upon manufacturers, and failed to adequately assess the environmental effects of Posilac's approval. See *id.* at 1182. The court found that the FDA approved Posilac on November 5, 1993 despite public criticism and despite concerns of possible "negative health effects on human consumers." *Id.* at 1183. The court noted, however, that a Congressional task force found the FDA position adequately supported. The court accepted the task force's finding and concluded that the amount rBST ingested by humans "poses no significant risk to human safety" due to the pasteurizing of milk and cooking of meat that would kill 90% of the rBST, and that the hormone is "orally inactive." *Id.* at 1184. The court held that the FDA's approval did not lack an adequate basis in the records, and granted the defendant's motion for summary judgment. See *id.* at 1196-97.

Some consumers, as well as scientists and environmentalists, were infuriated by the lack of FDA protection. See *Marden*, *supra* note 38, at 623. Such critics claim that FDA review of the bovine growth hormone was flawed and that particular health concerns were not addressed. See *id.*

41. See *Stauber*, 895 F. Supp. 1178, 1192.

42. See David A. Wirth, *European Communities Restrictions on Imports of Beef treated with Hormones—Nontariff Trade Barriers—Control of Food Additives—Scientific Basis for Restrictions—WTO Dispute Settlement Mechanisms—Scope of Review*, 92 AM. J. INT'L L. 755, 755 (1998).

43. See *WTO Decision*, *supra* note 12. The European Union Regulation 88/146/EEC, published in 1988, bans all BST products. The FDA, prior to approval of products, will normally not allow the product to enter the stream of commerce.

44. See *Trade Hearing*, *supra* note 6. Hearing testimony describes United States retaliatory measures against the European Union from 1989 until 1996. The European Council continually refused to revoke the ban on United States bovine growth hormone products, and even implemented additional legislation. See also note 27 (modifications to the initial bovine growth hormone



develop cystitis, which would then have to be treated with antibiotics that would end up in the beef and milk.<sup>45</sup> Also, the EU defended its directive by claiming that the U.S. bovine industry was not banned from the EU entirely, because the Texas Beef industry sells non-BST beef to the EU.<sup>46</sup>

### C. The WTO Report

After FDA approval of BST, the U.S. tried to recapture the lost EU market by turning to the WTO for support.<sup>47</sup> The U.S. claimed the European Council's actions violated the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)<sup>48</sup> of the General Agreement on Tariffs and Trade (GATT).<sup>49</sup> The U.S. further argued that the EU's use of sanitation as the rationale support for the European Council's measures affected international trade and discriminated against imports.<sup>50</sup> The WTO formally responded to the U.S. complaint in August of 1997.<sup>51</sup> In its initial report, the WTO Dispute Settlement Body ("DSB")<sup>52</sup> clarified the reason for

legislation).

45. Antibiotics are normally used to treat the cystitis. Large number of cows injected with BST need antibiotics, which build up in the muscle tissue of the animal and are discharged in its milk. Muscle composes the majority of consumable beef. The United States maintained that antibiotics were only found in the beef and milk in "trace" amounts that would not injure the consumer. This health concern is the same which inspires U.S. consumers to purchase organic milk.

46. Texas beef packers refused to use bovine growth hormone and were able to maintain beef trade with the EU. The continuing relationship was exploited by the EU to demonstrate that the entire United States trade market had not been targeted.

47. The *WTO Decision*, *supra* note 12, *WTO Appellate Decision*, *supra* note 11, and *WTO Arbitration Report*, *supra* note 14, have been reviewed in recent publications. See, e.g., Pierre V.F. Bos & Marco M. Slotboom, *The EC Technology Transfer Regulation-A Practitioner's Perspective*, 32 INT'L LAW. 1 (1998); Vern R. Walker, *Keeping the WTO from Becoming the "World Trans-Science Organization": Scientific Uncertainty, Science Policy, and Factfinding in the Growth Hormones Dispute*, 31 CORNELL INT'L L. J. 251 (1998). The primary focus of this Note is of the impact WTO decisions may have on the future of restrictive trade regulations, primarily between the United States and the EU.

48. This section of GATT provides that restraints on trade are allowed if the restraints are for sanitary or phytosanitary purposes that are necessary to preserve the health and safety of the citizens of the member state. See Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, PmbL, Marrakesh Agreement Establishing the World Trade Organization, reprinted in 1 LAW AND PRACTICE OF THE WORLD TRADE ORGANIZATION (1995).

49. *General Agreement on Tariffs and Trade*, Oct. 30, 1947, 61 Stat. 1336, 55 U.N.T.S. 187.

50. See *WTO Decision*, *supra* note 12. The U.S. argued that if the EU banned BST products for reasons other than sanitary measures, then EU ban was in violation of the TBT Agreement. See section "Claims of the Parties" for a further description of the arguments made to the WTO.

51. See *WTO Decision*, *supra* note 12.

52. The Dispute Settlement Body of the World Trade Organization is the body that sits in judgment of all disputes that arise under GATT. After the Dispute Settlement Body files an initial report, the decision can be reviewed by the Appellate Body, as in the BST case, and an Appellate Report will be issued.

the European Commission's actions. Representatives of the European Commission argued that the hormone-injected animals were not "like"<sup>53</sup> other animals and, even if they were like other animals, there was no unfair bias in favor of domestic animals.<sup>54</sup>

In 1997, the WTO's DSB finally came to a decision in favor of the U.S. and other countries that had joined the complaint in the BST case.<sup>55</sup> The DSB found specifically that the EU had acted inconsistently with international agreements, and recommended that the European Commission's measures be brought in conformity with its international obligations.<sup>56</sup> The EU appealed the decision in September of 1997, claiming that the DSB had erred in its interpretation of the SPS Agreement and that risk assessment was not relevant to the trade issue.<sup>57</sup> The EU further argued that the desires of its constituency should be a factor considered by the WTO's DSB.<sup>58</sup>

The U.S., in turn, appealed the WTO's initial decision, seeking findings of additional violations of the SPS Agreement.<sup>59</sup> The U.S. also rebutted the assertions of the EU regarding the "precautionary principle," which dictates that a state can be preemptively cautious in setting health standards.<sup>60</sup> The

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53. The EU argued that the BST-injected animals did not meet the requirement of being the same products imported into the EU as those within the EU. See *WTO Decision*, *supra* note 12. If the EU succeeded in this argument, then there would not be evidence of discrimination against "like products," and there would be no violation of GATT.

54. The EU claimed that Article III(4) of GATT was not violated, and that the measures were justified by Article XX(b) concerning human and animal health. See *WTO Decision*, *supra* note 12 at 14.

55. Argentina, Australia, New Zealand, and Canada joined the U.S.'s complaint. See Edmund L. Andrews, *In Victory for U.S., Europe Ban on Treated Beef is Ruled Illegal*, N.Y. TIMES May 9, 1997, at A1.

56. See *WTO Decision*, *supra* note 12, at 200-01. The Conclusion of the World Trade Organization Report states the following:

(i) The European Communities, by maintaining sanitary measures which are not based on a risk assessment, has acted inconsistently with the requirements contained in Article 5.1 of the Agreement on the Application of Sanitary Measures; (ii) The European Communities, by adopting arbitrary or unjustifiable distinctions in the levels of sanitary protection it considers to be appropriate in different situations which result in discrimination or a disguised restriction on international trade, has acted inconsistently with the requirements contained in Article 5.5 of the Agreement on the Application of Sanitary and Phytosanitary Measures; and (iii) The European Communities, by maintaining sanitary measures which are not based in existing international standards without justification under Article 3.3 of the Agreement on the Application of Sanitary and Phytosanitary Measures, has acted inconsistently with the requirements contained in Article 3.1 of that Agreement.

*Id.* at 201. The WTO further "recommend[ed] that the Dispute Settlement Body requests the European Communities to bring its measures in dispute into conformity with its obligations under the Agreement on the Application of Sanitary and Phytosanitary Measures." *Id.* at 201.

57. See *WTO Appellate Report*, *supra* note 11.

58. See *id.*

59. See *id.* at 26-28.

60. The EU argued that, as a matter of customary international law, there existed a precautionary

Appellate Body refused to address the highly debated "precautionary principle," stating that such an evaluation was irrelevant to the outcome of the case.<sup>61</sup> The Body did conclude that the EU's measurers were not consistent with of the SPS Agreement, and mandated that the EU comply with the treaty.<sup>62</sup>

The U.S.'s victory has been curtailed by the EU's failure to comply and the lack of international resources to enforce the WTO decision.<sup>63</sup> Recently, a Hearing of the Trade Subcommittee of the House Ways and Means Committee addressed this issue.<sup>64</sup> In that hearing, Charlene Barshefsky, trade representative, announced that the U.S. will "not tolerate failure to comply with trade agreements or the WTO rules," even as the U.S. embarks on a Trans-Atlantic Economic Partnership trade agreement with the EU.<sup>65</sup> Barshefsky also emphasized the importance of the U.S./EU trade relationship and continued cooperation.<sup>66</sup>

### III. THE HISTORY OF BOVINE SOMATOTROPIN ENCEPHALOPATHY (BSE)

When examining the present trade dispute between the U.S. and EU, it is important to note the international foundation for the dispute.<sup>67</sup> Fear of "mad cow disease,"<sup>68</sup> was prevalent throughout the international beef market in the 1990's, when the United Kingdom faced a cumbersome of cow's brain. The form of the disease that affects humans is called Creutzfeldt Jakob Disease

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principle permitting a state to be cautious in setting health standards when scientific uncertainty exists. *Id.* at 7 and 17-18.

61. *See id.*

62. *See id.* at 98-101.

63. *See WTO Arbitration*, *supra* note 14. The Arbitrator determined that fifteen months would be a reasonable period of time for the EU to comply with the Articles of the SPS Agreement. He denied the EU time to perform a risk assessment, but granted more time than the U.S. asserted was reasonable for compliance.

64. *See Trade Hearing*, *supra* note 6.

65. *Id.* at 3.

66. *See id.* at 6.

67. The present dispute concerns cosmetic ingredient regulating legislation proposed by the European Commission directed at preventing the spread of BSE. The European Commission proposed a directive in March of 1998 that would ban the import of cosmetic products containing certain bovine materials. *See* Commission Directive 98/16/EC, art. 2, 1998 OJ (L 77) 44 ("cosmetic products containing the substances set out in the Annex cannot be placed on the Market from 1 April, 1998. Once in effect, this directive would prevent billions of dollars of U.S. cosmetic products from entering the Europe Union.

68. BSE is popularly known throughout the world as "mad cow disease." In the United Kingdom, with the first report of BSE in 1985, the disease earned the name "mad cow disease" creates holes in the brain, causing animals to behave unusually." The term is still used in popular publications. *E.g.*, Matt Ridley, *Mad Cows, a Study in Official Lunacy Acid Test*, DAILY TELEGRAPH (London), Oct. 19, 1998, at 22.

("CJD") and is terminal, working quickly to destroy the brain.<sup>69</sup> The reaction of the EU was to enact legislation that regulated imported and intra-community bovine materials and placed a ban on British beef. The U.S. took similar measures that included a ban on Canadian beef.<sup>70</sup>

#### *A. Mad Cow Disease in the United Kingdom*

The United Kingdom's first reported case of BSE was in 1986.<sup>71</sup> From that point on, the United Kingdom took measures to restrict the spread of the disease. These efforts intensified once scientists determined that contaminated feed containing animal parts caused the disease.<sup>72</sup> As scientists learned more about the disease, they discovered a link between BSE and CJD,<sup>73</sup> and the European Commission and other non-member states banned the import of United Kingdom beef.<sup>74</sup>

United Kingdom beef has been banned from the EU since 1996.<sup>75</sup> The British beef ban has created tension within the European community, especially since the United Kingdom has complied with EU directives and public health measures. The United Kingdom filed suit against the EU in the European Court of Justice to lift the ban.<sup>76</sup> The most recent decision, on May 5, 1998, dismissed the United Kingdom's complaint asking that the temporary emergency measures be lifted for policy reasons.<sup>77</sup> The court denied the appeal because of public health concerns.<sup>78</sup>

By contrast, the United Kingdom is largely concerned with its beef industry and the economic welfare of its people.<sup>79</sup> Grazing lands are being

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69. See *Dolly the Sheep Helps Battle for BSE Cure*, BIRMINGHAM POST, Oct. 22, 1998, at 28. The disease is characterized by the mutation of prions, or brain proteins and is called scrapie in sheep. See *id.* The duration of the illness is six months or less. See generally DONALD VOET & JUDITH G. VOET, BIOCHEMISTRY 1026-28.

70. The United States restricted the importation of Canadian beef because the country received shipments of beef from the United Kingdom. 104 CONG. REC. S3159 (daily ed. Mar. 28, 1996).

71. Case C-180/96, *United Kingdom of Great Britain and Northern Ireland v. Commission*, 1998 ECJ CELEX LEXIS 4915, at \*8 (1998). See also Ridley, *supra* note 68.

72. See *id.* at \*9.

73. See sources cited *supra* note 70. By 1996, ten people had died of the human form of BSE, although thousands of cows had been slaughtered because of potential contamination and as of October 1998, 28 people had died of the disease in the United Kingdom.

74. See *United Kingdom of Great Britain and Northern Ireland*, 1998 ECJ CELEX LEXIS 4915, at \*12.

75. See *id.* at \*14.

76. See *id.*

77. See *id.* at \*66.

78. See *id.* at \*59-63.

79. As one commentator noted, [t]he livelihoods of thousands [of farmers] are at stake and their plight could not only affect what we eat but also the look of the British landscape." James Meikle, *Farmers Despair as Livings Collapse with the Crashing Markets*, GUARDIAN, Oct. 3, 1998, at 4.

converted into crop land, creating new problems for farmers.<sup>80</sup> The rate of suicide among farmers in the United Kingdom has increased since the ban on British beef began in 1996.<sup>81</sup> The devastation of the British beef industry has led to violations of EU law as smugglers have attempted to bring banned beef into the EU market.<sup>82</sup> The United Kingdom claims that the beef is now safe and BSE has been eradicated, but both the EU and the world beef market remain cautious about opening the doors to British beef.<sup>83</sup>

### B. The Human Strain of BSE

A motivating factor for the world ban upon British beef was the connection between BSE and Creutzfeldt Jakob Disease, a human strain of spongiform encephelopathy. Scientists have discovered BSE is transmissible to humans through certain risk materials in infected cows.<sup>84</sup> The disease's long incubation period in both humans and animals creates difficulty in researching and identifying the origin of the disease.<sup>85</sup> The progression of the disease is similar in cows and humans. In both cows and humans, the disease causes deterioration of brain tissue, creating holes, leaving the brain looking much like a sponge.<sup>86</sup> Both the human and bovine forms of the disease highly

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80. See, Boris Worrall, *Battle Under Way to Save Disappearing Hedgerows*, BIRMINGHAM POST, Oct. 22, 1998, at 4. The United Kingdom has now placed the farmers in a difficult situation. Because the changing of grazing land into crop land would require the removal of some aesthetic hedgerows, the United Kingdom is enforcing legislation that restricts farmers from uprooting hedgerows. The farmers are now caught between the need to plant crops for survival and the landscape regulations meant to protect the picturesque hedgerows. See *id.*

81. See Meikle, *supra* note 79. Farmers were found to be "ten times more likely to kill themselves with firearms than other men." *Id.*

82. See *Mad Cow Disease: Massive Beef Export Fraud Uncovered*, EUR. REP., Sept. 3, 1997, available in 1997 WL 13046321 [hereinafter *Beef Export Fraud*]. A German meat importer may have been knowingly importing beef from the United Kingdom in violation of the EU ban. See *id.* In July of 1997, authorities uncovered a similar Belgian "beef smuggling operation." *Id.*

83. The EU has been providing subsidies to British farmers and, due to the unsettled question of the extent of harm from the beef, the EU refuses to lift the ban. See David Steele, *Beef on Bone Ban to Stay; Meat Trade Dismayed*, HERALD, Jan. 23, 1999, at 2.

84. Steve Connor, *Science: How Many More will Die? Scientists Attempting to Estimate the Numbers Likely to Die from the Human Version of "Mad Cow Disease" Have Some Important New Clues that Could Help Direct Their Research*, INDEPENDENT (LONDON), Jan. 15, 1999, at 9. But see Case C-103/96, *United Kingdom of Great Britain and Northern Ireland v. Commission*, 1998 ECJ CELEX LEXIS 4195, at \*72. In 1996, the Scientific Veterinary Committee of the EU claimed that there was no proven connection between BSE and any human disease. See *id.*

85. See Connor, *supra* note 84. Scientists must know four things in order to "guess" at the size of what could be a Creutzfeldt Jakob Disease (CJD) epidemic: 1) an estimate of the total amount of tainted beef products consumed in the eighties, 2) the length of incubation, if any, in humans, 3) an understanding of the "species barrier" between humans and cows, and 4) the role of genetics in the post-consumption human reaction to BSE. *Id.*

86. See *id.* Testing has also been done on mice in order to determine how genetics can create different reactions to BSE. See *id.* See also S.B. Prusiner, *Prions*, 95 PROC. NAT'L ACAD. SCI. U.S.A.

transmissible.<sup>87</sup>

Due to the nature of the illness, it is difficult to determine if the British beef ban and the regulation of bovine materials in the EU has been effective in retarding the spread of BSE and CJD. The continued risk of contracting a terminal human disease is, however, a viable health and safety concern. Thus, the international community is not in violation of any treaties in regulating potentially tainted beef or risk materials.<sup>88</sup>

### C. European Union Regulations

The EU enacted an emergency measure in March 1996 to protect its member countries against BSE from the United Kingdom.<sup>89</sup> This decision banned British beef products from the EU, and was stricter than any prior regulation or decision concerning British beef or bovine materials.<sup>90</sup> This measure was only the beginning of increased bovine regulations. Fear of the human health repercussions of BSE led to additional legislation, some of which has been followed by the member states, and some of which has not.<sup>91</sup> The EU has regulated the movement of bovine animals in the community, the marketing and veterinary care of bovine animals, and the trading of bovine products, from ovaries and sperm to gelatins and non-beef products

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13363, 13363 (1998) (Stating that BSE and CJD are known prion diseases, describing findings from a mice study, and stating that treatment of prion diseases may be applied to other degenerative disorders). Humans, as well as bovines, lose balance and can lose all normal voluntary functioning within months. *See id.* After the voluntary actions are lost, the brain continues to deteriorate until all involuntary nerve endings (synapses) die from the disease as well, including the heart. *See id.* *See also* F.E. Cohen & S.B. Prusiner, *Pathologic Conformations of Prion Proteins*, 67 ANN. REV. BIOCHEM. 793 (1998).

87. *See* John Von Radowitz, *Tonsil Test Offers Hope of Early Warning on CJD*, SCOTSMAN, Jan. 15, 1999, at 2, available in 1999 WL 5806464. "[P]roteins that spread the disease cannot be cleaned from surgical instruments no matter how thoroughly they are sterilised." *Id.*

88. The banning of British beef due to concern about BSE has been upheld in the Court of European Justice. *See* sources cited *supra* note 70. Additionally, the issue of banning beef out of concern about BSE has not been contested in the WTO. It appears that health and safety concerns about food products are considered more justifiable when the effect upon human health is clear, as with BSE.

89. Commission Directive 96/239, 1996 O.J. (L 78) 47.

90. For prior bovine regulations, *See* Commission Decision 95/287, 1995 O.J. (L 181) 40 (removing tissues with BSE from bovine meat), replacing Commission Decision 94/474, 1994 O.J. (L 194) 96 (BSE protection measures), Commission Decision 90/200, 1990 O.J. (L 105) 24 (concerning bovine tissues and organs in relation to BSE) and 89/469; 92/290, O.J. 1992 (L 152) 37 (BSE protection with respect to bovine embryos); Commission Decision 97/1, 1996 O.J. (L 1) 3 (regulating bovine animal semen collection centers). *See* Case C-180-96, *United Kingdom of Great Britain and Northern Ireland v. Commission*, 1998 ECJ CELEX LEXIS 4195 for a discussion of how these directives relate to each other.

91. The non-compliance has been largely confined to individuals acting against their own government's mandates. *See supra* note 82 and accompanying text.

from slaughtered animals.

#### *D. United States' Reaction to BSE*

As in other areas of the world, the U.S. reacted to BSE by banning British beef from the U.S. market. Newspaper articles, talk shows,<sup>92</sup> and trade discussions<sup>93</sup> reflected the U.S.'s fear of BSE. Discussions of whether or not to eat beef accompanied proposed travel to European countries, especially the United Kingdom. The reaction of the domestic beef market soon became a promotion of "BSE free" U.S. beef.

Recently, a popular television program faced a civil lawsuit filed by the Texas beef industry for slander when BSE was mentioned in connection with U.S. beef on the program.<sup>94</sup> On March 28, 1996, the day after the European Commission decided to ban British beef, the U.S.'s Senate proposed a ban on Canadian beef because Canada had received shipments of British beef.<sup>95</sup> This reaction is similar to the EU's in ban on all British beef from the rest of the member states.<sup>96</sup>

### IV. THE EUROPEAN UNION'S BAN OF COSMETICS DUE TO BSE

In the E.C. directive proposed in March 1998,<sup>97</sup> the EU proposed a ban on cosmetic products containing certain bovine risk materials produced after April 1, 1998 from the European marketplace. This directive bans specified

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92. Oprah Winfrey, a popular American talk show host, hosted a program titled "Dangerous Food" in which American beef was discussed in relation to BSE. See *Texas Beef Group v. Winfrey*, 201 F.3d 680, 682 (5th Cir. 2000).

93. See *Trade Hearing*, *supra* note 6.

94. See *Texas Beef Group*, 201 F.3d 680, 682.

95. 104 CONG. REC. S3159 (daily ed. Mar. 28, 1996). This measure was proposed in order to retaliate against Canada for banning all U.S. grain, including Midwest grain, from Canada due to karnal bunt found in Arizona.

96. The U.S. claimed that the regulation of bovine products should not apply to them because of the reliability of the Food and Drug Administration (FDA) research. However, the U.S. uses the same tactics as the EU. For example, the U.S. banned Canadian beef after Canada banned U.S. grains. See *supra* note 95. Both countries justified the bans by noting possible health threats. The Canadian legislation appears to be a retaliatory measure against the U.S., yet the U.S. is not "tolerating" any protectionism on the part of the EU.

97. Commission Directive 98/16, O.J. (L 77) 44-46 (adapting to technical progress Annexes II, III, VI, and VII to Council Directive 76/768 on the approximation of the laws of the Member States relating to cosmetic products). Article 2 states:

"Member States shall take the necessary measures to ensure that the cosmetic products containing the substances set out in the Annex cannot be placed on the Market from 1 April 1998. This does not apply to products produced before 1 April 1998. Member states may retain in force those measures implementing Directive 97/1/EC until 1 April 1998."

*Id.*

risk materials (SRMs) including gelatins, tissues and fluids from the encephalon, the spinal cord, and the eyes.<sup>98</sup> These materials, the E.C. suggests, are dangerous due to the potential spread of BSE.<sup>99</sup> However, the EU Farm Council has decided to postpone the ban on SRMs until a further determination can be made as to whether the risk materials actually host BSE.<sup>100</sup> Additionally, the European Council refused to enact the Commission legislation as it was drafted and has yet to approve new legislation proposed by the European Commission.<sup>101</sup> One explanation for this postponement is the ban's extensive effect on the pharmaceutical, cosmetic, and even tire industries, as well as its potential ill effects on international beef trade.<sup>102</sup> This delay has given the U.S. a brief period of time to determine what measures must be taken in order to maintain desired relations with the EU.<sup>103</sup>

The U.S. has won a preliminary trade dispute with the EU on the use of tallow in cosmetic products.<sup>104</sup> The tallow trade negotiations stopped the EU from halting the U.S.'s one hundred million dollar per year trade in cosmetics with the EU.<sup>105</sup> The dispute is not over, however, because the communities have not come to an agreement as to gelatine materials from cows.

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98. See Commission Directive 97/1, 1997 O.J. (L 16) 85 (amending Directive 76/786 to prohibit, temporarily, the use of bovine tissues and fluids from the encephalon, the spinal cord and the eyes in cosmetic products in the EU market).

99. Decision 97/534/EC of July 1997 sets forth the prohibitions in the EU on the basis of fear of BSE. See Commission Decision 97/534 1997 O.J. (L 216) 95-98.

100. See *Mad Cow Disease: Farm Council Defines Commission, Delays Ban on SRMs Until 1999*, EUROPEAN REPORT, Apr. 4, 1998 ("EU Agricultural Ministers decided on March 31 to postpone a ban on specified risk materials (SRM) from cattle until January 1, 1999.") [hereinafter *Farm Council Defies Commission*].

101. See *id.*

102. See *id.*

103. "The United States, which has no reported cases of BSE, has complained that the cost of removing SRMs from billions of Dollars (sic) of meat exports every year would be excessive." *Id.* See also *Trade Hearing*, *supra* note 6

104. See *Mad Cow Disease: Tallow Safer than Gelatine, Says Scientific Steering Committee*, EUR. REP., Feb. 25, 1998, available in 1998 WL 8800710. Scientists remain cautious of deeming gelatines safe, and consider three issues:

the risk of human exposure to BSE from direct consumption of potentially infective material; the risk incurred in being exposed to processed infective material such as tallow (use[d] in making soaps, candles and machinery grease, for example) and gelatine (used in cosmetics, pharmaceuticals and food additives); and the risk of infection through recycling infective material via its use in animal feed.

*Id.*

105. See *Beef Export Fraud*, *supra* note 82 at 2.



*A. Effects of the European Union's Legislation on the United States Beef Industry*

A EU cosmetics ban would place the U.S. beef industry in a greater uproar than that caused by the BST ban, primarily because the U.S. bovine industry claims that there is no BSE in the U.S.<sup>106</sup> The passing of the EU directive would take away a market for the bovine materials referred to as specified risk materials (SRMs). Some of the E.C. specified products currently move in U.S. trade, originating in the beef industry. The money lost by the beef industry alone would amount to millions of U.S. dollars annually. Small dairy farmers cannot afford to lose the export market in these bovine by-products.<sup>107</sup>

*B. Effects of the European Union's Legislation on the United States' Pharmaceutical and Cosmetic Industries*

The E.C.'s proposed legislation would prohibit billions of dollars worth of U.S. cosmetics from entering the EU market.<sup>108</sup> The EU claims that U.S. cosmetics present a risk of Creutzfeld-Jakob because U.S. cosmetic manufacturers use SRMs in their products. Yet, the U.S. claims that there is no reported BSE in the U.S. If this is true, the ban of U.S. products does not make sense as a protection of human health and is thus an unnecessary restriction on trade. If there is no BSE in the U.S., whether SRMs could harbor BSE is irrelevant because U.S. produced materials are not contaminated.

*C. Implications of Postponement for the United States*

The U.S. is likely to retaliate if the EU passes the proposed legislation.<sup>109</sup> The U.S.'s response to postponement was evident in a trade subcommittee hearing in the House of Representatives.<sup>110</sup> In her testimony, Charlene

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106. See Bud Brewster, *BSE Threatens EU Tallow and Gelatin Supplies*, COSMETICS & TOILETRIES, Dec. 1, 1997, at 11.

107. In light of the financial strain the BST has placed on the smaller milk producers and cattle farmers, the reduction of the market for bovine by-products in the U.S. could prove to be more harmful than some farmers are capable of enduring economically. See Marden, *supra* note 40.

108. See *Trade Hearing*, *supra* note 6.

109. The WTO was formed for the purpose of avoiding unilateral actions to enforce the GATT. See Julie Goldman, *Bad Lawyering or Ulterior Motive? Why the United States Lost the Film Case Before the WTO Dispute Settlement Panel*, 30 LAW & POL'Y INT'L BUS. 417, 417 (1999). The U.S. may take the issue to the WTO (although that is a time consuming prospect) or it may pass equally damaging restrictions on trade with the EU. See *Trade Hearing*, *supra* note 6.

110. See *Trade Hearing*, *supra* note 6.

Barshefsky, United States Trade Representative, reporting on the WTO's decision affecting trade relations, stated that the U.S. would take action with respect to the cosmetic ban because such directives "would not be tolerated" by the U.S.<sup>111</sup> During the hearing, a Trans-Atlantic partnership was proposed that would address this trade issue and other concerns about the EU relationship.<sup>112</sup>

The postponement of the enactment of such trade-limiting legislation merely postpones the inevitable trade war. Only by the cooperative efforts of the U.S. and EU governments can a trade war be avoided.<sup>113</sup> The Transatlantic trade agreements may be a solution for the U.S. and EU, providing an opportunity to work together and resolve the bovine disputes.<sup>114</sup>

Most importantly, postponement of the EU legislation restricting cosmetics containing SRMs gives the U.S. time to resolve the situation through negotiation.<sup>115</sup> Should trade negotiation not lead to a solution, the postponement also gives the U.S. an opportunity to prepare a proper response to the legislation, whether through compliance or trade retaliation.<sup>116</sup> These possible responses will be explored in detail below, but cannot be fully understood without consideration of the reasons for the proposed legislation.

## V. POSSIBLE EXPLANATIONS FOR THE EUROPEAN COSMETIC LEGISLATION AND OTHER BOVINE TRADE DISPUTES

### A. Protectionism

The U.S.'s first reaction to a new trade restriction is to claim that the restriction is a protectionist measure.<sup>117</sup> The restriction in this case affects \$4.5 billion in trade of U.S. cosmetics.<sup>118</sup> The U.S.'s contention that there is

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111. *See id.*

112. *See id.*

113. *See Farm Council Defies Commission, supra* note 100. By working together to come to an understanding of trade requirements, the U.S. and EU were able to stop the banning of tallow regulations, and postpone the date of gelatine material regulation. *See id.*

114. *See Trade Hearing, supra* note 6.

115. *See id.* The continued trade discussions are currently taking place, allowing the parties to come to an agreement on gelatine and other materials.

116. *See* Gary Yerkey & J. Kirwin, *U.S. Meet Again in Attempt to Avert Trade War over Farm Products*, 14 INT'L TRADE REP. 688 (1997) (explaining that the U.S. threatened to ban over \$300 million in EU meat for safety reasons in retaliation for failing to come to an agreement on trade issues); Both compliance and retaliation have been used in the past by the U.S., such as when the U.S. turned to the WTO to resolve the BST trade dispute.

117. *See* Barry James, *A Trans-Atlantic Beef: EU Threatens U.S. Meat Ban Over Inspections*, INT'L HERALD TRIBUNE, Dec. 19, 1997, at 1 (Washington described the cosmetics ban by the EU as protectionist).

118. *See Trade Hearing, supra* note 6.

no BSE in the U.S., if true, would support the theory that the ban is a protectionist, unnecessary restriction on trade.<sup>119</sup>

The EU's traditional response that the measure is equally applicable to member states and third parties has not been accepted by the international community.<sup>120</sup> This argument has been rejected by the EU's own courts, primarily because protectionism is still discriminatory.<sup>121</sup> The EU courts' reasoning is analogous to the U.S. Constitution's Commerce Clause,<sup>122</sup> and its restrictions on states' unfair trade practices.<sup>123</sup> The basic treaty of the EU<sup>124</sup> provides that the EU member states may not restrict trade between states.<sup>125</sup> Exceptions to this standard rule allow restriction of trade for several specific reasons, most importantly to protect human health.<sup>126</sup> Still, these exceptions to free trade may not be used as "arbitrary discrimination or a disguised restriction on trade."<sup>127</sup> Similarly, in the U.S., a restriction may be

119. See *Tore Wilhelmsen As v. Oslo Kommune*, [1997] 3 CMLR 823 at 869 (State monopoly on beer is incompatible with Article 16 of the EEZ; there is no right to discriminate between domestic products and Member States' products). See also Steven J. Rothberg, Note, *From Beer to BST: Circumventing the GATT Standards Code's Prohibition on Unnecessary Obstacles to Trade*, 75 MINN. L. REV. 505, 511-17 (1990).

120. For an analysis of protectionism and the way it functions in the international community, see Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. Chi. L. Rev. 1 (1999).

121. See *id.* at 4-5. The EU ruled that certain regulations of German beer were unnecessary restrictions on trade, even though the restriction applies equally to member states and third countries.

122. U.S. CONST. art. I, § 8, cl. 3. This clause provides: "Congress shall have the Power . . . [3] To regulate commerce with foreign Nations and among the several States and with the Indian Tribes." *Id.*

123. See Rothberg, *supra* note 119, at 529. Rothberg examines *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), in which the court held that regardless of the purported health and safety concerns of the City of Madison, there must be legitimate reasons for imposing the standards or requirements. See *Dean Milk Co.*, 340 U.S. at 354-56. Although the legislation in *Dean Milk* appeared to be neutral on its face, it discriminated against the movement of interstate commerce. *Id.* The court further stated that it did not matter that the state of Wisconsin was equally burdened as other states; the issue was the discrimination against other states. *Id.* This Note will pursue this analysis further with respect to the argument of the EU that its restriction falls equally upon member states and third parties.

124. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (1958) (hereinafter EEC Treaty).

125. See EEC Treaty, *supra* note 124 arts. 30-38, 298 U.N.T.S. 11, 26-30 (Chapter 2, The Elimination of Quantitative Restrictions between Member States).

126. See EEC Treaty, *supra* note 143, art. 36, 298 U.N.T.S. 11, 29.

127. See *id.* Article 36 states in whole:

The provisions of Articles 30 to 34 inclusive shall not be an obstacle to prohibitions or restrictions in respect of importation, exportation or transit which are justified on grounds of public morality, public order, public safety, the protection of human or animal life or health, the preservation of plant life, the protection of national treasures of artistic, historical or archeological value or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute either a means of arbitrary discrimination or a disguised restriction on trade between member states.

*Id.*

invalid although it applies equally to the legislating state and other states.<sup>128</sup>

### *B. Safeguarding of Cultural Values*

The EU argued in its appeal to the WTO that public perception should be a factor in legislative assessment.<sup>129</sup> In essence, the EU essentially argued that the public should be able to determine the level of protection from their own governing body. This assertion is a cultural argument as well as a legal one. The members of the EU may have a cultural predisposition towards naturally processed and untainted food products. A recent article examined the cultural aspects of the European BST restrictions,<sup>130</sup> focusing on natural food preparation processes that often are considered unsanitary by U.S. standards.<sup>131</sup> Standard U.S. food preparation is considered "processing" by EU standards.<sup>132</sup> These cultural differences may be the basis for the EU allowing natural and traditional processing techniques and cautioning against technological processes and "novel" foods.<sup>133</sup>

The cultural differences are not as clear or distinct, however, when applied to the recent cosmetic legislation.<sup>134</sup> The relevant difference could be identified as the European distaste for mass production. Today, however, in light of the number of European and international consumers, EU production of items such as cosmetic products needs to progress at high rates to keep up with the market. This high demand within the EU and the cultural expectation of natural items may conflict with each other. It is necessary, in order to meet the demand without imported "processed" items, for the European industries to produce in mass quantities. Thus, the EU cannot reasonably claim that cultural distaste for mass production justifies its ban on U.S. bovine products.

An alternative argument of the EU is the support of European preference for traditional instead of technological methods of processing.<sup>135</sup> This is a

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128. See *supra* note 121.

129. See *WTO Appellate Decision*, *supra* note 10 at 14.

130. Marsha A. Echols, *Food Safety Regulation in the European Union and the United States: Different Cultures, Different Laws*, 4 COLUM. J. EUR. L. 525 (1998).

131. See *id.* at 531 & n.31.

132. See *id.* at 531-32 & n.30. The article suggests that the cultural differences between the U.S. and the EU are the reasons for the excessive legislation enacted by the EU. See *id.*

133. See *id.* at 543.

134. Professor Echols's article primarily addressed the cultural aspects of food, not the cultural aspects of cosmetics or other products. See *id.*

135. The genetic engineering argument is a difficult one to address. The growth of genetically engineered materials is fast-paced and consuming, covering many aspects of trade. See Bill Lambrecht, *Critics Vilify New Seed Technology that Monsanto may Soon Control*, ST. LOUIS POST DISPATCH, Nov. 1, 1998, at A1 (new genetic technology will render the seeds of crops sterile so

rational basis for disfavoring U.S.'s cosmetic products, but it is less persuasive when the disputed item is a natural substance. Regardless of how a cosmetic is actually produced, when the restriction applies to the ingredients, here the bovine gelatins, only the ingredients are culturally significant. Where the disputed ingredients are not genetically altered or hormone injected bovine products but natural bovine products that have been used for years in the manufacturing of cosmetics and pharmaceuticals, the "natural" cultural argument breaks down. Moreover, it would be difficult to argue that the European Community has a unique cultural predisposition to keep BSE (or SRMs) out of its products, especially since BSE is "an agreed risk."<sup>136</sup>

Alternatively, the EU or cultural difference supporters might assert that the BSE epidemic is the result of altering nature. The traditional cultural expectations of the European community suggest that the products produced and purchased within the community are natural, meaning untainted. For example, when BSE was first detected in the United Kingdom, the origin was determined to be the mashed sheep parts in the bovine feed.<sup>137</sup> Cows do not normally eat animal parts, so the spread of the disease can be attributed to "unnatural" human interference. This line of reasoning helps explain the EU's extensive legislation protecting against a repeat of the BSE episode in the United Kingdom.<sup>138</sup> Although the explanation for food product legislation is now clear, there is still no evidence of how the cultural argument applies to cosmetics, or whether such an explanation matters in the world trade community.<sup>139</sup> Further, this cultural reasoning may not apply to

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farmers are only able to use genetically engineered seeds). Two specific areas affected by advancements in technology are cosmetics and pharmaceuticals. See Juan Enriquez, *Genomics and the World's Economy: Policy Forum: Genomics*, 281 SCIENCE 925 (1998). The world is facing a great deal of change, as well as risks, with the development of genetic engineering. See *id.* Three key risks include the effect of rising and falling technology companies on the international stock market, failure to fully review and test products because of pressure to introduce the products into the economy, and knowledge gaps that could lead to problems such as the recent mad cow disease crisis in the United Kingdom." See *id.*

136. See Echols, *supra* note 130, at 542.

137. Since cows are vegetarians, such an alteration of their food supply appears inconsistent with EU cultural expectations as described in Professor Echols's article. See *supra* note 130-134 and accompanying text.

138. See Echols, *supra* note 130, at 540-43. Altering nature is a prevalent topic in the media today. The EU's legislation appears to support the theory that European's prefer natural products, especially since they do not know what the future will bring alterations in nature. An "epidemic" similar to the BSE crisis could happen again in any context, from tainted tomatoes to genetically modified soybeans. See Connor, *supra* note 84.

139. Echols suggests that the cultural explanation does not satisfy the world trade community, but offers a tangible reasoning. See Echols, *supra* note 130.

cosmetic legislation because cosmetics are not food products.<sup>140</sup> Additionally, the alternative to the bovine gelatins in the cosmetic products is a bioengineered product called Xgel FS. Without bovine products, cosmetics manufacturers will have to use this synthetic substitute, resulting in cosmetics that are inconsistent with the cultural traditions of the European Union.<sup>141</sup>

### *C. Health and Safety Concerns*

Finally, health and safety may be a legitimate reason for the EU cosmetic legislation if scientific findings support the potential danger of bovine gelatines.<sup>142</sup> Scientific analysis must determine the potential for BSE contamination of the SRMs as well as whether the use of SRMs in pharmaceutical and cosmetic products could actually cause the human form of BSE. The WTO might decide that the concern and the restriction on trade of such products is valid, but only for products whose ingredients or risk ingredients originate in a state that has BSE. The U.S. contention that there is no BSE in the U.S.,<sup>143</sup> however, undermines the argument that the restriction is purely not for health and safety concerns.<sup>144</sup>

Additionally, postponement by the European Community is inconsistent with purported health and safety concerns. If it was genuinely concerned about the introduction of contaminated products into the market, the EU would probably not wait to enact the pertinent legislation. Further, the cows that will be used after March 1999 should be healthy BSE-free animals, even if they come from the United Kingdom.<sup>145</sup> These two factors make the EU's

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140. See *supra* note 139. The issue on the cosmetics legislation may boil down to the argument that the total risks from U.S. cosmetics are unknown.

141. See *Bioprogress Acquisition of DHA Nutrition Expands Product Line, Adds Distribution*, BUS. WIRE, Aug. 11, 1998(examination of biologically engineered products that replace bovine gelatins in pharmaceuticals and cosmetics, specifically, the XGel FS process for soft capsules).

142. These "ifs" have yet to be resolved by scientists. This is purportedly one of the explanations for the postponement of the enactment of the cosmetic legislation.

143. Although there is no evidence that conflicts with the U.S.'s contention that it is BSE free, CJD and scrapie are not foreign to the U.S. In March 1999, at least two individuals have been diagnosed with CJD, both of whom were deer hunters (one from Missouri and one from Utah). The prion-related diseases have been present for at least 15 years in the U.S. as evidenced by the research of Dr. Prusiner. See *supra* note 86 and accompanying text.

144. It is important to note that one of the European concerns is that the British hid the tainted beef problem in the 1980s and it is not clear whether the United States, or any other nation is doing, or has done, the same. Additionally, the BSE has been found in Switzerland, an unsuspected locale. The EU can dispute the argument that BSE is not presently in the U.S. by emphasizing the lack of knowledge about the disease.

145. The killing of animals in the late 1980s should have removed the risk of BSE from the United Kingdom. All animals under 30 months old (the five year latency period of BSE in cows) were slaughtered. All of the at-risk cows were not slaughtered, however. This could be an explanation for a continued risk in the United Kingdom.

health and safety argument less convincing. The longer the legislation is postponed, the less convinced the world population will be that it is a valid health restriction.

#### *D. Socio-Economic Power*

Similar to the protectionism theory, this theory suggests that the EU has an interest in dominating the world market. It is not interested in producing everything; rather, the EU is interested in regulating products to meet the community's standards. The EU's extensive and redundant legislation of bovine products supports this theory.

This hypothesis is further supported by the timing of the proposal. Because of the WTO decision of August 1997, and the subsequent "temporary" banning of cosmetics, it is possible that the actions of the European Commission are retaliatory in nature. The Appellate Report of the beef hormone case issued in February of 1998, the same month as the new legislation.<sup>146</sup> The European Commission may be seeking to obtain much greater control in the world marketplace than the Community presently holds. The continual revision of bovine legislation is merely one example of the way in which initially reasonable restrictions on trade are modified and enhanced, subtly, to the point where the restrictions unnecessarily encumber trade.<sup>147</sup> Further, the initial purpose of banning BST products was socio-economic, not health-related.<sup>148</sup> The purpose of the cosmetic legislation may be the same.

### VI. FUTURE TRADE IMPLICATIONS

Failing to work together will have repercussions for both the U.S. and the EU. For example, enforcement of the proposed cosmetic legislation may result in U.S.'s retaliation,<sup>149</sup> or may cause the U.S. to seek assistance from the WTO.<sup>150</sup> Since the U.S. and EU depend upon each other for a substantial

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146. See *WTO Appellate Decision*, *supra* note 11.

147. See Rothberg, *supra* note 123, at 530-36.

148. See *Refusal to Include Hormone in the List of Substances not Subject to MRLs Condemned*, EU FOCUS, July 16, 1998, at 13.

149. This prospect seems likely in view of the fact that the U.S. reacted in this did to Canada's restriction on grains. See, e.g.s Karl Tao Greenfield, *Banana Wars, A Trade Fight over Fruit Threatens to Spread to Other Food Groups, Clothes, and even Hobbies*, TIME, Feb. 8, 1999, at 42. For more detailed information, see *supra* notes 95-97.

150. Turning to the WTO for assistance is usually a last resort. See *Trade Hearings*, *supra* note 6. Nevertheless, the U.S. may seek WTO intervention as the U.S. did in the BST trade dispute. See *WTO Decision*, *supra* note 12.

amount of trade each year,<sup>151</sup> it would be in the economic and diplomatic interests of both communities to reach a compromise on the trade issues. This is particularly important because it is not clear how the WTO would decide this issue.<sup>152</sup>

### *A. Essential Elements of a Trade Agreement*

If the U.S. and EU do choose to work together and enact the proposed Trans-Atlantic Trade Agreement, they may be able to come to an understanding beneficial to both governments and their citizens. In order for such a pact to be successful, especially in the case of the bovine regulations, the countries must come to an agreement regarding when a trade issue or dispute poses a genuine health and safety concern. It is important, in order to eliminate the scientific differences and disagreements, that the communities set consistent and equivalent standards of regulation to allow products accepted by the FDA to avoid re-inspection, testing, and additional approval procedures.<sup>153</sup>

Other specific issues that need to be addressed include product standards, pre-dispute procedures, early dispute settlement, and post-dispute resolution. The most controversial of these issues is product standards, because this would require addressing all of the cultural and health concerns, as well as the scientific differences discussed in detail in this Note. But, by establishing minimum standards, both the EU and the U.S. can seek to meet minimum requirements and develop a method for dealing with specific requirements. To avoid extended controversy when a dispute arises, such as the BST dispute over the side effects of BST, in compliance with the product standard the U.S. manufacturer should first meet a minimum research time or quality requirement aligned with the agreement that is specific to "scientific discoveries" for particular end products. That is, the requirement may be specific for food, cosmetics, or the like. As long as the relevant research and

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151. See *Trade Hearing*, *supra* note 6.

152. See Ryan David Thomas, Note, *Where's the Beef? Mad Cows and the Blight of the SPS Agreement*, 32 Vand. J. Transnat'l L. 487, 510-16 (1999). This author argues that the WTO would uphold the ban on SRMs would be upheld by the WTO under the SPS agreement. *Id.* at 510-11. He bases his argument primarily on the identifiable risks of the materials in food products. *Id.* at 510-13. However, the concern in relation to pharmaceutical products is that they may be far enough removed from "food products." Additionally, concerns remains about the validity of the scientific research that has been performed to date.

153. To provide a workable model for the Trans-Atlantic Trade Agreement, the U.S. and EU should look to existing trade agreements, such as NAFTA. NAFTA addresses similar trade concerns, providing a model to deal with scientific, cultural, and health concerns. See NAFTA, Chapter seven: Agricultural and Sanitary and Phyto-Sanitary Measures. See also Part III, Chapter nine: Standards Related Measures.



findings are disclosed upon introduction of the product to the EU market, then the EU's equivalent to the FDA can review the research. The agreement would outline a maximum time of review after which the product will be introduced to the European market. If the EU objects to the methods or results of the research for health and safety reasons, then the burden should be upon the manufacturer to prove that the product is safe for human consumption.<sup>154</sup> If the EU rejects the product again, then, at the request of either party, the issue should be submitted to an arbitration panel composed of representatives from the U.S., EU, and a neutral third party. The research should then be examined to determine if it meets the standards and requirements of the agreement. If the research meets the standards outlined, and the panel determines that there is no health and safety concern, then the product should be introduced to the EU market. This process should also apply if the U.S. questioned EU products.

The purpose of this method is to decrease, or eliminate, ex post facto product bans and retaliatory tariff increases. The agreement would require the parties to define reasons for rejecting products that are in accordance with the agreement. Also, manufacturers from the EU and from the U.S. will know exactly what "validation requirements" must be met to market the products. This agreement should also include a provision, similar to NAFTA's, requirement that the review procedure for internal products be the same as that for external products.<sup>155</sup>

The purpose of this agreement differs from that of NAFTA.<sup>156</sup> The EU has different objectives and remains one of the three largest world competitors. This proposed agreement differs from the WTO, also, because it is a supplemental agreement designed to implement a procedure to ultimately

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154. A suggested maximum length of time for review would be under six months. The manufacturer would then have three to six months to introduce further evidence that the product meets certain standards outlined in the agreement.

155. For example, the U.S. should not review European Products more strictly than American products, and the EU should not review American products more strictly than European products. If the standard is high, in general, then there is no unfair trade practices. In contrast, the different standards of review would indicate discrimination, which should be per se unfair and invalid trade practice under the new agreement.

156. The primary purpose of this proposed agreement is to determine standards and methods to avoid trade disputes arising with products. The agreement does allow for restrictions upon market access, but only for valid reasons. And the agreement should be relatively narrow and brief. NAFTA, however, is extensive and took years to implement. The NAFTA discussions began in the 1980's, yet the treaty was not completed until August, 1993, with supplements in 1995. See The North American Free Trade Agreement Implementation Act, 1993 W.L. 561124 (N.A.F.T.A.); Nafta Supplemental Agreement, available in 1995 WL 522861 (N.A.F.T.A.). The purpose of NAFTA was to begin "free trade" among the United States, Canada and Mexico. See NAFTA, *supra* note 4 at Part I, Chapter One: Objectives.

chapter should set forth the objectives of the chapter should address "National Standards-Related Measures,"<sup>163</sup> defining both scope and treatment (Article II).<sup>165</sup>

The third chapter should address "Institutional Settlement Procedures."<sup>167</sup> Although areas of greatest concern and impact of the Treaty between the U.S. and the EU

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Reaffirming the importance of trade goals and objectives;  
Emphasizing the importance of public participation in enhancing the quality of products presently available;  
Noting the existence of differences in their respective standards;

Recalling their desire to support and build on existing laws, in order to promote cooperation between the Commission, and an Arbitration panel, to facilitate review of trade products, continued preservation and enhancement of quality of life in their territories;  
Have agreed as follows:

162.

#### Chapter 1: Objectives

The objectives of this Agreement are to:

- foster the protection and improvement of trade and well-being of present and future generations;
- promote sustainable development based on regulatory policies and standards;
- Support the trade goals and objectives of the GATT;
- Avoid creating trade disputes or new trade barriers;
- Strengthen the cooperation on the development of regulations, procedures, policies and practices;
- Enhance compliance with, and enforcement of, regulatory policies and standards;
- Promote transparency and public and private participation in regulatory policies and regulations and product standards;
- Promote economically efficient review and regulation;
- Promote prevention of violation, dispute settlement

163. See North American Free Trade Agreement, National Treatment and Market Access for Goods

by begun a similar, albeit unilateral, as.<sup>168</sup> The latest proposed regulation animal diseases attempts to outline of potential danger of transmissible is proposed regulation addresses the disputes. If the U.S. integrates the he proposed treaty, the process of ommentence.

ons in coming to an agreement with he EU would allow FDA approved An underlying requirement of this adopt the same objectives. I propose he physical health of the community ientific truths.

rative trade practice has proven pproaching when the U.S. and EU

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proposed a regulation entitled "*Proposal for down rules for the prevention and control of*" *Id.* This regulation attempts to set forth identifying BSE free countries and regions, and proposed regulation specifically does not apply l, paragraph 2(a).

ation: *A Functional Analysis of Sovereignty*, 15 ; that the United States excludes imports of food y United States legislation). Similarly, the EU idue limits (MRLs) than EU legislation allows. ould be the U.S. allowing cheese considered the U.S. market.

nd people is whether or not the present issue of rbara McMahon, *US Considers Blood Ban over available in 1999 WL 5644606*. The U.S. is not m Britain or visited Britain during the height of n over the BSE epidemic as serious and is now a Ault, *FDA Urged to Defer Donations by UK* .9762247.

nt Negotiations in the EU, NAFTA, and WTO: INT'L L. 231, 234 (1997). "Most governments odyng standards that do not meet their chosen



European Council, i.e., the BSE  
and are in violation of WTO  
, appears to be willing to delay the  
cosmetics ban to further research its  
intent.<sup>177</sup> This postponement is not a  
assurance that the EU will not  
restrict the entry of certain cosmetic  
possibility seems greater in light of the  
with the WTO Appellate decision

sequent postponement has been to  
s. The governments of the EU and  
e to an agreement in order to allow  
trade relationships with one another.  
reement presents an opportunity to  
minimum result of the agreement  
address future problems, especially  
in this era of developing biological  
f scientific discovery often leaves  
e. As for the future of the cosmetic  
and EU to break the present cycle  
instead of retaliatory measures.

*Victoria H. Zerjav*

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ent of the cosmetics ban, the EU has actively  
e Suzanne Daley, *Mad Cow Disease Panicking*  
t A1 (explaining that the 2000 outbreak of BSE  
e latest bans targeting contaminated beef from